

THE  
“Yearly Digest”  
OF  
Indian & Select English Cases

Reported in all the important Legal Journals during the year

1918

BY

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MADRAS:

PRINTED AT THE COMMERCIAL PRESS, MADRAS, S. E.

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## ABBREVIATIONS EXPLAINED.

### Reports.

All. ...	...	...	...	Indian Law Reports, Allahabad Series
A. L. J.	...	...	...	Allahabad Law Journal.
Bom.	...	...	...	Indian Law Reports, Bombay Series.
Bom L. R.	...	...	...	Bombay Law Reporter.
Bur. L. T.	...	...	...	Burma Law Times.
Cal.	...	...	...	Indian Law Reports, Calcutta
C. L. J.	...	...	...	Calcutta Law Journal.
C. W. N.	...	...	...	Calcutta Weekly Notes.
Cr. L. J.	...	...	...	Criminal Law Journal.
Cr. L. R.	...	...	...	Criminal Law Review.
I. A.	...	...	...	Law Reports, Indian Appeals.
I. C.	...	...	...	Indian Cases.
L. B. R.	...	...	...	Lower Burma Rulings.
L. W.	...	...	...	Law Weekly.
Mad.	...	...	...	Indian Law Reports, Madras Series
M. L. J.	...	...	...	Madras Law Journal.
M. L. T.	...	...	...	Madras Law Times.
M. W. N.	...	...	...	Madras Weekly Notes.
N. L. R.	...	...	...	Nagapur Law Reports.
O. C.	...	...	...	Oudh Cases.
P. R.	...	...	...	Punjab Record.
P. L. R.	...	...	...	Punjab Law Reporter.
P. W. R.	...	...	...	Punjab Weekly Reporter.
Pat.	...	...	...	Patna.
Pat. L. J.	...	...	...	Patna Law Journal.
Pat. L. W.	...	...	...	Patna Law Weekly.
S. L. R.	...	...	...	Sind Law Reporter.
U. B. R.	...	...	...	Upper Burma Rulings.

### OTHER ABBREVIATIONS.

Appl.	...	...	...	Applied.
Appr.	...	...	...	Approved.
Dist.	...	...	...	Distinguished.
Disc.	...	...	...	Discussed.
Diss.	...	...	...	Dissented from.
Expl.	...	...	...	Explained
Foll.	...	...	...	Followed
F. B.	...	...	...	Full Bench.
P. C.	...	...	...	Privy Council.
Ref.	...	...	...	Referred to.

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- 152 Ref. and Foll. (1918)  
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- 220 Ref. (1918) Pat. 81=  
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- 232 Ref. 3 Pat. L J 168.
- 235 Dist. 45 I C 813.
  
- 24 All 151 Ref. 8 L W 461=  
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- 174 Ref. 4 Pat L W 240.
  
- 25 All 27 Ref. 84 P R 1918
- 59 Not Foll. 61 P R 1918.
- 115 Ref. 4 Pat. L W 146.
- 385 Foll. 16 A L J 88
- 407 Foll. 46 I C 815.
- 407 Dist. 45 I C 905.
- 431 Ref. 7 L W 298=35  
M L J 93=47 I C 778.
- 443 Ref. 92 P R 1918.
- 537 Ref. 3 Pat L J 243.
- 629 Rel. 45 I C 290.
- 629 Foll. (1918) Pat. 1.
  
- 26 All 220 Not Foll. (1918) M  
W N 414.
- 220 Dis. 34 M L J 494=  
46 L C 86
- 270 Foll. 40 All 517.
- 318 Dist. 4 Pat. L W 57.
- 334 Ref. (1918) M W N  
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- 334 Dist. 4 Pat L W 57.
- 333 Ref. 35 M L J 51.
- 468 Ref. 45 P R 1818.
- 468 Foll. 77 P W R 1918.
- 564 Ref. 16 A L J 486.
  
- 581 Foll. 57 P W R 1918.
- 611 Ref. (1918) Pat. 328=  
3 Pat. L J 326.
  
- 27 All 88 Foll. 46 I C 272.
- 334 Dist. 7 L W 16.
- 540 Foll. (1918) M W N  
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- 592 Foll. 46 I C 326.
- 655 Ref. 3 Pat L J 433.
- 670 Foll. (1918) M W N  
318=7 L W 547.
- 670 Appr. 40 P W R 1918  
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- 28 All 44 Ref. 7 L W 201.
- 50 Foll. 20 Bom. L R 472.
- 78 Ref. 3 Pat. L J 255.
- 95 Foll. 40 All 535.
- 112 Ref. 97 P R 1918.
- 137 Dist. 42 P L R 1918.
- 240 Rel. 43 I C 902.
- 397 Dist. 11 P R 1918.
- 337 Ref. 27 C L J 489.
- 406 Ref. 3 Pat. L J 243.
- 483 Ref. (1918) Pat. 274=  
5 Pat. L W 144=3 Pat. L  
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- 488 (P C) Ref. 6 P R 1918.
- 508 Ref. 10 P R. 1918.
- 508 Expl. 45 I C 206.
- 622 Ref. 30 P R. 1918.
  
- 29 All 10 Foll. 43 I. C. 849.
- 125 Not Foll. 24 P R 1918.
- 184 Ref. 35 M L J 219=7  
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- 239 Dist. 8 L W 455=35  
M L J 364=47 I C. 578.
- 244 Foll. 45 I C 806.
- 282 Foll. 40 All 103=16  
A L J 11.
- 339 Appl. 41 Mad 458=23  
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- 339 (P C) Ref. 34 M L J  
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- 385 Foll. 35 M L J 303=  
23 M L T 300.
- 487 Ref. 3 Pat L J 83.
- 601 Dist. 45 P R 1918=77  
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- 667 Ref 3 Pat L J 168=43  
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- 30 All 84 Ref 40 All 575.
- 84 Dist. 47 I C 611.
- 116 Foll. 3 Pat L J 302.
- 156 Rel. 45 I C 206.
- 331 Ref. 22 C W N 931.
- 458 Foll. 34 M L J 479.
  
- 31 All 9 Ref. 3 Pat L J 361.
- 9 Dist. 4 Pat L W 303.
- 11 Ref. 40 All 584.
- 161 Not Foll 8 I. W 480.
- 170 Ref. 35 M L J 317.
- 176 Dist 45 I C 206.

—285 Foll. 43 I. C. 812.  
 —382 Appr. (1918) M W N 384.  
 —445 Foll. 46 I C 338.  
 —453 Foll. 4 Pat L W 50.  
 —497 (P C) Ref (1918) Pat 86.  
 —583 Expl and Dist. 35 M L J 694.

32 All 25 Ref. (1918) Pat 241=5 Pat L W 147.  
 —59 Ref. 3 Pat L J 92.  
 —183 Foll. 8 P L R 1918.  
 —439 Ref. 35 M L J 317.  
 —524 Dist. 43 I C 460.  
 —594 Ref. 47 P R 1918.  
 —594 Dist. 20 P W R 1918.  
 —612 (P C) Foll. (1918) Pat 69.

33 All 20 Ref. 3 Pat L J 443.  
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 —376 Dist. 76 P W R 1918.  
 —450 Dist. 77 P W R 1918.  
 —453 Dist. 45 P R 1918.  
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 —743 Dist. 71 P R 1918.

34 All 4 Ref. 22 P R 1918.  
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 —36 Ref. 38 P R 1918=68 P W R 1918.  
 —49 Ref. 26 P R 1918=51 P W R 1918.  
 —49 Dist. 98 P R 1918=49 P W R 1918.  
 —63 Con. 41 Mad. 488.  
 —63 Dist. 43 I C 626.  
 —102 Foll. (1918) M W N 505=47 I C 882.  
 —103 Foll. 24 M L T 183.  
 —103 Rel. 35 M L J 467.  
 —197 Ref. 45 Cal 336=27 C L J 316.  
 —207 Foll. 16 A L J 493=40 All 518.  
 —282 Rel. 43 I C 902.  
 —296 (P C) Ref. 8 L W 28.  
 —490 Ref. (1918) Pat. 343=3 Pat L J 310.  
 —496 Foll. 88 P W R 1918.  
 —496 Dist. 27 C L J 374.

35 All. 43 Rel. (1918) M W N 262.  
 —48 (P C) Dist. 34 M L J 79.  
 —74 Diss. 85 M L J 686.  
 —80 Ref. 8 L W 24.  
 —80 Con. 43 I C 833.  
 —90 Diss. 34 M L J 404=1918 M W N 280=19 Cr. L J 483=23 M L T 285=45 I C 147.  
 —90 Not Foll. 7 L W 38.  
 —146 Ref. 7 L W 291=23 L T 178.

—154 Foll. 3 Pat L J 188.  
 —202 Foll. (1918) M W N 262.  
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 —211 Ref. 1918 Pat. 181=3 Pat. L J 199.  
 —283 Expl. and Dist. 47 I C 341.  
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 —324 Foll. 40 All 518.  
 —331 Ref. 96 P R 1918.  
 —410 Dist. 89 P R 1918=88 P W R 1918.  
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 —446 Foll. (1918) M W N 274.  
 —466 Ref. 35 M L J 217=8 L W 486.  
 —466 Foll. 33 M L T 81=7 L W 411.  
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 —40 Ref. 3 Pat. L J 443.  
 —81 Foll. 28 C L J 306.  
 —250 Ref. 40 All 76.  
 —268 Foll. (1918) M W N 173.  
 —383 (P C) Ref. (1918) Pat 71.

37 All 45 Expl. S L W 62.  
 —65 Not Foll. 46 I C 377.  
 —113 Ref. 7 L W 201=41 Mad. 435.  
 —283 Diss. 35 M L J 259.  
 —296 Not Appr. 41 Mad. 287.  
 —414 Foll. 7 L W 201=(1918) M W N 226.  
 —474 Dist. 34 M L J 545=16 A L J 409=27 C L J 548=45 I C 1.  
 —535 Ref. 34 M L J 590.  
 —535 Ref. 8 L W 103.  
 —535 Foll. 45 I C 774.  
 —575 Not Foll. 41 Mad. 23

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 —457 Foll. 5 Pat. L W 34.  
 —467 Rel. 46 I C 33.  
 —488 Ref. 40 All. 505.  
 —540 Not Foll. 45 I C 783.  
 —581 Dist. 45 I C 401.

39 All. 49 Ref. 29 P L R 1918.  
 —61 Foll. 23 M L T 245.  
 —95 Ref. 22 C W N 709.  
 —204 Ref. 40 All. 582.  
 —293 Foll. 46 I C 716.

—437 (P. C.) Ref. 7 L W 407.  
 —437 (P. C.) Dist. 15 P R 1918=24 P W R 1918=43 I C 678.  
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 —496 Cons. 43 I C 833.  
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2 A L J 275 Expl. 45 I C 206.  
 —353 Dist. 45 I C 330.

4 A L J 160 Dist. 47 I C 578.  
 —227 Foll. 45 I C 806.  
 —461 Foll. 47 I C 12.  
 —717 Foll. 16 A L J 377.

5 A L J 115 Foll. 8 L W 480.  
 —175 Rel. 45 I C 206.

6 A L J 94 Ref. 23 M L T 245.  
 —207 Foll. 43 I C 812.  
 —263 Dist. 45 I C 206.  
 —552 Foll. 16 A L J 859.

7 A L J 802 Dist. 43 I C 460.  
 —818 Foll. 16 A L J 881.  
 —1137 Foll. 43 I C 341.

8 A L J 1 Foll. 46 I C 423.  
 —237 Rel. 43 I C 793.  
 —237 Ref. 4 Pat. L W 65.  
 —931 Dist. 16 A L J 137.

9 A L J 23 Foll. 40 All. 96.  
 —37 Dist. 43 I C 626.  
 —183 Rel. 43 I C 902.  
 —771 Foll. 16 A L J 249.

10 A L J 259 Foll. 45 I C 1.

11 A L J 11 Diss. 19 Cr. L J 433=45 I C 147.  
 —93 Foll. 4 Pat. L W 50.  
 —172 Con. 43 I C 833.  
 —238 Foll. 16 A L J 55.

- 638 Appl. 46 I C 978.
- 12 A L J 315 Foll. 47 I C 611.
- 387 Not Foll. (1918) M W N 507.
- 465 Diss 41 Mad. 533=47 I C 659.
- 757 Foll. 41 Mad. 115.
- 774 Foll. 43 I C 515.
- 13 A L J 110 Not Appr 45 I C 35.
- 753 Foll. 45 I C 774.
- 809 Dist. 45 I C 1.
- 14 A L J 111 Foll. 43 I C 940.
- 198 Dist. 43 I C 956.
- 822 Con 43 I C 833.
- 834 Not Foll. 45 I C 783.
- 997 Dist. 43 I C 484.
- 1055 Dist. 45 I C 401.
- 1265 Dist. 45 I C 658.
- 15 A L J 69 Foll. 27 C L J 461.
- 87 Ref. 40 All 75.
- 136 Foll. 46 I C 716.
- 382 Foll. 45 I C 782.
- 473 Appr. 3 Pat L J 456.
- 511 Overruled 49 All. 579.
- 525 Dist. 46 I C 679.
- 581 Cons. 43 I C 833.
- 684 Foll. 45 I C 806.
- 697 Cons. 43 I C 113.
- 777 Appl. 45 I C 959.
- 16 A L J 1 Dist 45 I C 489.
- 61 Foll. 47 I C 702.
- 217 Dist. 45 I C 993.
- I L R Bombay Series.
- 1 Bom 177 Foll. and Appr. 45 Cal. 17.
- 367 Ref. (1918) Pat 97.
- 398 Ref. 4 Pat. L W 157.
- 2 Bom 273 Ref. 35 M L J 51.
- 481 Foll. 20 Bom. L R 607.
- 3 Bom 182 Ref. (1918) Pat 21.
- 242 Ref. 23 C W N 93.
- 312 Foll. 27 C L J 453.
- 353 Rel. 43 I C 943.
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- 437 Rel. 7 L W 516.
- 4 Bom 37 Appl. 41 Mad. 44.
- 235 Dist 34 M L J 79.
- 515 Ref. 23 P W R 1918.
- 643 Dist. 45 Cal. 631=27 C L J 607.
- 5 Bom 48 (P. C.) Ref. 13 P R 1918.
- 371 Ref. 24 M L T 175
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- 437 Foll. 41 Mad. 749.
- 496 Ref. 22 C W N 611.
- 527 Foll. 46 I C 10.
- 613 Ref. 22 C W N 611.
- 647 Dist. 20 Bom. L R 447
- 6 Bom 558 Not Foll 43 I C 578.
- 7 Bom 341 Ref. 72 P R 1918=
- 31 P L R 1918.
- 341 Foll. 11 Bur LT 124.
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- 8 Bom 368 Foll. 35 M L J 88
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- 9 Bom 198 Ref. 34 M L J 563
- 41 Mad. 749.
- 193 Not Foll. 34 M L J 244.
- 373 Foll. 41 Mad 319.
- 11 Bom 216 Foll. 8 L W 206.
- 331 Foll. 5 Pat. L W 167.
- 506 Ref. 35 M L J 51.
- 551 Foll. 45 I C 949.
- 702 Ref. 3 Pat. L J 291.
- 13 Bom 237 Foll. 43 I C 537.
- 600 Ref. (1918) Pat. 30.
- 14 Bom 266 Foll. 14 N L R
- 192=43 I C 111=19 Cr. L J 79.
- 331 Foll. 3 Pat. L J 302.
- 15 Bom 155 Ref 3 Pat. L J
- 339=5 Pat L W 45=
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- 527 Foll. 20 Bom. L R 411.
- 612 Ref. (1918) MN W 555.
- 16 Bom 91 Ref 7 L W 298.
- 117 Ref. 99 P R 1918.
- 117 Diss. 46 I C 277.
- 123 Foll. 3 Pat L J 119.
- 661 Ref. 45 Cal. 720.
- 683 Foll. 24 M L T 179.
- 17 Bom 41 Ref 3 Pat L J 443
- 235 Foll. 27 C L J 453.
- 341 Ref. 27 C L J 538.
- 341 Foll. (1918) M W N 244.
- 18 Bom 35 Ref. (1918) Pat.
- 220=3 Pat. L J 460.
- 98 Ref. 23 P W R 1918..
- 144 Ref. 22 C W N 611.
- 237 Dist 41 Mad 624.
- 369 Dist. (1918) M W N 680.
- 516 Foll. 20 Bom. L R 325.
- 19 Bom. 140 Foll. 34 M L J 431=23 M L T 291.
- 216 Ref. 3 Pat L J 122.
- 493 Dist. 24 P W R 1918.
- 571 Dist. 13 P R 1918.
- 20 Bom. 94 Appr. 23 M L T 94.
- 236 Ref 3 Pat. L J 78.
- 435 Foll 8 P L R 1918.
- 495 Dist. 47 I C 611.
- 495 Appr. 20 Bom. L R 514=16 A L J 113=
- 43 I C 807 P C.
- 495 Foll. 4 Pat L W 92.
- 540 Ref 4 Pat. L. W 153
- 736 Ref. 3 Pat L J 194.
- 755 Ref. (1918) Pat 86.
- 21 Bom. 297 Rel. 35 M L J 533.
- 333 Ref. 16 A L J 339.
- 22 Bom. 235 Foll. 14 N L R
- 192=43 I C 711=19 Cr. L J 79.
- 321 Foll 24 M L T 183=
- 8 L W 480.
- 340 Foll. (1918) M W N 748.
- 409 Ref. 3 Pat L J 199.
- 669 Foll. 45 I C 201.
- 711 Foll. 41 Mad. 727.
- 718 Ref. 84 P R 1918.
- 23 Bom. 137 Expl 41 Mad 650.
- 177 Ref. (1918) Pat. 347.
- 213 Foll. 45 Cal. 720
- 271 (P C) Ref. 16 P R 1918.
- 296 Ref. 6 P R 1918.
- 318 Dist. 41 Mad 256.
- 406 Ref. (1918) Pat. 21.
- 723 Dist. 47 I C 611.
- 24 Bom. 420 Dist 47 I C 611.
- 556 Foll. 41 Mad. 749=47 I C 733.
- 556 Rel. 34 M L J 563.
- 25 Bom. 179 Ref. 27 C L J 465.
- 332 Ref. 34 M L J 517=
- 23 M L T 341.
- 422 Ref. 45 Cal. 720.
- 470 Dist. 20 Bom. L R 983
- 593 Ref. 44 P R 1918.
- 631 Foll. 43 I C 165=5
- Pat. L W 141.
- 26 Bom 26 Ref. (1918) Pat. 192.
- 57 Ref. 5 Pat. L W 40.
- 109 Ref. 3 Pat. L J 255.
- 252 Ref. 8 L W 438=24
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- 298 Ref. 20 Bom. L R 970.
- 305 Ref. 16 P R 1918=
- 37 P W R 1918=16 P L R 1918.

- 319 Ref. 14 P R 1918.
- 353 Ref. 22 C W N 931.
- 360 Dist. 35 M L J 872.
- 374 Diss. 45 I C 985.
- 379 Ref. 8 L W 28=1918 Pat. 278.
- 500 Ref. 8 L W 28=(1918) M W N 448=45 I C 783.
- 526 Appr. 45 I A 156=28 C L J 408=24 M L T 231=8 L W 167=46 I C 481.
- 558 Not Foll. 41 Mad. 156 19 Cr. L J 162.
- 739 Foll. 45 I C 83.

- 27 Bom. 135 Ref. 24 M L T 96 =8 L W 225.
- 284 Ref. 84 P R 1918
- 297 Foll. 43 I C 399.

- 28 Bom. 248 Dist. 3 P R 1918.
- 262 Foll. 28 C L J 222.
- 294 Ref. 3 Pat. L J 306=(1918) Pat. 145.
- 420 Ref. 23 C W N 93.

- 29 Bom. 207 Appr. 3 Pat. L J 194.
- 400 Expl. 41 Mad. 604.
- 405 Ref. 35 M L J 355.
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- 30 Bom. 56 Foll. 27 C L J 326.
- 119 Foll. and Appl. 45 Cal. 320.
- 119 Appr. 23 M L T 86.

- 31 Bom. 165 Dist. 40 All 487=35 M L J 459=24 M L T 236=28 C L J 394.
- 381 Foll. 47 I C 12.
- 527 Dist. 23 M L T 158.

- 32 Bom. 111 Foll. 27 C L J 326.
- 181 Foll. 27 C. L J 506.
- 184 Foll. 20 Bom. L R 998.
- 259 Dist. 43 I C 865.
- 348 Ref. 3 Pat. L J 396.
- 560 Ref. (1918) Pat. 55=4 Pat. L W 70
- 569 Ref. 8 L W. 493.
- 619 Foll. 27 C L J 119.

- 33 Bom. 33 Not Foll. 5 P R Cr 1918.
- 34 Foll. 64 P W R 1918.
- 44 Ref. 41 Mad 535.
- 69 Diss. 24 M L T 856.
- 325 Dist. 76 P W R 1918.
- 411 Ref. 34 M L J 561=23 M L T 84.
- 419 Ref. (1918) MWN 410.
- 475 Not Foll. 3 Pat. L J 355
- 722 Ref. 85 M L J 27.

- 34 Bom. 135 Ref. (1918) Pat. 278.
- 358 Diss. 45 Cal. 111.
- 436 Foll. 76 P. W. R. 1918.
- 599 Ref. (1918) Pat. 95=4 Pat. L W 325=3 Pat. L J 568.

- 35 Bom. 29 Diss. 45 I C 109.
- 293 Rel. 34 M L J 596.
- 452 Ref. and Dist. 8 P R 1918.
- 511 Foll. 47 P L R 1918 =35 P W R 1918=43 I C 656.

- 36 Bom. 120 Rel. 43 I C 943.
- 156 Diss. 41 Mad 616=(1918) M W N 524.
- 164 Ref. 48 P W R 1918.
- 164 Doub. 24 M L T 420.
- 279 Dist. 41 Mad. 624.
- 329 Dist. 43 I C 685.
- 424 Ref. 3 Pat. L J 163
- 500 Dist. 74 P L R 1918 =75 P W R 1918.
- 510 Overruled 35 M L J 783.
- 533 Foll. 27 C L J 119.

- 37 Bom. 251 Ref. 27 C L J 274.
- 506 Ref. (1918) M W N 540.
- 562 Ref. 13 P R 1918.
- 563 Ref. 13 P R 1918.
- 631 Foll. 20 Bom. L R 472.
- 658 Foll. 46 I C 424.

- 38 Bom. 94 Cons. 43 I C 865.
- 94 Diss. 23 M L T 266=45 I C 905
- 120 Diss. 45 Cal. 111.
- 194 Foll. 42 P L R 1918.
- 204 Ref. 23 M L T 203.
- 227 Foll. 5 Pat. L W 167.
- 249 Ref. 34 M L J 561. 23 M L T 84.
- 309 Dist. 49 P R 1918.
- 369 Dis 34 P W R 1918.
- 381 Not Foll. 41 Mad 208.
- 909 (F. B.) Ref. 13 P R 1918.

- 39 Bom. 410 Foll. 27 C L J 119.

- 40 Bom. 11 Foll. 23 M. L. T. 320.
- 210 Foll. 8 L W 206.
- 289 Ref. 4 Pat. L W 57.

- 41 Bom. 315 Foll. 42 Bom. 277=20 Bom. L R 161.

- 480 Diss. 7 L W 124.
- 530 Not Appr. 43 I C 908.
- 536 Appr. (1918) M W N 230.
- 546 Ref. 34 M L J 561=23 M L T 84.

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- 9 B H C R 1 Ref. 22 C W N 611.

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- 249 Ref. 7 L W 36.

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- 277 Dist. 43 I C 871.
- 394 Foll. 43 I C 282.

- 2 Bom. L R 592 Foll. 47 I C 898.

- 3 Bom. L R 255 Foll. 43 I C 165.

- 4 Bom. L R 178 Foll. 45 I C 793.

- 280 Not Foll. 43 I C 578=19 Cr. L J 162.
- 315 Appr. 46 I C 481.

- 5 Bom. L R 103 Foll. 47 I C 716.

- 103 Dist. 43 I C 833.
- 140 Foll. 43 I C 999.
- 329 Ref. 22 C W N 611.
- 392 Foll. (1918) M W N 769.

- 421 Foll. 46 I C 670.
- 469 Foll. 47 I C 716.
- 469 Dist. 43 I C 833.
- 478 Foll. 46 I C 815.
- 478 Dist. 45 I C 905.
- 483 Dist. 45 I C 106.
- 885 Foll. 20 Bom. L R 947.

- 6 Bom. L R 98 Rel. 43 I C 551
- 441 Dist. 24 P W R (Cr) 1918.

- 541 Diss. 14 P R (Cr) 1918
- 647 Dist. 42 Bom. 277=20 Bom. L R 161.

- 750 Foll. 57 P W R 1918
- 785 Foll. 40 All. 507=16 A L J 445.
- 871 Foll. 46 I C 888.

- 8 Bom. L R 379 Dist. 45 I C 380.

—507 Dist. 19 Cr. L J 189.  
—950 Foll. 45 I C 267=19  
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9 Bom. L R 99 Foll. 76 P W R  
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—356 Ref. 1 P R (Cr.) 1918.  
—597 Foll. 45 I C 806=20  
Bom. L R 724.  
—671 Foll. 47 I C 12.  
—1232 Dist. 76 P W R 1918.  
—1322 Foll. 43 I C 812.

10 Bom. L R 59 Dist. 47 I C  
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—279 Dist. 43 I C 865.

11 Bom. L R 861 Dist. 47 I C  
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13 Bom. L R 1 Foll. 46 I C  
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—201 Rel. 43 I C 800=19 Cr  
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—853 Rel. 43 I C 943.

14 Bom. L R 1 Dist. 43 I C 626.  
—259 Dist. 43 I C 685.  
—310 Appr. 35 M L J 608=  
24 M L T 447  
—314 Ref. 8 L W 28=41  
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—390 Dist. 75 P W R 1918.  
—938 Foll. 20 Bom. L R 325.  
—1034 Foll. 45 I C 1=20  
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15 Bom. L R 456 Cons. 43 I C  
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—606 Expl. and Dist. 47 I C  
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—882 Cons. 43 I C 865.

16 Bom. L R 328 Foll. 47 I C  
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—400 Foll. 45 I C 515.  
—566 Ref. 41 Mad. 208.

17 Bom. L R 617 Dist. 45 I C  
1=20 Bom. L R 587.  
—921 Foll. 47 I C 659.

18 Bom. L R 378 Dist. 43 I C  
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—418 Dis. 45 I C 460.  
—621 Cons. 43 I C 833.  
—856 Dist. 43 I C 484.  
—915 Foll. 43 I C 673.  
—999 Dis. 45 I C 401.  
—1027 Dist. 45 I C 653.

19 Bom. L R 140 Foll. 23 M  
L T 291.  
—388 Dist. 46 I C 679.  
—424 Foll. 45 I C 782.  
—488 Foll. 43 I C 678.  
—498 Expl. and Diss. 47 I C  
192.

—561 Not Appr. 43 I C 908.  
—642 Cons. 43 I C 833.  
—737 Foll. 45 I C 806.  
—751 Cons. 43 I C 113  
—757 Foll. 20 Bom. L R 724.  
—866 Appl. 45 I C 959

20 Bom. L R 38 Dist. 45 I C 489  
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—207 Foll. 43 I C 111=14  
N L R 192=19 Cr. L J 79.

2 Cal. 131 Ref. 3 Pat. L J 571.  
—184 Ref. 27 C L J 592.  
—233 Foll. 43 I C 74.

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—540 Foll. 4 Pat L W 104.  
—96 Ref. 3 Pat L J 483.  
—306 Foll. 46 I C 783.  
—826 Dist. 45 I C 109.

4 Cal. 17 Ref. 4 Pat L W 157.  
—20 Dist. 45 Cal 697.  
—172 Ref. 3 Pat L J 581.  
—172 Foll. 19 Cr L J 281.  
—455 Ref. (1918) Pat 170.  
—696 Dist. 11 P R (cr) 1918.  
—397 Ref. (1918) Pat 170.

5 Cal. 59 Foll. 34 M L J 479.  
—86 Foll. 27 C L J 326  
—110 Dist. 22 C W N 817.  
—198 Ref. 53 P W R 1918=  
25 P L R 1913.  
—259 Appr. 45 I A 148.  
—438 Ref. 14 P R 1918.  
—488 Cons. 22 C W N 362.  
—512 Ref. (1918) Pat. 86  
—584 Foll. (F B) 34 M L J  
97=(1918) M W N 169=  
43 I C 268=23 M L T 26  
—584 Appr. and Foll. 20  
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—775 Ref. 23 M L T 81.  
—776 (P C) Foll. 7 L W 41.  
—776 Not Foll. 8 L W 480.  
—962 Ref. 27 C L J 488.  
—910 Ref. (1918) Pat. 170.

6 Cal. 55 Dist. 32 P R 1918.  
—482 Ref. 28 C L J 213  
—762 Not Foll. 19 Cr. L J  
499=22 C W N 646=27  
C L J 377  
—764 Dist. 40 All. 518.  
—764 Expl. 8 L W 62.  
—789 Doub. and Dist. 47 I C  
275

7 Cal. 46 Ref. 27 C L J 465.  
—256 Ref. 15 P W R 1918.  
—381 Ref. (1918) Pat. 152.  
—459 Diss. 34 M L J 499=  
43 I C 86=(1918) M W N  
411.

8 Cal. 51 Ref. (1918) Pat. 265  
—51 Foll. 35 M L J 312.  
—39 Not Foll. (1918)  
M W N 743  
—248 Diss. 3 Pat. L J 119.  
—302 Ref. 8 L W 167.  
—357 Ref. 27 C L J 274.  
—422 Cons. 23 C W N 1.  
—485 Foll. 47 I C 877.  
—556 Diss. 43 I C 532.  
—632 Ref. (1918) Pat. 152.  
—783 Ref. (1918) Pat. 170.  
—871 Ref. 23 C W N 611.

9 Cal. 209 Foll. 27 C L J 326.  
—482 Rel. 22 C W N 550.  
—563 Ref. 22 C W N 331.  
—695 Ref. 22 C W N 611.  
—695 Dist. 47 I C 634.

10 Cal. 109 Ref. 45 Cal. 169.  
—324 Ref. (1918) Pat. 86  
23 C W N 64.  
—445 Ref. 41 Mad. 538.  
—713 Dist. 43 I C 539.  
—320 Foll. (1918) M W N  
38.  
—856 Ref. 1918 Pat. 152.  
—1335 Foll. 1918 Pat 76.

11 Cal. 6 Foll. 27 C L J 418=  
46 I C 189.  
—91 Foll. 41 Mad. 727=7  
L W 520.  
—121 Ref. (1918) Pat. 243=3  
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—237 Ref. 3 Pat L J 478.  
—301 (P C) Ref. 13 P R 1918.  
—463 P C Ref. 6 P R 1918.  
—501 Foll. 5 Pat L W. 52  
—583 Ref. 45 Cal 159.  
—684 Ref. (1918) Pat 181=  
3 Pat L J 199.

12 Cal. 117 Ref. 46 I C 62  
—185 Ref. 27 C L J 480.  
—296 Appl. 24 M L T 179.  
—414 Ref. 22 C W N 543=  
28 C L J 256  
—614 Ref. 79 P R 1918=25  
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13 Cal. 21 Ref. (1918) Pat 71.

14 Cal. 18 Dist. 113 P R 1918.  
—64 Foll. (1918) M W N  
173.  
—141 Ref. 1918 Pat 30.  
—387 Ref. 23 C W N 64.

- 493 Dist. 7 L W 225=45 I C 62.  
—631 Ref. 23 P W R 1918.  
—661 Dist. 43 P R 1918.  
—757 Dist. 22 C W N 919 =43 I C 464.  
—768 Ref. (1918) Pat. 220= 3 Pat. L J 460.  
—885 Foll. 4 Pat L W 327.  
—887 Foll. 3 Pat L J 302.
- 15 Cal. 8 Ref. 3 Pat L J 78.  
—174 Ref. 4 Pat L W 218.  
—446 Ref. 22 C W N 627 =27 C L J 418.  
—521 Ref. 45 Cal 785.  
—521 Cons. 24 M L T 197.  
—608 Ref. 4 Pat L W 220.  
—773 Disc. 45 Cal 697.  
—800 Foll. 47 I C 881.
- 16 Cal 40 Foll. 48 I C 64.  
—80 Doub. 47 I C 657.  
—307 Ref. 8 L W 405=24 M L T 373.  
—397 Dist. 7 L W 225=45 I C 62.  
—535 Dist. 41 Mad 474.  
—556 Ref. 27 C L J 274.  
—556 P O Dist. 5 Pat L W 167.  
—682 Ref and Dist S P R 1918.
- 17 Cal 436 Ref. 8 L W 197.  
—436 (P C) Foll. (1918) M W N 699.  
—538 Foll. 46 I C 429.  
—631 Ref and Dist. 22 C W N 540=27 C L J 998 =47 I C 911.  
—711 Foll. 27 C L J 572.  
—826 Ref. 28 C L J 273.  
—852 Foll. 1 P W R (Cr) 1918=19 Cr L J 314=10 P R (Cr) 1918.  
—872 Ref. 27 C L J 463= 45 Cal 336.  
—926 Ref. 90 P R 1918.
- 18 Cal 10 Foll. 46 I C 272.  
—10 Appl. 28 C L J 437.  
—86 Ref. 28 C L J 268.  
—151 Appr. 41 Mad 44.  
—157 (P C) Ref. 13 P R 1918.  
—164 Cons. 41 Mad 513.  
—215 Foll. 23 P W R 1918.  
—349 Foll. 5 Pat L W 52.  
—368 Ref. 22 C W N 817.  
—414 (P C) Foll. (1918) M W N 433.  
—414 Ref. 8 L W 202.  
—481 Ref. 3 Pat L J 122.
- 19 Cal 123 Ref. 41 P R 1918.  
—219 Ref. 35 M L J 317.  
—249 Ref. 7 L W 243.  
—253 Appl. 3 C L J 437.  
—289 Foll. 8 L W 489.  
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—507 (P. C.) Rel. 34 M L J 177.  
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20 Cal. 93 Foll. 7 L W 243.  
—296 Ref. 28 C L J 123.  
—296 Foll. 35 M L J 46.  
—328 Ref. 3 Pat. L J 396.  
—483 Dist 2 P R (Cr) 1918.  
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—609 Ref. 4 Pat. L W 116 =3 Pat. L J 156.  
—609 Comm (1918) Pat. 8.  
—708 Ref. 3 Pat. L J 1.
- 21 Cal. 70 Ref. 28 C L J 51.  
—92 Ref. 4 Pat. L W 153.  
—103 Foll. 23 M L T 240= 19 Cr. L. J. 359.  
—206 Dist. 43 I C 865.  
—279 Foll. 47 I C 963.  
—366 Appl. 41 Mad 513.  
—387 Foll. 3 Pat. L J 119.  
—473 Expl. 41 Mad. 447.  
—504 Ref. 27 C L J 599.  
—955 Ref. 4 Pat. L W 40.
- 22 Cal. 8 Dist. 13 P R 1918.  
—21 Foll. 40 All. 512.  
—551 Ref. 23 M L T 258.  
—589 Foll. 8 L W 480.  
—638 Doub and Dist. 47 I C 275.  
—864 Foll. 8 L W 489.  
—909 Ref. 73 P R 1918.
- 23 Cal. 1 Ref. 22 C W N 745.  
—174 Dist. 45 Cal. 727=27 C L J 484.  
—420 Foll. 46 I. 424.  
—604 Ref. 30 P R (Cr) 1918.  
—621 Ref. 40 All. 39.  
—621 Foll. 8 L W 461.  
—681 Foll. (1918) M W N 751.  
—867 Dist 16 A L J 360.  
—874 Ref. 4 Pat. L W 40.  
—896 Ref. 3 Pat L J 493 =(1918) Pat 269.  
—956 Cons. 22 C W N 362.  
—975 Dist. (1918) Pat 192 =3 Pat. L J 565.
- 24 Cal. 53 Foll. 16 A L J 499.  
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- 244 Diss. 43 I C 532.  
—272 Ref. 4 Pat. L W 146.  
—296 Foll. 4 Pat L W 86.  
—406 Ref. 13 P R 1918; 3 Pat L J 199.  
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—551 Dist. 45 Cal 697.  
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—900 Ref. 12 P R 1918.
- 25 Cal. 99 Foll. 43 I C 685.  
—99 Dist. 41 Mad 474.  
—103 Ref. (1918) Pat. 170.  
—210 Foll. 45 I C 855.  
—305 Diss. 45 Cal. 691.  
—434 Ref. 4 Pat. L W 329.  
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—595 Appr. 11 Bur. L T 116.  
—703 Ref. (1918) Pat 274 =3 Pat L J 498=5 Pat L W 144.  
—844 Appl. 46 I C 973.  
—917 Ref. 4 Pat L W 316 =(1918) Pat. 210.
- 26 Cal. 101 Appr. 46 I C 277.  
—409 Ref. 27 C L J 605.  
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—156 Ref. 27 C L J 447.  
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—479 Ref. 27 C L J 433.  
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—781 Ref. (1918) M W N 751 =8 L W 461.  
—810 Cons. 23 C W N 1.  
—943 Foll. 47 I C 892.
- 28 Cal. 113 Ref. 67 P R 1918.  
—113 Diss. 15 P L R 1918= 86 P W R 1918.

—223 Foll. 46 I C 272.  
—411 Dist. 43 I C 251.  
—557 Dist. 45 I C 437=  
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—557 Expl. 8 L W 416.  
—591 Ref. 34 M L J 517=  
23 M L T 341.  
—1022 Ref. (1918) Pat. 265.

29 Cal. 167 (P.C.) Foll. (1918) M  
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—187 Ref. 27 C L J 599.  
—223 Ref. (1918) Pat 184  
—415 Foll. 2 P R (Cr) 1918.  
—431 Foll. 41 Mad. 727.  
—491 Diss. 3 Pat L J 33.  
—583 Ref. 36 M L J 51.  
—654 Dist. 22 C W N 894.  
—699 Ref. 3 Pat. L J 149.  
—707 Diss. 3 Pat L J 379.  
—871 Foll. 64 P W R 1918.

30 Cal 155 Ref. 27 C L J 465.  
—231 Foll. 47 I C 716.  
—291 Ref. 27 C L J 599.  
—339 Diss. 3 Pat. L J  
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—421 Ref. 4 Pat. L W 62.  
—539 Ref. 27 C L J 459=  
22 C W N 130=1918 Pat  
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—539 Foll. 46 I C 670.  
—693 Foll. (1918) Pat. 78.  
—725 Foll. 47 I C 716.  
—843 Ref. 7 L W 36.  
—865 Dist. 45 I C 106.  
—910 Dist. 2 P R (Cr) 1918.  
—923 Dist. 3 Pat L J 346.  
—1060 Foll. 41 Mad 327.

31 Cal 89 Foll. 28 C L J 271.  
—195 Dist. 46 I C 495.  
—314 Ref. 3 Pat L J 327.  
—314 Foll. 23 M L T 187  
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—350 Foll. 41 Mad. 246=  
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—550 Ref. 45 Cal 294.  
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—757 Foll. 27 C L J 579.  
—792 Expl. 22 C W N 145  
—822 Foll. 3 Pat L J 454.  
—849 Ref. 21 P R 1918.  
—863 Ref. 1918 Pat. 274=  
3 Pat L J 490=5 Pat L W  
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—965 Foll. 4 Pat L W 134.

—965 Ref. 3 Pat L J 33.  
—1021 Ref. 27 C L J 556.  
—1026 Ref. 22 C W N 769.  
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—1036 Dist. 46 I C 447  
—1057 Diss. 27 C L J 461

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—178 Ref. 4 Pat. L W 153.  
—219 Foll. 45 Cal. 1.  
—236 Dist. 23 M L T 208.  
—444 Foll. 43 I C 847.  
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—193 Foll. 4 Pat L W 143.  
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—352 Ref. 27 C L J 465.  
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—498 Foll. 24 M L T 102=  
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—566 Ref. 45 Cal 294  
—596 Ref. 22 C W N 660=  
28 C L J 160.

—630 Dist. 27 C L J 556  
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—890 Dist. 45 Cal 702.  
—927 Not Foll. 41 Mad. 151.  
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—1065 Doub. 3 Pat. L J 156  
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—211 Ref. 25 P R 1918.  
—358 Overruled 45 Cal. 87.  
—872 Ref. 3 Pat L J 163.  
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—551 Diss. 20 Bom. L R  
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—120 Dist. 1918 Pat. 223.  
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—437 Ref. 34 M L J 206  
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—457 Foll. 16 A L J 217=  
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—457 Disappr. 45 I C 993.  
—551 Ref. 41 Mad 197.  
—618 Ref. and Foll. 5 Pat.  
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=3 Pat L J 339=45 I C  
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—774 Ref. and Foll. 4 Pat.  
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—820 Not Foll. 3 Pat. L  
J 386.  
—961 Ref. 28 C L J 437.  
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—996 Foll. 43 I C 731.  
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- 694 Ref. 3 Pat. L. J. 38.
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- 918 Foll. 43 I. C. 341.
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- 270 Foll. 46 I. C. 423.
- 307 Ref. 4 Pat. L. W. 153.
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- 468 Foll. (1918) M. W. N. 503=8 L. W. 141=24 M. L. T. 101; (1918) Pat. 181.
- 880 Ref. 4 Pat. L. W. 98.
- 913 Dist. 42 Bom. 309.
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- 150 Ref. 3 Pat. L. J. 243.
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- 966 Foll. 23 M. L. T. 245.
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- 66 Foll. 23 P. W. R. (Cr.) 1918=12 P. R. (Cr.) 1918.
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- 323 Ref. 22 C. W. N. 627=27 C. L. J. 413.

- 394 Foll. 4 Pat. L. W. 130.
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- 56 Ref. 28 C. L. J. 123=(1918) M. W. N. 703.
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- 239 Doub. (1918) M. W. N. 487.
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- 653 Ref. (1918) Pat. 152.
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—512 Ref. 35 M L J 27=  
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—591 Ref. (1918) Pat. 26.  
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- 12 C L J 574** foll. 28 C L J 151.  
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—547 Foll. 43 I C 723.  
—646 Dist. 45 Cal. 691.
- 14 C L J 38** Ref. 27 C L J 334.  
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—639 Foll. 27 C L J 110.
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—649 Not. Foll. 41 Mad. 612.
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- 103 Ref. 3 Pat L J 460.  
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- 18 C L J 86** Foll. 23 C L J 318  
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—149 Ref. 22 C W N 104.  
—220 F B Dist. 3 P R 1918.  
—303 Ref. 34 M L T 167=7  
7 L W 148=23 M L T 156.  
—306 (F. B) Foll. (1918) M  
W N 205.  
—300 Appr. 41 Mad. 641.  
—431 Ref. (1918) M W N  
507.  
—525 Dist. 27 C L J 525.  
—529 Ref. and Dist. 8 P R  
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—534 Ref. 4 Pat L W. 153.  
—572 Ref. 23 M L T 346.  
—578 Ref. 3 Pat L J 168.  
—578 Dist. 43 I C 370.  
—752 Foll. 16 A L J 49.
- 26 Mad 19 Ref. 7 L W 503=  
45 I. C. 16=(1918) M W N  
292.  
—143 Overruled. 41 Mad. 75.  
—179 Dist. 32 P R 1918.  
—190 Foll. 16 A L J 223.  
—195 Foll. 24 M L T 400.  
—230 Appl. 23 M. L T 208  
=(1918) M W N 195.  
—330 Foll. 23 M L T 280=  
34 M L J 177.  
—410 Foll. 19 Cr L. J. 443.  
—627 Dist. 43 I C 526.  
—635 Expl. 41 Mad. 604.  
—638 Dist. 47 I C 692.  
—645 Not Foll. (1918) M  
W N 427.  
—656 Foll. 45 I C 147=7 L  
W 533=23 M L T. 235=  
19 Cr L J 482.  
—662 Ref. 69 P R 1918.  
—686 Dist. 45 I C 786.  
—740 Ref. and Disc. 8 P R  
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- 27 Mad. 26 Ref. 8 L W 438=  
46 I C 62.  
—61 Foll. 2 P. R. (Cr) 1918.  
—94 Dist. 45 I C 653.  
—109 Dist. 34 M L J 473=  
47 I C 713.  
—192 Appr. 23 M L T 34;  
20 Bom. L. R. 514.  
—291 Ref. and Rel. 34 M L  
J 234=23 M L T 161.  
—368 Foll. 24 M L T 400.  
—382 Ref. 3 Pat L J 168.  
—382 Dist. 43 I C 370.  
—465 Dist. 24 M L T 247=  
8 L W 92.  
—483 Dist. 45 I C 658.

- 528 Foll. 40 All. 512.  
—577 Foll. 46 I C 850=5  
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—577 Ref. 27 C L J 274.  
—588 Discussed 8 L W 62.
- 28 Mad 1 Foll. 43 I C 679.  
—50 Cons. 43 I C 155.  
—57 Overruled 41 Mad. 659  
=(1918) M W N 461=35  
M L J 57=24 M L T 115  
=8 L W 62.  
—67 Foll. 14 P W R 1918.  
—87 Ref. and Discu. 8 P R  
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—122 Ref. 8 L W 28.  
—182 Ref. 23 M L T 316.  
—236 Ref. 3 Pat L J 51.  
—308 Not Foll. 24 M L T  
242=19 Cr L J 603.  
—308 Ref and foll 24 M L T  
242=45 I C 507.  
—308 Doub. 22 C W N 646.  
—344 Appl. 41 Mad 454.  
—351 Ref. (1918) Pat 86.  
—394 Ref. (1918) Pat 55=4  
Pat L W 70.  
—423 Foll. 34 M L J 223.  
—457 Foll. 8 L W 473=47  
I C 533=35 M L J 625.  
—474 Foll. 43 I C 122.  
—508 (P C) Ref and Rel. 7 L  
W 86=(1918) M W N 146.  
—563 Dist 19 Cr L J 88.
- 29 Mad. 24 Ref. 41 Mad 374.  
—24 Diss. 45 Cal. 285.  
—24 Overruled 34 M L J  
104=(1918) M W N 350=  
7 L W 243=23 M L T 44.  
—62 Foll. 45 I C 750=(1918)  
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—89 Ref 3 Pat L J 291.  
—151 Ref (1918) Pat 141=  
3 Pat L J 182.  
—179 Overruled 41 Mad 743  
=8 L W 103=(1918) M  
W N 514=34 M L J 590.  
—190 Dist. 47 I C 445.  
—314 Foll. 27 C L J 506.  
—367 Ref 3 Pat L J 443.  
—373 Foll. 4 Pat L W 234.  
—390 Rel 35 M L J 57.  
—390 disc. 8 L W 62.  
—393 Foll. (1918) M W N  
461.  
—501 Foll. 43 I C 379.  
—515 Ref 8 L W 206.
- 30 Mad 1 Foll. 24 M L T 175.  
—6 dist 43 I C 956.  
—61 Ref 23 M L T 67=  
(1918) M W N 235.  
—136 Ref 7 P R. (Cr) 1918.  
—143 Ref (1918) M W N  
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- 148 Foll. 43 I C 563.  
—148 Dist 45 I C 234.  
—253 Foll. 43 I C 379.  
—231 Foll. 24 M L T 400.  
—245 Foll. 7 L W 201.  
—255 Foll. 47 I C 733=34  
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—274 Foll. 3 Pat L J 355.  
—300 Ref. 23 M L T 68=  
(1918) M W N 235.  
—324 Ref. 35 M L J 51.  
—340 Diss. 47 I C 611.  
—332 Foll. 19 Cr. L J 264.  
—383 Foll. (1918) M W N  
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—393 Foll. 34 M L J 229.  
—402 Dist 47 I C 578.  
—426 Expl. 41 Mad. 650.  
—433 Ref. 23 C W N 93.  
—438 Dist 45 I C 401.  
—447 Ref. 34 M L J 431=  
23 M L T 241.  
—478 Ref. 34 P R 1918 :  
(1918) Pat. 152=3 Pat L  
J 255.  
—507 Ref. 41 Mad. 467.  
—519 Ref. 28 C L J 306.
- 31 Mad. 37 Dist. 45 I C 689=  
(1918) M W N 333.  
—47 Foll. 43 I C 865.  
—49 Ref. 27 C L J 326.  
—127 Foll. 43 I C 111=14  
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—133 Dist. (1918) Pat. 69.  
—140 (F.B.) Foll. (1918) Pat  
30.  
—238 Foll. 23 M L T 106.  
—446 Ref. 35 M L J 512.  
—458 Foll. and Rel. 23  
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—463 Ref. (1918) M W N  
757.  
—474 Foll. 8 L W 154.  
—482 Dist. 43 I C 833.  
—534 Ref 41 Mad 353.  
—843 Diss. 20 Bom. L R 398.
- 32 Mad 49 (F.B.) Foll. (1918).  
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—49 Diss. 20 Bom. L R 998.  
—76 Dist. 45 I C 86.  
—136 Ref. and Disc. S P  
R 1918.  
—167 Ref. 23 M L T 94.  
—184 Not Appr. 8 P L R  
1918.  
—191 Expl. 47 I C 552.  
—191 Rel. 34 M L J 536.  
—218 Foll. 16 A L J 217=  
46 I C 289.  
—218 Dist. 45 I C 993.  
—258 Dist. 19 Cr L J 38.  
—410 Foll. 47 I C 563.  
—416 Rel. 43 I C 902.  
—421 Cons. 41 Mad. 427 =  
45 I C 18=(1918) M W N  
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- 478 Ref and Dist. 23 M L  
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- 33 Mad 41 Ref. 8 L W 37.  
—41 Dist. 41 Mad 733=45  
I C 545=(1918) M W N  
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—66 Foll. 47 I C 692.  
—74 Foll. 41 Mad. 151.  
—91 Ref. 3 Pat L J 195.  
—102 Ref. 3 Pat L J 255.  
—112 Foll. 8 L W 206.  
—241 Affirm 23 M L T 1=  
41 Mad 286=43 I C 566=  
34 M L J 24.  
—260 Dist. 41 Mad. 118=43  
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—312 Ref. (1918) Pat. 241=5  
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—362 Dist. 8 L W 145.  
—532 Foll. 8 L W 225.
- 34 Mad. 64 Ref. 111 P R 1918.  
—97 Overruled. 43 I C 566=  
23 M L T 1.  
—112 Dist. 45 I C 86.  
—141 Foll. 24 M L T 242.  
—159 Ref. (1918) Pat. 278.  
—161 Ref. 8 L W 109.  
—161 Dist. 32 P R 1918.  
—173 Ref. (1918) M W N 276  
=34 M L J 425=23 M L  
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—173 Doub. 45 I C 80.  
—253 Not Foll. 45 I C 257  
=19 Cr. L J 497.  
—349 Ref. 11 Bur L T 138.  
—417 Ref. 41 Mad 467.  
—470 Ref. 20 Bom L R 514.  
—470 Affirm and Reversed.  
23 M L T 94.  
—493 Ref. 23 M L T 346.  
—493 Foll. 47 I C 301.  
—505 Foll. 41 Mad. 169=  
7 L W 443.
- 35 Mad. 114 Ref. 7 L W 86.  
—120 Foll. 24 M L T 351.  
—142 Cons. 41 Mad. 427=  
45 I C 18=(1918) M W N  
285=23 M L T 261.  
—136 Foll. 19 Cr. L J 117.  
—186 Not Foll. 41 Mad 156  
=43 I C 578=19 Cr. L J  
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—592 Not Foll. 47 I C 702.  
—607 Ref. 7 L W 241.  
—607 Foll. 45 I C 1=34  
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543 : 16 A L J 409  
—631 Foll. 23 M L T 288.  
—659 Ref. 7 L W 201.  
—692 Dist. 43 I C 76.
- 36 Mad 39 Ref. 41 Mad 241.  
—46 Ref. 3 Pat L J 255.  
—46 Dist. (1918) M W N 194.  
—68 Dist. 46 I C 978.

—131 Foll. 47 I C 624.  
 —131 Ref. 8 L W 256.  
 —131 Ref. (1918) M W N 175.  
 —145 Dist. 42 I C 526=  
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 —145 Expl. 41 Mad 604.  
 —168 Dist. 23 M L T 154.  
 —185 Dist. 41 Mad 454.  
 —203 Rel. 24 M L T 448.  
 —308 Diss. 46 I C 716.  
 —343 Ref. 4 S P W R 1918.  
 —343 Excl. and Dist. 35 M L J 612.  
 —434 Ref. 3 Pat L J 199.  
 —492 Dist. 41 Mad. 511.  
 —544 Doub. 23 M L T 215.  
 —553 Ref. 7 L W 16.  
 —553 Consid. 43 I C 155.  
 —570 Overruled 41 Mad 659  
 =35 M L J 57=8 L W 62  
 =(1918) M W N 461=24  
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 —593 Rel. 24 M L T 448.

37 Mad 25 Ref. 34 M L J 431=23 M L T 291.  
 —29 Foll. 35 M L J 361.  
 —112 Rel. 43 I C 793=19  
 Cr. L J 217.  
 —146 Appr. 23 M L T 461.  
 —146 Foll. 45 I C 18.  
 —199 Ref. 41 Mad. 604=47  
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 —270 Dist. 8 L W 206.  
 —387 Dist. 26 C L J 611.  
 —403 Dist. 8 L W 470=27  
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 —408 Dist. 24 M L T 356=  
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 —443 Dist. 7 L W 508.  
 —455 Foll. 35 M L J 361.  
 —462 Ref. 4 Pat. L W 102=  
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 —514 disappr 45 I A 78=35  
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38 Mad 18 Cons. 41 Mad. 513  
 =23 M L T 106.  
 —25 Foll. 27 C L J 461.  
 —118 Dist. 41 Mad. 102.  
 —138 Dist. 43 I C 861.  
 —160 Diss. 41 Mad. 731=  
 46 I C 849=34 M L J  
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 —160 Foll. (1918) M W N  
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 —178 F. B. Foll. (1918) M  
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 —203 Foll. 45 I C 774=8 L  
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 —203 Rel. 34 M L J 590=  
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 —221 Ref. 41 Mad. 616.

—280 Foll. 23 M L T 337=  
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 —280 Ref. 34 M L J 425.  
 —395 Overruled 41 Mad.  
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 —406 (P. C.) Foll. 41 Mad.  
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 —406 Ref. 24 M L T 115=8  
 L W 62=35 M L J 57.  
 —551 Foll. 41 Mad. 182.  
 —766 Overruled. 41 Mad  
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 —801 Dist. 7 L W 404.  
 —823 Cons. 45 I C 103.  
 —843 Dist. 43 I C 711.  
 —843 Doub. 24 M L T 276.  
 —850 Not Foll. 47 I C 341  
 24 M L T 163=41 Mad.  
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 —991 Ref. 24 M L T 376.  
 —922 Ref. 3 Pat L J 448.  
 —927 Ref. 14 N L R 184.  
 —1071 Dist. 43 I C 808.  
 —1105 Foll. 35 M L J 638.  
 —1106 Appl. 24 M L T 440.  
 —1153 Foll. 13 P W R 1918.  
 —1192 Dist. 41 Mad. 237.

39 Mad. 1 Foll. 34 M L J 553=  
 24 M L T 175=8 L W 46.  
 —84 Foll. 23 M L T 138.  
 —136 Cons. 43 I C 833.  
 —149 Ref. 41 Mad. 442.  
 —255 Dist. 45 I C 62=7 L  
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 —351 Dist. 41 Mad. 538.  
 —376 Ref. 41 Mad. 1.  
 —494 Dist. 45 I C 653.  
 —503 Foll. 41 Mad. 727=7  
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 —544 Dist. 45 I C 76=7 L  
 W 438.  
 —597 Ref. 23 M L T 307.  
 —617 Ref. 7 L W 508=41  
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 —634 (P C) Ref. 24 M L T  
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 35 M L J 57.  
 —843 Cons. 45 I C 103.  
 —843 Ref. and comm. 4 Pat.  
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 —905 Ref. 35 M L J 355.  
 —915 Ref. 34 M L J 177.

—946 Foll. 34 M L J 217=  
 19 Cr L J 369=23 M L T  
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 —1016 Foll. 7 L W 36.  
 —1164 Foll. 45 I C 525=21  
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40 Mad 160 Not. Foll. (1918)  
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 —110 Ref. 41 Mad. 237=97  
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 —233 Dist. 46 I C 880=8 L  
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 —299 Ref. 41 Mad. 318.  
 —308 Ref. 5 Pat. L W 147.  
 —308 Dist. (1918) Pat. 241.  
 —338 Foll. 45 I C 669.  
 —338 Ref. 23 M L T 245.  
 —419 (F B) Ref. 7 L W 243  
 =(1918) M W N 350.  
 —585 Expl. 45 I C 22.  
 —594 Foll. 45 I C 527=19  
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 —594 Foll. 7 L W 287.  
 —630 Foll. 22 C W N 958  
 —672 Foll. 23 M L T 266 =  
 45 I C 905  
 —709 Ref. 41 Mad. 374=23  
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 —709 Foll. 7 L W 243=  
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 —709 Cons. 23 C W N 64=  
 34 M L J 358.  
 —759 Dist. 7 L W 333.  
 —780 Foll. 3 Pat. L J 367.  
 —886 (P C) Cons. 43 I C 113  
 —910 Ref. 8 L W 142=24  
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 —964 Dist. 41 Mad. 418=  
 45 I C 671.  
 —1083 Foll. 45 I C 425.  
 —1108 Foll. 41 Mad 374.  
 —1173 Ref. 8 L W 136=  
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41 Mad. 23 Overruled 8 L W  
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 —136 Expl. and dist 47 I C  
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 —245 Ref. and Foll. 8 L W  
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 —418 Foll. 41 Mad 749=47  
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5 M L J 20 Ref. 45 I C 280.  
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7 M L J 1 Foll. 23 M L T 161  
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—102 Expi. 45 I C 489.  
8 M L J 148 Not Foll. 100 P  
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9 M L J 131 Dist. 45 I C 24=  
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—177 Diss. 34 M L J 177=  
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10 M L J 126 Foll. 45 I C 671.  
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—134 Foll. 47 I C 733.  
—404 Dist. 47 I C 533.  
15 M L J 126 Foll. 43 I C  
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—229 Dist. 43 I C 711.  
—368 Ref. 43 I C 677.  
—462 Appl. 41 Mad. 188.  
—437 Ref. 21 P R 1918.  
16 M L J 166 Dist. 45 I C 330.  
—357 Dist. 45 I C 905.  
—358 Foll. 43 I C 379.  
17 M L J 14 Foll. 43 I C 532.  
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—158 Dist. 19 Cr. L J 208.  
—217 Not Foll. 47 I C 630.  
—228 Foll. 45 I C. 806.  
—266 Foll. 19 Cr. L J 264.  
—288 Dist. 47 I C 578.  
—304 Dist. 45 I C 401.  
—347 Foll. 47 I C 12.  
—379 Foll. 47 I C 611.  
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—553 Foll. 43 I C 865.  
—583 Foll. 20 P L R 1918=  
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—615 Diss. 35 M L J 90.  
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—66 Foll. 43 I C 111=19 Cr.  
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—122 Dist. 47 I C 611.  
—241 Overruled 41 Mad. 418.  
—462 Foll. 35 M L J 309=  
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—254 Not Appr. 19 Cr L J  
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—435 Dist. 47 I C 12.  
—527 Dist. 45 I C 535.  
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—760 Foll. 34 M L J 24  
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—535 Overruled 43 I C 566.  
—303 Doub. 45 I C 80.  
—917 Foll. 43 I C 341.  
21 M L J 92 Foll. 46 I C  
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—161 Foll. 19 Cr L J 117.  
—161 Not Foll. 43 I C 578.  
—532 Ref. 14 N L R 154.  
—620 Dist. 43 I C 76.  
—631 Cons. 45 I C 109.  
—845 Ref. 7 L W 194.  
—1000 Foll. 47 I C 624.  
—1024 Dist. 46 I C 973.  
—1036 Foll. 43 I C 122.  
—1158 Dist. 43 I C 626.  
22 M L J 331 Ref. 41 Mad 233.  
23 M L J 244 Disappr. 47 I C  
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—234 Foll. 23 M L T 106.  
—321 Foll. 45 I C 1.  
—677 Diss. 45 I C 30=34 M  
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—680 Foll. 47 I C 563.  
—719 Discuss. 8 L W 62.  
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—266 Foll. 43 I C 356.  
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—462 Foll. 41 Mad 418.  
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—483 Foll. 47 I C 597=24  
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—484 Dist. 43 I C 526.  
—534 Ref. 41 Mad. 535=  
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—545 Cons. 43 I C 155.  
—659 Ref. 7 L W 194.  
25 M L J 228 Foll. 45 I C 774.  
—360 Diss. 46 I C 849.  
—379 Ref. 34 M L J 431.  
—501 Overruled 45 I C 18.  
—563 Ref. 23 M L T 245.  
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—215 Foll. 35 M L J 387=  
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—612 Dist. 43 I C 908.  
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—80 Foll. 43 I C 515.  
—173 Foll. 41 Mad. 233.  
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—409 Dist. 45 I C 62.  
—48 Ref. 35 M L J 27=46  
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—480 Ref. 46 I C 131.  
—677 Foll. 14 P W R 1918  
—690 Ref. 35 M L J 405.  
—690 Dist. 47 I C 945.  
—691 Ref. 35 M L J 405=  
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28 M L J 44 Diss. 45 I C 656  
—136 Foll. 23 M L T 138=  
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—303 Dist. 8 L W 438.  
—372 Dist. (1918) M W N  
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—510 Ref and Foll. 8 L W  
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—650 Foll. 41 Mad. 418.  
29 M L J. 1 Consi. 45 I C 109.  
—91 Dist. (1918) M W N  
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—219 Foll. 35 M. L. J. 253.  
—231 Dist. 41 Mad. 237.  
—276 Dist. 45 I C 653.  
—553 Dist. 47 I C 882.  
—669 Ref. 41 Mad. 251.  
—733 Ref. 24 M L T 251.  
—793 Cons. 43 I C 833.  
30 M L J 62 Doub. (1918)  
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—116 dist. 43 I C 956.  
—207 Ref. 35 M L J 219.  
—241 Appl. 41 Mad. 454.  
—391 Dist. 47 I C 882.  
—404 Foll. 23 M L T 233.  
—404 Doub. (1918) M W N  
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—504 Foll. 45 I C 905.  
—529 Dist. 45 I C 460.  
—565 Foll. 43 I C 651.  
—565 Appr. 41 Mad. 612.  
—592 Ref. 23 M L T 245.  
—619 Ref. 41 Mad 357.  
31 M L J 147 Foll. 45 I C 535  
=23 M L T 307.  
—225 Dist. 43 I C 484.  
—247 Foll. 35 M L J 385=  
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—275 Dist. 45 I C 62.  
—401 Expi. 45 I C 22.  
—406 Foll. 34 M L J 229.

—406 Ref. 35 M L J 512.  
 —435 Cons. 45 I C 833.  
 —465 Foll. 43 I C 673.  
 —472 Dist. 43 I C 833.  
 —768 Foll. 45 I C 959.  
 —799 Dist. 45 I C 401.  
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 —829 Appl. 23 M L T 288.  
 —837 Foll. 45 I C 527=19  
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 —837 Affirm. 24 M L T 182.

32 M L J 13 Dist. 46 I C 880.  
 —22 Ref. 34 M L J 431=23  
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 —85 Ref. 34 M L J 431.  
 —110 Ref. 35 M L J 219.  
 —181 Foll. 45 I C 525=19  
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 —180 Foll. 45 I C 669.  
 —237 Ref. 34 M L J 104.  
 —259 Foll. 43 I C 865.  
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 —428 Foll. 45 I C 782.  
 —439 Foll. 45 I C 535=23  
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 —465 Foll. 45 I C 76=7 L  
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 —455 Ref. 35 M L J 507.  
 —532 Not Foll. 45 I C 671.  
 —541 Ref. 7 L W 287.  
 —615 Dist. 46 I C 679.

33 M L J 1 (P. C.) Foll. 23 M  
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 —15 Foll. 43 I C 678.  
 —14 Dist. 24 P W R 1818.  
 —39 Foll. 34 M L J 291.  
 —42 Cons. 43 I C 833.  
 —84 Ref. 23 M L T 161=7  
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 —213 Expl. and Dist. 47 I  
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 —519 Expl. and Dist. 47 I  
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 —601 Foll. 47 I C 630.  
 —740 Foll. 8 L W 206.

34 M L J 1 Dist. 45 I C 489.  
 —12 Ref. (1918) Pat. 152.  
 —17 Foll. 47 I C 733.  
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 —282 Ref. 34 M L J 561.  
 —342 Foll. 24 M L T 315.

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1 M L T 137 Dist. 45 I C 330.

2 M L T 147 Foll. 45 I C 806.  
 —239 Foll. 19 Cr. L J 264.  
 —371 Dist. 45 I C 653.  
 —435 Foll. 47 I C 12.

3 M L T 25 Dist. 47 I C 578.  
 —90 Dist. 45 I C 460.  
 —95 Foll. 43 I C 865.  
 —97 Dist. 45 I C 653.

4 M L T 449 Foll. 43 I C 781.

5 M L T 236 Foll. 64 P W R  
 1918.  
 —256 Not Appr. 19 Cr. L J  
 301.  
 —283 Foll. 43 I C 956.

6 M L T 7 Dist. 47 I C 12  
 —193 Dist. 45 I C 595.

7 M L T 31 Foll. 43 I C 654.  
 —106 Ref. 35 M L J 372.  
 —352 Doub. 45 I C 80.  
 —369 Foll. 43 I C 566.  
 —Overruled 43 I C 566.  
 —180 Foll. 19 Cr. L J 56.  
 —234 Dist. 45 I C 86.  
 —228 Foll. 43 I C 341.  
 —377 Ref. 7 L W 201.

9 M L T 1 Foll. 46 I C 428.  
 —93 Not foll. 45 I C 257.  
 —283 Foll. 19 Cr. L J 117.  
 —325 Foll. (1918) M W N  
 239=24 M L T 242.  
 —295 Ref. 7 L W 435.  
 —450 Foll. 43 I C 861.

10 M L T 251 Dist. 46 I C 973.  
 —429 Foll. 43 I C 122.

11 M L T 6 Dist. 43 I C 626.  
 —56 Dist. 43 I C 76.  
 —182 Ref. 23 M L T 245.

12 M L T 491 Ref. 23 M L T  
 268.

13 M L T 194 Cons. 43 I C 833.  
 —206 Foll. 43 I C 956.  
 —360 Diss. 46 I C 716.  
 —421 Foll. 45 I C 774.

14 M L T 189 Doub. 23 M L T  
 291.

—530 Dist. 43 I C 597.  
 —537 Not Appr. 47 I C 192.

15 M L T 156 Cons. 45 I C 109.

16 M L T 6 Foll. 43 I C 515.  
 —33 Foll. 45 I C 527=19  
 Cr. L J 623.

—33 Affirm. 24 M L T 182.  
 —253 Foll. 46 I C 205.  
 —442 Ref. 23 M L T 18.  
 —442 Foll. 8 L W 103.  
 —442 Doub. 45 I C 743.  
 —442 Expl. 46 I C 62.

17 M L T 85 Doub. 23 M L T  
 291.  
 —347 Foll. 43 I C 532.  
 —424 Dist. 45 I C 76.  
 —453 Ref. 23 M L T 258.

18 M L T 67 Cons. 45 I C  
 109.  
 —151 Dist. 45 I C 653.  
 —161 Doub. 23 M L T 307.  
 —582 Cons. 43 I C 833.  
 —502 Foll. 19 Cr. L J 359.

19 M L T 50 Doub. 23 M L T  
 307.  
 —86 Overruled. 24 M L T 137  
 —188 Diss. 23 M L T 138.  
 —203 Dist. 43 I C 566.  
 —390 Foll. 43 I C 651.

20 M L T 10 Dist. 45 I C 460.  
 —70 Foll. 23 M L T 183.  
 —78 Cons. 43 I C 833.  
 —345 Foll. 43 I C 679.  
 —350 Expl. 45 I C 22.  
 —505 Dist. 45 I C 401.

21 M L T 23 Dist. 46 I C 880.  
 —62 Foll. 23 M L T 291.  
 —91 Foll. 43 I C 865.  
 —121 Not Foll. 45 I C 671=  
 23 M L T 206.  
 —319 Dist. 46 I C 679.  
 —329 Expl. 45 I C 216=23  
 M L T 316.  
 —344 Foll. 45 I C 782  
 —411 Foll. 23 M L T 44.

22 M L T 22 Foll. 43 I C 678.  
 —57 Foll. 45 I C 425.  
 —76 Cons. 43 I C 113.  
 —121 Foll. 45 I C 806.  
 —211 Foll. 45 I C 504=19  
 Cr. L J 600.  
 —380 Foll. 23 M L T 266.  
 —403 Dist. 45 I C 489.  
 —422 Ref. 24 M L T 370.  
 —451 Foll. 24 M L T 311.

23 M L T 81 Overruled 35 M  
 L J 317=24 M L T 183.

24 M L T 231 Appl. 24 M L  
 T 440.

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(1910) M W N 117 Doub. 45  
 I C 80.  
 —135 Dist. 43 I C 757.  
 —213 Overruled. 43 I C 566

—354 Foll. 19 Cr. L. J. 86.  
—399 Ref. (1918) Pat. 55.  
—431 Ref. 7 L. W. 508.  
—431 Foll. 34 M. L. J. 309=  
23 M. L. T. 251=(1911) 1  
M. W. N. 5 Diss. 1 L. W. 201  
=(1918) M. W. N. 226.

30 Expl. 41 Mad. 121.  
—75 Cons. 41 Mad. 503=34  
M. L. J. 454.  
—67 Dist. 23 M. L. T. 127.  
—105 Ref. 35 M. L. J. 27.  
—105 Expl. 8 L. W. 145.  
—143 Diss. 35 M. L. J. 90.  
—188 Foll. 43 I. C. 861.  
—349 Ref. 34 M. L. J. 206.  
—385 Dist. 43 I. C. 76.

(1911) 2 M. W. N. 97 Ref. and  
Foll. 7 L. W. 83.  
—119 Foll. 46 I. C. 428.  
—225 Dist. 43 I. C. 973.  
—943 Ref. 23 M. L. T. 248.

(1912) M. W. N. 32 Dist. 43 I. C.  
626.  
—529 Dist. 43 I. C. 606=19  
Cr. L. J. 189.  
1913 M. W. N. 195 Ref.  
(1918) M. W. N. 40.  
—183 Cons. 43 I. C. 833.  
—338 Foll. (1918) M. W. N.  
477.  
—339 Ref. 41 Mad. 118.  
—387 Foll. 45 I. C. 774.  
—387 Appr. (1918) M. W. N.  
514.  
—655 Foll. 8 L. W. 109.  
—775 Dist. 43 I. C. 861.  
—816 Ref. (1918) M. W. N.  
231.

(1914) M. W. N. 16 Foll. 35 M.  
L. J. 451.  
—16 Not Appr. 47 I. C. 192.  
—157 Dist. 43 I. C. 537.  
—216 Cons. 45 I. C. 109.  
—379 Ref. (1918) Pat. 50.  
—387 Foll. 43 I. C. 679.  
—462 Foll. 43 I. C. 515.  
—480 Dist. (1918) M. W. N.  
497.  
—618 Ref. 8 L. W. 438.  
—620 Ref. (1918) M. W. N.  
208.  
—766 Foll. 23 M. L. T. 154.  
—760 Ref. (1918) M. W. N.  
172.  
—767 Ref. (1918) M. W. N. 40.  
—915 Doub. 45 I. C. 743.

(1915) M. W. N. 24 Foll. (1918)  
M. W. N. 197.  
—118 Foll. (1918) M. W. N.  
562.

—132 Foll. (1918) M. W. N.  
346.  
—249 Foll. 7 L. W. 404.  
—278 Ref. 41 Mad. 577.  
—430 Dist. 24 M. L. T. 351.  
—547 Cons. 45 I. C. 109.  
—846 Foll. 45 I. C. 414.

(1916) 1 M. W. N. 31 Cons.  
43 I. C. 833.  
—123 Ref. (1918) M. W. N.  
226.  
—171 Foll. (1918) M. W. N.  
133.  
—188 Dist. 43 I. C. 956.  
—237 Diss. (1918) M. W. N.  
346.  
—332 Dist. 45 I. C. 460.  
—471 Ref. (1918) M. W. N.  
507.  
—471 Appl. and Ref. (1918)  
M. W. N. 507.

(1916) 2 M. W. N. 65 Cons. 43  
I. C. 833.  
—82 Foll. 24 M. L. T. 356  
=(1918) M. W. N. 675.  
—137 Foll. (1918) M. W. N.  
757.  
—207 (F. B.) Foll. (1918) M.  
W. N. 244.  
—224 Dist. (1918) M. W. N.  
327.  
—258 Appl. (1918) M. W. N.  
175.  
—234 Foll. 45 I. C. 535.  
—341 Foll. 43 I. C. 661.  
—497 Foll. 45 I. C. 525.  
—551 Dist. 45 I. C. 401.

(1917) M. W. N. 5 Foll. 23 M. L.  
T. 251.  
—5 Ref. 34 M. L. J. 431  
—25 Dist. 45 I. C. 653.  
—30 Overr. 24 M. L. T. 115=  
(1918) M. W. N. 461=41  
Mad. 659  
—38 Foll. (1918) M. W. N.  
376.  
—44 Dist. 46 I. C. 880.  
—171 Foll. 45 I. C. 669.  
—185 Ref. (1918) M. W. N.  
283.  
—185 Expl. 41 Mad. 577=45  
I. C. 26.  
—278 Foll. 43 I. C. 865.  
—306 Ref. 8 L. W. 21.  
—439 Foll. 43 I. C. 678.  
—473 Foll. 45 I. C. 782.  
—477 Foll. 45 I. C. 806.  
—514 Cons. 43 I. C. 833.  
—682 Foll. 45 I. C. 504=19  
Cr. L. J. 600.  
—778 Expl. 45 I. C. 22  
—805 Dist. 43 I. C. 76.

(1918) M. W. N. 16 Dist. 45 I. C.  
489.

—38 Foll. 45 I. C. 656.  
—226 Foll. (1918) M. W. N.  
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1 L. W. 89 Dist. 7 L. W. 503.  
—96 Foll. 7 L. W. 36.  
—667 Foll. 23 M. L. T. 251.  
—667 Ref. 7 L. W. 508.  
—687 Foll. 23 M. L. T. 291.  
—687 Ref. 34 M. L. J. 431.  
—726 Diss. 8 L. W. 145.  
—1050 Foll. 43 I. C. 515.

2 L. W. 8 Overruled 41 Mad.  
188.  
—188 Diss. 35 M. L. J. 10  
—206 Foll. 35 M. L. J. 335  
=24 M. L. T. 197.  
—661 Cons. 45 I. C. 109.  
—655 Dist. 45 I. C. 653.  
—941 Ref. 23 M. L. T. 66.  
—958 Ref. and Foll. 7 L.  
W. 83.  
—1200 Foll. 19 Cr. L. J.  
359

3 L. W. 22 Ref. 23 M. L. T. 215.  
—207 Dist. 43 I. C. 156.  
—315 Foll. 8 L. W. 432.  
—422 Ref. (1918) Pat. 86.  
—471 Dist. 45 I. C. 460.

4 L. W. 59 Dist. 7 L. W. 225.  
—112 Foll. 7 L. W. 16.  
—114 Ref. 8 L. W. 24.  
—114 Cons. 43 I. C. 833.  
—499 Foll. 41 Mad. 325=  
34 M. L. J. 524  
—521 Foll. 43 I. C. 661.  
—530 Dist. 43 I. C. 184.  
—602 Dist. 45 I. C. 401.  
—625 Foll. 45 I. C. 525.

5 L. W. 132 Dist. 45 I. C. 880.  
—228 Expl. and Dist. 35 M.  
L. J. 692  
—323 Foll. 43 I. C. 865.  
—346 Ref. 7 L. W. 243.  
—369 Not Foll. 45 I. C. 671  
—392 Expl. 7 L. W. 543.  
—425 Foll. 45 I. C. 669.  
—472 Foll. 45 I. C. 414.  
—472 Ref. 7 L. W. 524.  
—482 Overruled. 8 L. W. 62.  
—570 Dist. 45 I. C. 653.  
—711 Foll. 45 I. C. 782.

6 L. W. 22 Foll. 45 I. C. 535.  
—213 Foll. 43 I. C. 678.  
—222 (P. C.) Ref. 7 L. W. 194.  
—330 Cons. 43 I. C. 833.  
—330 Ref. 8 L. W. 24.  
—428 Foll. 45 I. C. 504.  
—509 Foll. 45 I. C. 806.  
—515 Foll. 24 M. L. T. 134  
—592 Foll. 8 L. W. 151.

—630 Expl. 45 I C 32.  
—694 Ref. 8 L W 186.  
—708 Dist. 48 I C 73.

7 L W 94 Dist. 45 I C 48=  
8 L W 154.  
—411 Not. Foll. 8 L W 40.

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(1875) M H C R 95 Not Foll.  
34 M L J 344.

1 M H C R 258 Not Foll.  
L W 490.

2 M H C R 19 Appr. 4 Pat.  
L W 92: 28 M L T 84.

5 M H C R 161 Foll. 45 I C 672.

6 M H C R 164 Rel. 84  
M L J 284.

—164 Ref. 28 M L T 161.  
—258 Ref. 28 M L T 66.

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1 N L R 9 Foll. 43 I C 952.  
—112 Foll. 43 I C 15.  
—187 Foll. 45 I C 993.  
—187 Dist. 45 I C 289.

3 N L R 171 Overruled 14 N  
L R 181.

—172 Appr. 35 M L J 788.  
—182 Foll. 45 I C 474.

5 N L R 117 Dist. 46 I C 727.

8 N L R 22 Expl. 43 I C 16.  
—123 Ref. 14 N L R 184.  
—163 Foll. 45 I C 496.

11 N L R 116 Appr. 14 N L  
R 149.

2 N L R 113 Cons. 43 I C 833.  
—146 Foll. 45 I C 993.

13 N L R 121 Foll. 47 I C 9.  
—130 Appr. 35 M L J 783.  
—139 Overruled 14 N L R  
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2 O C 26 Foll. 47 I C 673

5 O C 203 Foll. 46 I C 841=21  
O C 182.

7 O C 290 Foll. 57 P W R 1918

9 O C 33 Expl. 45 I C 849.

10 O C 132 Foll. 46 I C 841=  
21 O C 182.  
—128 Foll. 43 I C 841=21 O  
C 132.

13 O C 297 Dist. 40 P L R  
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15 O C 319 Cons. 21 O C 138

16 O C 105 Dist. 45 I C 3.  
—120 Cons. 43 I C 833.

17 O C 224 Dist. 45 I C 378.  
—242 Expl. 45 I C 339.  
—303 Expl. 46 I C 90.

20 O C 211 Foll. 45 I C 506.  
(1.17) Patna 52=3 Pat. L J  
285=5 Pat. L W 324  
—169 Foll. 4 Pat L W 84.

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1 Pat. L J 16 Diss. 3 Pat. L  
J 199.

—173 Ref. 4 Pat. L W 303.  
—208 Ref. 3 Pat. L J 255.

—293 Ref. 3 Pat L J 229.  
—258 Foll. (1918) Pat. 352

—373 Foll. 43 I C 445=  
19 Cr. L J 141.

—414 Ref. (1918) Pat 210=  
4 Pat. L W 316.

—420 Dist. 3 Pat. L J 484

2 Pat. L J 86 Ref. 4 Pat. L  
W 104.

—86 Appr. and Dist. 3 Pat.  
L J 248.

—101 Diss. 24 M L T 149.  
—101 Doub. (1917) M W N  
487.

—124 Ref. 3 Pat. L J 361.  
—149 Ref. 41 Mad. 317.

—225 Dist. 43 I C 377.  
—259 Foll. 3 Pat L J 330

—276 Dist. 4 Pat L W 60.  
—280 Foll. 4 Pat. L W 130

—313 Ref. 3 Pat L J 465.  
—457 Foll. 3 Pat L J 145=  
4 Pat L W 84.

—493 Ref. 3 Pat L J 361.  
—493 Cited 4 Pat L W 303.

—496 Ref. 3 Pat L J 339.  
—695 Foll. 4 Pat L W 212.

3 Pat L J 43 Ref. 3 Pat L  
J 255.

—179 Foll. 47 I C 646=8  
L W 460.

—250 Ref. (1918) Pat 265.

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1 Pat L W 48 Foll. 4 Pat L W  
38.

—57 Dist. 45 I C 101.  
—81 Ref. 4 Pat L W 104.  
—245 Foll. 4 Pat L W 75.  
—327 Foll. 4 Pat L W 180.  
—340 Foll. 19 Cr. L J 157.  
—409 Dist. 4 Pat L W 30.  
—425 Foll. 45 I C 782.  
—433 Dist. 43 I C 377.  
—434 Cited 4 Pat L W 308.  
—504 Foll. 4 Pat L W 84.  
—541 Ref. 4 Pat L W 218.  
—557 Dist. 24 P W R 1918.  
—557 Expland Dist. 47 I C  
1.2.  
—748 Ref. 4 Pat. L W 104.  
—748 Appr. and Dist. 3 Pat.  
L J 218.

2 Pat. L W 29 Foll. 4 Pat. L  
W 226.

—38 Not Foll. 43 I C 501.  
—42 Foll. 43 I C 501.

—57 Cons. 43 I C 833.  
—115 Foll. 3 Pat L J 302=  
4 Pat. L W 927.

—160 Foll. 45 I C 806.

3 Pat. L W 30 Ref. 4 Pat.  
L W 303.

—35 Foll. 4 Pat. L W 303.  
—88 Ref. and Com. 4 Pat.  
L W 316.

4 Pat. L W 1 Dist. 45 I C 489.  
—52 Foll. 47 I C 702.

—153 Foll. 4 Pat L W 212.

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78 P R 1875 Dist. 66 P R  
1918=12 P L R 1918=  
70 P W R 1918.

20 P R (Cr.) 1878 Ref. 26 P  
R (Cr) 1918.

38 P R 1878 Dist. 66 P R 1918  
=12 P L R 1918=70 P W  
R 1918.

21 P R (Cr) 1881 Foll. 45 I C  
843.

27 P R 1881 Foll. 72 P L R  
1918=72 P W R 1918.

37 P R (Cr) 1881 Ref. 26 P R  
(Cr) 1918.

9 P R 1882 Ref. 62 P W  
R 1918.

50 P R 1882 Foll. 26 P W  
R 1918=43 I C 749

64 P R 1882 Ref. 13 P R  
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84 P R 1882 Dist. 80 P L R 1918=82 P W R 1918= 45 I C 179	76 P R 1890 Dist. 40 P L R 1918=80 P W R 1918.	9 P. R. (Cr) 1893 Appr. 19 Cr L. J 436=45 I C 150.
18 P R 1883 Ref. 17 P W R (Cr) 1918.	92 P R 1890 Dist. 22 P R 1918	19 P. R. 1898. Foll. 17 P W R. 1918 43 I C 177.
141 P R 1883 Dist. 66 P R 1918=12 P L R 1918.	16 P R 1891 Dist. 32 P R 1918.	29 P. R. 1898 Dist. 43 I C 523=44 P L R 1918.
25 P R (Cr) 1884 Foll. 47 I C 81.	7 P R 1892 Foll. 43 J O 165=17 P W R 1918.	31 P. R. 1898 Ref. 13 P R. 1918.
27 P R (Cr) 1884 Overruled 10 P R (Cr) 1918=1 P W R (Cr) 1918=19 Cr L J 314.	54 P R 1892 Ref. 29 P R 1918.	33 P R 1898 Ref. 70 P R 1918.
47 P R 1884 Ref. 22 P W R 1918	139 P R 1892 Dist. 45 I C 966.	33 P R 1893 Foll. 71 P W R 1918.
37 P R 1885 Ref. 54 P L R 1918=27 P W R 1918.	2 P R (Cr) 1893 Ref. 16 P R (Cr) 1918.	33 P R 1893 Appr. and Dist. 5 P L R 1918.
65 P R 1885 Dist. 32 P R 1918.	6 P R 1893 Ref. 13 P R 1918.	32 P R 1898 Foll. 46 I C 11.
68 P R 1886 Dist. 23 P R. 1918.	50 P R 1893 Ref. 106 P R 1918.	24 P R 1899 Foll. 64 P W R 1918.
47 P R 1887 Ref and Dist 8 P R 1918.	62 P R 1893 Foll. 81 P W R 1918.	33 P R 1899 Ref. 79 P R 1918
52 P R (Cr), 1887 Ref. 11 P R (Cr) 1918.	70 P R 1893 Ref. 45 P R 1918=77 P W R 1918.	79 P R 1900 Ref. 5 P L R 1918.
2 P R (Cr) 1888 Ref. 8 P R (Cr) 1918.	92 P R 1893 Disc. 8 P R 1918.	102 P R 1900 Foll. 13 P W 1918.
4 P R 1888 Foll. 46 I C 679.	55 P R 1894 Ref. 49 P R 1918.	10 P R (Cr) 1901 Obso. 22 P W R (Cr) 1218.
54 P R 1888 Ref. 29 P R 1918.	103 P R 1894 Ref. 13 P R 1918.	15 P. R. 1901 Ref. 72 P. R. 1918= Foll. 31 P L R 1918.
58 P R 1888 Ref. and Dic. 8 P R 1918.	139 P R 1894 Foll. 43 I C 177.	20 P R 1901 Foll. 43 P L R 1918=4 P W R (Cr) 1918.
80 P R 1888 Ref. 24 P R 1918.	48 P R 1895 Dist. 83 P R 1918.	20 P R (Cr) 1901 7 P R (Cr) 1918.
89 P R 1888 Foll. 46 I C 679.	90 P R 1895 Ref. 79 P R 1918.	24 P R 1901 Foll. 4 P W R (Cr) 1918.
91 P R 1888 Ref. 46 I C 182.	—1895 Ref. and Dist. 25 P L R 1918=52 P W R 1918.	24 P R (Cr) 1901 F B Ref. 7 P R (Cr) 1918
13 P R 1889 Ref. 62 P W R 1917.	10 P R 1896 Dist. 23 P R 1918.	35 P R 1901 Foll. 46 I C 430.
30 P R (Cr.) 1889 Ref. 26 P R (Cr.) 1918.	49 P. R. 1896 Ref. 67 P. R 1918=15 P L R 1918= 36 P W R 1918.	109 P R 1901 Foll. 18 P L R 1918=39 P W R 1918.
35 P R 1889 Ref. and Dist. 25 P L R 1918=52 P W 1918.	6 P. R. 1897 Ref. 20 Bom. L R 591	117 P R 1901 Ref. and Foll. 65 P R 1918=46 I C 679= 14 P L R 1918.
35 P R 1889 (Cr.) Foll. 46 I C 689.	13 P. R. (Cr) 1897 Ref. 3 P R (cr) 1918.	6 P R (Rev) 1902 Foll. 45 I C 574.
50 P R 1889 Ref. 32 P R 1918.	13 P. R. 1897 Obso. 22 P W R (Cr) 1918.	31 P R (Cr.) 1902 Ref. 8 P R (Cr.) 1918.
157 P R 1889 Ref. 13 P R 1918.	28 P. R. 1897 Dist. 41 P R 1918.	
	51 P. R. 1897 Ref. 5 P L R 1918.	

36 P R 1902 Dist. 21 P R 1918.	2 P R 1907 Dist. 88 P R 1918.	21 P R 1912 Ref. 13 P R 1918.
8 P R 1903 Ref. 72 P R 1918 = 31 P L R 1918.	12 P R 1907 Ref. 13 P R 1918.	25 P R 1912 Foll. 71 P L R 1918 = 72 P W R 1918.
55 P R 1903 Ref. 5 P L R 1918.	16 P R 1907 Foll. 21 P R 1918.	33 P R 1912 Ref. 36 P R 1918 = 7 P W R 1918.
5 P R 1904 Foll. 11 P L R Ref. 1918 = 71 P W R 1918 = 70 P R 1918.	23 P R 1907 Ref. 69 P R 1918.	39 P R 1912 Foll. 29 P W R 1918.
7 P R 1904 Ref. 72 P R 1918 = 31 P L R 1918. — 1904 Dist. 19 P W R (Cr.) 1918.	57 P R 1907 Ref. 13 P R 1918.	45 P R 1912 Foll. 45 I C 966.
13 P R 1904 Foll. and Ref 16 P W R (Cr.) 1918 = 6 P R (Cr.) 1918.	75 P R 1907 Foll. 43 I C 749 = 26 P W R 1918.	59 P R 1912 Dist. 80 P L R 1918 = 45 I C 179.
18 P R 1904 Ref. and Disc S P R 1918.	26 P R 1907 Ref. 87 P R 1918.	65 R P 1912 Dist. 82 P W R 1918.
56 P R 1904 Ref. 13 P R 1918.	125 P R 1907 Ref. 21 P R 1918.	94 P R 1912 Ref. 79 P R 1918 = 25 P L R 1918 = 52 P W R 1918.
23 P R 1905 Foll. 22 P R 1918 = 44 P W R 1918.	140 P R 1907 Foll. 72 P L R 1918 = 73 P W R 1918.	114 P R 1912 Dist. 2 P R 1918.
34 P R (Cr.) 1905 Ref. 3 P R (Cr.) 1918.	154 P R 1907 Foll. 95 P R 1918.	4 P R 1913 (F B) Dist. 12 P R 1918.
82 P R 1905 Ref. 72 P R 1918 = 31 P L R 1918.	21 P R (Cr.) 1908 Ref. 5 P R (Cr.) 1918.	7 P R (Cr.) 1913 Ref. 23 P R (Cr.) 1918.
25 P R 1905 Foll. and Ref 14 P L R 1918 = 65 P R 1918.	29 P R 1908 Dist. 30 P W R 1918.	16 P R 1913 Ref. 9 P R (Cr.) 1918 = 14 P W R (Cr.) 1918.
6 P R 1906 Ref 13 P R 1918.	57 P R 1908 Ref. 79 P R 1918.	53 P R 1913 Ref. 10 P R 1918.
29 P R 1906 Dist. 11 P R 1918.	87 P R 1908 Ref. and Dist. 25 P L R 1918 = 52 P W R 1918.	62 P R 1913 Dist. 46 I C 51.
41 P R 1906 Appr. 34 M L J 32.	118 P R 1908 Ref. 69 P W R 1918.	55 P R 1913 Foll. 13 P W R 1918.
65 P R 1906 Ref. 79 P R 1918 = 25 P L R 1918 = 52 P W R 1918.	84 P R 1909 Ref. 82 P R 1918.	88 P R 1913 Ref. 45 P R 1918 = 77 P W R 1918.
69 P R 1906 Dist. 8 P L R 1918.	85 P R 1909 Dist. 66 P R 1918 = 70 P W R 1918.	1 P R 1914 Dist. 46 I C 490 = 81 P R 1918.
110 P R 1906 Appr. 43 I C 306 = 20 Bom L R 528.	5 P R 1910 Ref. 21 P W R 1918.	1 P R 1914 Diss. 56 F L R 1918 = 43 I C 429 = 13 P W R (Cr.) 1918.
127 P R 1906 Foll. 8 P L R 1918.	42 P R 1910 Ref. 33 P L R 1912 = 55 P W R 1918.	1 P R (Cr.) 1914 Diss. 19 Cr. L J 141.
129 P R 1906 Ref. 72 P R 1918 = 31 P L R 1918.	2 P R 1911 Dist. 9 P W R 1918.	10 P R 1914 Ref. 15 P L R 1918 = 36 P W R 1918.
133 P R 1906 Ref. 72 P R 1918 = 31 P L R 1918.	29 P R 1911 Foll. 71 P L R 1918 = 72 P W R 1918.	20 P R 1914 Ref. 3 Pat L J 255.
	33 P R 1911 Ref. 95 P R 1918.	29 P R 1914 Ref. 95 P R 1918.
	10 P R 1912 Ref. 5 P L R 1913.	30 P R (Cr.) 1914 Dist. 19 P W R (Cr.) 1918.

63 P R 1914 Foll and Ref. 46 I C 51=84 P R 1918.  
 83 P R 1914 Dist. 46 I C 495.  
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# THE

# “YEARLY DIGEST”

## I—INDIAN DECISIONS,

### ABADI.

**ABADI**—See also.—LANDLORD AND TENANT.

——— *Alienation of site by non-proprietor if valid—Status of alienor, how determined—Malik qabza if entitled to site.*

A non-proprietary resident in a village cannot, in the absence of a well-established custom, dispose of the site on which his house is built or his right of residence in the house without the consent of the proprietors of the village.

The status of the person making the disposition must, however, be determined with reference to the time when he occupied the site.

A *malik qabza* having full proprietary rights over the cultivated land in his possession as *malik* has the same rights in the absence of any proof to the contrary and the proprietors who are entitled to a share in the *shamilat* are not entitled to interfere with the sale of the house by him. (*Shadi Lal, J.*) **LADHA RAM v. BAHADUR KHAN.** 39 F. L. R. 1918= 29 P. W. R. 1918=43 I. C. 696.

——— Building on—Right of proprietors to mandatory injunction only on proof of substantial injury. See CO-OWNERS 29 P. R. 1918.

——— *Right to, vested in all proprietors of village—Loss of right to share of Kuri Kamini effect of—Wajib-ul arz, entry in.*

Nothing that is not specifically mentioned in the *wajib-ul arz* can be allowed to derogate from the common right of all the proprietors of a village to the *abadi*. The fact that a proprietor has lost the right to a share in the *kuri kamini*, does not deprive him of the right to control the disposal of *abadi* land.

### ABWAB.

(*Le Rossignol, J.*) **PARWARISH BAKSH v. MUHAMMAD HUSSAIN.** 19 P. W. R. 1918= 43 I. C. 466.

——— *Tenant, right of, to house-site—Permission of mulguzar.*

A tenant's right to a site for his house free of charge is subject to the permission of the *mulguzar* as to the position and the extent of the site, but failure by a resident *mulguzar* to object to the occupation of a site by a tenant for even two or three years would be conclusive evidence that the permission had been given (*Halifax, A. J. C.*) **MUSSAMMAT DEORI v. MUKUNDA KUNBI.** 43 I. C. 508.

**ABANDONMENT**—Landlord and tenant—Removal of occupant of house to another house, if evidence of abandonment

The mere removal of the occupant of a house to another house is not in itself sufficient evidence of an abandonment of a kind which entitles the landlord to claim a right by escheat. (*Kanhaiya Lal, A. J. C.*) **GAUR SHANKAR v. ABBAS BEG.** 5 O. L. J. 165= 46 I. C. 12.

**A3WAB.**—Agra Tenancy Act. See B. T. ACT C. P. TEN. ACT.

MADRAS ESTATES LAND ACT.

——— *Peishcush—Levy of from Nisfidars and Lakhirajdars, not illegal—Legitimate origin of payment can be inferred from antiquity and purpose of payment. See B. T. ACT, S. 74* 44 I. C. 497.

——— *Peishcush levied by Government for upkeep of embankment—Legality of long payment—Inference from.*

## ACCOUNTS.

An annual sum levied by Government for the upkeep of embankments is not an abwab.

Long continued payment from time immemorial which in itself is a title in the recipient of the payment is a good and sufficient basis of the claim. (*Jenkins, C. J. and Holmwood, J.*) *UDOY NARAIN JANA v. THE SECRETARY OF STATE FOR INDIA.*

22 C. W. N. 283=47 I. C. 297.

**ACCOUNTS**—Partnership—Suit for rendition of accounts by one partner against legal representative of deceased partner—Maintainability of. *See* PARTNERSHIP. 16 A. L. J. 305.

——Principal and agent—Legal representatives of agent—Liability to account—Onus—Procedure.

The death of an agent during the pendency of a suit against him for accounts does not exonerate his legal representatives from all liability to the principal. The statement of claim put in by plff., should be investigated preferably by a commissioner in the presence of the representatives of the deceased agent. The onus would be on the plff., to prove such item in the sum which he claims *e.g.*, to prove that each item was actually realised by the agent and further that it was not paid to his credit. The representatives of the deceased agent would be at liberty to adduce such evidence as they please to show either that the money was not realised by the agent or that after realisation it was paid to the plff. The amount actually due being thus ascertained, the Court would pass a decree against the assets of the deceased agent in the hands of the representatives. (*Wainsley and Paxton, JJ.*) *SASI SRKHARESWAR ROY v. HAJIRAN-NESSA BIBI.* 28 C. L. J. 492=47 I. C. 371.

**ACCOUNTS SETTLED** — Error in—Party when precluded from going behind accounts—Burden of Proof.

Where there is no settlement by compromise, between the plff. and deft., but only an ascertainment of the exact balance upon a full examination of the accounts, the plff. is not precluded from showing that there were errors in the accounts. The onus is on the plff. to show that the accounts were not properly examined. (*Shah Din and Cheris, JJ.*) *KHAZAN CHAND v. THE COMMITTEE OF THE NOTIFIED AREA, SANGLA HILL.* 62 P. L. R. 1918=133 P. W. R. 1918=46 I. C. 545.

——Re-opening of—Defence to a suit on—Obligation arising out of settled accounts.

If circumstances are proved which would entitle an obligor to go behind a settled account, he would be equally entitled to plead in defence to a suit based on an obligation alleged to flow from any such settled account, that the consideration based on that account has never been received. The mere fact that

## ADMISSION.

a mortgage has been taken by way of security for that obligation does not disentitle the deft. from raising the plea. (*Sadasiva Iyer and Napier, JJ.*) *ZEMINDAR OF KARVETNAGAR v. SUBBARAYA PILLAI.* (1918) M. W. N. 146=7 L. W. 36=43 I. C. 871.

**ACKNOWLEDGMENT**—Mahomedan Law—Acknowledgment with intent to confer legitimacy—Effect of when illegitimacy is established—Acknowledgment for collateral object if sufficient. *See* MAHOMEDAN LAW—MARRIAGE. 23 C. W. N. 1.

——By Receiver—Whether will save limitation—Debt due by a firm under dissolution. *See* LIM. ACT, SS. 19 AND 21. 35 M. L. J. 571.

——Sonship—Repudiation of, if possible. *See* MAHOMEDAN LAW, MARRIAGE. 23 C. W. N. 1.

**ACTIONABLE CLAIM**—Transfer of—Formalities necessary for—Entry in account books—Sufficiency of—Consent of debtor unnecessary. *See* T. P. ACT, S. 180. 47 I. C. 749.

**ADJUSTMENT**—Decree of, privately obtained in absence of defendant—Fraud—Proof—Suit set aside on—Position of parties. *See* C. P. Code, O. 23. R. 3. 28 C. L. J. 158.

——Out of court between dates of preliminary and final decree—Power of court to recognise at time of passing final decree—Adjustment certified under O. 21, R. 2 C. P. Code—Effect on Court's power. *See* C. P. CODE, O. 34, Rr 2 AND 5. 35 M. L. J. 579.

——Of suit—Agreement that a suit should abide the result of another suit—Decision in the second suit—Effect. *See* C. P. CODE, O. 23, R. 3. 8 L. W. 470.

**ADMINISTRATION** — Suit for—Pendency of—Right of assignee of portion of estate of deceased person to sue for declaration of title against third person. *See* RIGHT OF SUIT. 43 I. C. 539.

**ADMINISTRATOR**—*Pendente lite*—Power of court to direct administrator to supply widow contesting the will, with funds sufficient for conduct of litigation. *See* PROB. AND ADMN. ACT, S. 31. 44 I. C. 657.

**ADMISSIBILITY**—Ejectment suit—Certified copies of chittas and maps relating to partition under Regulation XIX of 1814. *See* EVIDENCE, ACT, S. 35. 23 C. W. N. 48.

**ADMISSION**—Counsel on point of Law—Effect on client. *See* PLEADER AND CLIENT. 27 C. L. J. 447.

## ADMISSION.

Parties to suit—Admissions by, entitled to great weight. See MAL. COMM. FOR TEN. IMP. ACT, SS 3 5, ETC. 35 M. L. J. 219.

Pleader and client—Admissions by pleader, binding on party. See PLEADER AND CLIENT. 44 I. C. 18.

In pleadings—Effect of. See EVIDENCE ACT, SS. 58 AND 92 35 M. L. J. 555.

Value of, as against party to a document—*Prima facie* presumed to be true, unless proved by independent evidence to be false. See EVIDENCE ACT, S 17.  
22 C. W. N. 530 (P. C.)

**ADOPTION**—Aroras in Lahore District—Adoption of daughter's son—Validity—Custom as to—Proof—Onus See CUSTOM. ADOPTION 106 P. R. 1918.

**ADVANCEMENT**—Presumption of—Purchase by Hindu father in name of son. See BENAMI. 73 P. R. 1918.

**ADVERSE POSSESSION**—Acquisition of right of Uralan—Limitation Act of 1859—Effect of. See MALABAR LAW, DEVASWAM LANDS. 23 M. L. T. 487.

Acquisition of title by—Plea of, to be succinctly raised and proved.

A claim of title by adverse possession raises a mixed question of law and fact and should, therefore, be raised in the Court of first instance so that the opposite party may plead to the claim and evidence may be adduced thereon. A person who seeks to establish such a claim has to show that his possession was adequate in continuity, publicity and in extent to extinguish the title of the true owner (*Drake Brokman, J. C.*) PRALHAD SINGH v. ABDUL AZIZ KHAN. 47 I. C. 892

Character of—Possession under will of uncertain construction—Acquisition of absolute title, only if express claim to hold an absolute estate is made out. See WILL, CONSTRUCTION. 3 Pat L. J. 199.

Co-owners—Sole occupation by one—No exclusion—Possession of co-owner referred to his lawful title.

Where one member of a joint family alone occupies the joint estate, that by itself affords no evidence of exclusion of other interested members of the family. Uninterrupted sole possession of such property, without more, must be referred to the lawful title possessed by the joint holder to use the estate, and cannot be regarded as an assertion of a right to hold it as separate, so as to assert an adverse claim against other interested members.

## ADVERSE POSSESSION.

Where possession can be either lawful or unlawful, in the absence of evidence, it must be assumed to be the former. (*Lord Buckmaster*) HARDIT SINGH v. GURMUKH SINGH.

64 P. R. 1918=53 P. W. R. 1918=  
24 M. L. T. 389=23 C. L. J. 437=  
20 Bom. L. R. 1064=47 I. C. 626. (P. C.)

Co-owner holding property—Deed of relinquishment by other co-sharer, unregistered—Admissibility in evidence. See (1917) DIG. COL. 7, JAMPU v. KUTRAMANI.

39 A.H. 596=15 A. L. J. 761=42 I. C. 713.

Co-owners—Possession of one, not adverse to the rest.

The possession of one co-owner even over the whole co-parcenary, is not *prima facie* adverse to the other co-owners 24 W. R. 425 foll. (*Stanyen, A. J. C.*) RAGHOB v. PALROBA. 45 I. C. 217.

Co-owners—Requisites of adverse possession.

The possession of one co-owner is *prima facie* the possession of the other co-owners and in order to make the possession of one co-owner adverse to the other co-owners there must be an actual ouster of the latter. Where one co-owner has been in uninterrupted possession for a large number of years, the Court may presume that there has been an ouster of the other co-owners without any express evidence of the fact of such ouster. (*Fletcher and Huda, JJ.*) AHAMUDDIN TAMJUDDIN v. AMIRUDDIN. 44 I. C. 215.

Co-sharers—Person taking exclusive possession under a Court-sale of the whole, though interest of certain sharers only sold—Possession adverse.

Where a purchaser at a Court-auction of the interest of some of the co-sharers takes exclusive possession of the whole property, his possession is adverse to the entire body of co-sharers. (*Richardson and Walmsley, JJ.*) PURNA CHANDRA PAL v. BARODA PROSANNA BHATTACHARJYA. 22 C. W. N. 637=45 I. C. 783.

Hindu widow—Trespass—Possession of trespassers, not adverse to reversioner till death of widow. See LIM. ACT, ART. 141. 47 I. C. 222.

Independent trespassers—No right to tack on possession.

It is not open to two independent (not claiming under one another) trespassers to tack on the possession of the other trespasser to his own. (*Rattigan, C. J.*) HUSSAIN BAKSH v. PALA SINGH.

153 P. W. R. 1918=47 I. C. 189

## ADVERSE POSSESSION.

—In interruption of—Symbolical delivery of possession as against Benamidar—Real owner's title not affected. See BENAMIDAR 22 C. W. N. 867.

—Interruption of—Symbolical possession—Effect of between parties to proceedings in which such possession given.

Symbolical possession is sufficient to interrupt adverse possession where the person setting up adverse possession was a party to the execution-proceedings in which the symbolical possession was given 5 Cal 584 foll. (*Lord Sumner*.) RADHA KRISHNA CHANDERJI v. RAM BHADUR. 34 M. L. J. 97=23 M. L. T. 26=16 A. L. J. 33=7 L. W. 149=27 C. L. J. 191=22 C. W. N. 235=(1918) M. W. N. 163=25 Bom. L. R. 502=43 I. C. 268 (P. C.)

—Landlord and tenant—Enhancement of rent—Tenant shown to have asserted right to hold at unalterable rent more than 12 years before suit—No title by adverse possession. See LANDLORD AND TENANT, RENT. 22 C. W. N. 826.

—Landlord and tenant—Knowledge essential.

Before the possession of a tenant can become adverse to the landlord, the latter must be proved to have had knowledge of such possession. (*Fletcher and Newbould, JJ.*) MURALI DHAR ROY v. SASADHUR PAL. 43 I. C. 344.

—Landlord and tenant—Permanent tenant—Encroachment on neighbouring land of landlord—Extent of interest affected. See (1917) DIG. COL. 10, SABADA KRIPA LALA v. ARHIL CHANDRA BISWAS. 21 C. W. N. 903=28 C. L. J. 18=41 I. C. 530.

—Limited Right—Right to manage devaswom (religious endowment) as Samudayee—Acquisition of, by prescription. See MALABAR LAW, DEVASWOM 34 M. L. J. 344=44 I. C. 630.

—Limited owner—Gift by—Possession for 12 years after death of limited owner—Acquisition of absolute title.

The possession of a donee from a limited owner continued for 12 years after the death of the limited owner gives him an absolute right to the property. (*Hattigan, C. J.*) KHAN BHADUR v. IBRAHIM KHAN. 46 I. C. 565.

—Mortgagor and mortgagee. See MORTGAGOR AND MORTGAGEE.

89 P. W. R. 1918.

—Mortgagor and mortgagee—Condition that mortgagee is to be absolute owner on

## AGENCY RULES.

default of payment—Possession after default. See (1917) DIG. COL. 12, ABDUL HAMID v. DURRIAH BIBI.

10 Bur. L. T. 219=36 I. C. 959.

—Mortgagor and mortgagee—Mortgagee entering into possession of the mortgagor—Possession of mortgagee not adverse to mortgagor. See T. P. ACT S. 76.

46 I. C. 872.

—Receiver—Possession of, on behalf of successful party in litigation. See RECEIVER. (1918) M. W. N. 583.

—Shebaitship—Transferee of office in possession for over 12 years—Acquisition of title. See LIM. ACT, S. 10.

4 Pat. L. W. 283.

—Tacking of, when allowed—Mortgagee from trespasser, if can add his possession to that of mortgagor.

To enable one to take advantage of the adverse possession of another it is essential that the adverse possessions which are to be tacked must be of the same or of an identical nature. A mortgage from a trespasser cannot, as against the true owner, tack his own possession as mortgagee to that of the mortgagor, for the latter is a trespasser on the proprietary right, whilst the mortgagee holds adversely merely to the extent of the mortgage interest. (*Lindsay, J. C.*) SAIYED-UN-NISA v. MAIKU LAL. 50 C. L. J. 391=47 I. C. 687.

—Test of—Prescriptive title, basis of.

The criterion of adverse possession is, whether a person possesses land, claiming it as his own and if he does, he must be held to be in adverse possession.

A prescriptive title is not based on original right or on morality, but solely on expediency. (*Shadi Lal and Rossignol, JJ.*) ALLAH DAD v. FAZAL DAD. 46 I. C. 964.

—Title acquired by—Suit for declaration of — Necessity. See RECORD OF RIGHTS. 3 Pat. L. J. 361.

—What constitutes. See (1915) DIG. COL. 25, MAHABIR MISSER v. NANDA KISORE MISSER 27 C. L. J. 583=27 I. C. 640.

AGENCY—Termination of—Question of fact. See LIM. ACT, ART. 89. 41 Mad. 1.

AGENCY RULES (GODAVARI) Rr. 10 and 16—Order by Agency, Munsif in execution of a decree by the Government Agent—Appeal.

The Government Agent acting under R. 10 of the Godavari Agency Rules employed a Munsif to execute a decree of the Agent's Court. The Agency Munsif made an order in

## AGENCY RULES.

the course of the execution proceedings against which the decree-holder filed an appeal in the usual form of a petition to the Government, under R. 16 of the Agency Rules.

*Held*, that the order of the Agency Munsif was not a decree, the provisions of the C. P. Code not being applicable to the case, and therefore no appeal lay against the order.

The order of the Agency Munsif could not in law, be said to be a proceeding of the Government Agent so as to attract the operation of R. 16 of the Agency Rules. The proceedings of a subordinate officer of a court of justice do not become the proceedings of the Court itself unless the statute law makes them so in respect of particular matters or unless those proceedings are submitted to the presiding officer of the court and adopted or approved of by him. 27 Mad. 109 dist. The desirability of a revision of the Agency Rules pointed out (*Sadasiva Iyer and Bakewell, JJ.*), *MANYAM MAHALAKSHMANNA v. MUCHIKA APPALARAJU*. 34 M. L. J. 473=47 I. C. 713.

AGENCY RULES (GANJAM AND YIZAGA-PATAK). RULES 6 and 16—Order restoring suit dismissed for default—'Decree' meaning of—Petition against Orders of Agents only to Government. See (1917) DIG. COL. 15, VENKATANAGABHUSHANAM v. MAHALAKSHMI. 41 Mad. 325=34 M. L. J. 524=42 I. C. 555.

AGENCY RULES (YIZAG). R. 19 Cl. 5—*Suit for land*—Meaning of *suit for declaration* under S. 73. Local Boards Act.

A suit for a declaration that *plff.* is a land holder of certain lands within the meaning of S. 73 of the Local Boards Act is one for the determination of an interest in immoveable property and is a "suit for land" within the meaning of those words in R. 10, cl. 5 of the Agency Rules. (*Oldfield and Sadasiva Aiyer, JJ.*) *MAHARAJAH OF JEYPORE v. DUGA RAJU BAHADUR*. 35 M. L. J. 284= (1913) M. W. N. 830=7 L. W. 564=45 I. C. 729.

AGENT—Minor if can be—Contract by minor on behalf of firm—Liability of firm under—Non-repudiation by minor of his own liability after attaining majority—Effect. See CONTRACT ACT, SS. 184 AND 248. 38 P. W. R. 1918.

Retention of principal's money—Liability for interest on—Extent of—Liability of Secretary of Fund. See COMPANY, FUND. (1918) M. W. N. 1.

See UNDER PRINCIPAL AND AGENT.

AGRA TENANCY ACT, (II OF 1901). S. 10—Scope of—Agreement between parties to pay certain rent for *ex-proprietary* holdings—Validity of.

## AGRA TENANCY ACT, S. 20.

The provisions of S. 10 of the Tenancy Act fix a maximum rent, but the parties are not thereby prevented either from contracting for the payment of a lower rate of rent, or from coming to a conclusion with reference to S. 10 as to what rent is likely to be fair and they may agree to pay the same. Such an agreement is not enforceable in itself. What is wanted is an order under S. 10, clause 5 fixing the rent to be paid by an *ex-proprietary* tenant, but the law does not lay down that this order cannot be based upon an agreement come to between the parties or that its terms cannot be taken into account. (*Piggot and Walsh, JJ.*) *JAHANGIRA v. KARRAR SINGH*

16 A. L. J. 212=44 I. C. 513.

SS. 10 and 21—Two documents executed on the same day—*Usufructuary mortgage* of *sir* with covenant not to set up *ex-proprietary* rights—Relinquishment of *sir*—Possession with mortgagors—Covenants void.

If a covenant to relinquish the *sir* lands is part of a transaction of sale or of mortgage, then the agreement to surrender will be void as unenforceable, no matter what ingenious devices may be employed to give colour to it. If a court is satisfied that there was first of all a transfer by way of sale or mortgage and that the transferee, having obtained the status of an *ex-proprietary* tenant, with full knowledge of that fact and of the rights preserved to him by statute, deliberately chooses as a separate transaction, to relinquish his *ex-proprietary* tenancy into the hands of the proprietor, or of the mortgagee in possession, the law cannot protect a reckless and imprudent man against the consequence of his own acts. (*Piggot and Walsh, JJ.*) *MIR DAD KHAN v. RAMZAN KHAN*. 40 All. 443=16 A. L. J. 329= 24 I. C. 938.

S. 20—Mortgage of occupancy holding—Mortgage void—Suit for redemption—Maintainability.

A usufructuary mortgage was made of an occupancy holding in 1906. The mortgage was void under S. 20 of the Tenancy Act. The mortgagor sued to redeem the mortgage and offered to pay the money due thereunder: *Held* that the *plff.* was entitled to get back possession on his paying the mortgage money as he had offered to do. (*Richards, C. J. and Tudball, J.*) *RAMZAN v. BHUKHAL RAI*. 16 A. L. J. 747=47 I. C. 852.

SS. 20 and 24—Occupancy holding—House of agriculturist, if transferable.

The manager of a joint Hindu family which owned a house in a town and lived by cultivation of an occupancy holding, executed a mortgage of the house in favour of the *plff.* The mortgagor died and the *plff.* brought a suit for the sale of the house against the remaining members of the joint family, who contended that as they and their ancestors

## AGRA TENANCY ACT, S. 20.

were cultivators and the house in dispute was used in connection with their cultivation, its hypothecation was invalid.

*Held*, that the house being situated in town and there being nothing to show that it passed to the debt, as an appendage or adjunct of the tenure or there was any connection whatsoever between the two, it could not be held to be appurtenant to their occupancy holding (*Futtolli, J.*) **NIRBHAY LAL v. KALLAN.**

45 I. C. 546.

—S. 20—*Transfer—Occupancy tenancy acquired by member of joint Hindu family—Profits thereon into common stock—Whether such forms joint family property—Personal law of prize—Applicability—Statute, interpretation.*

A special statute like the Agra Tenancy Act can and does modify the operation of the ordinary Hindu law in certain matters.

Hence, where a zemindar granted a lease of certain land to M who formed with certain other persons a joint Hindu family and it was found that M threw the profits derived from this land into the common stock of the joint family, *held* that the tenancy did not become part of the assets of the joint family, inasmuch as its doing so would amount to the court sanctioning the transfer of a tenancy otherwise than under S. 20 of the Tenancy Act. (*Piggot and Walsh, JJ.*) **KALLU v. SITAL.** 40 All. 314=16 A. L. J. 223=

44 I. C. 717.

—Ss 20 (2) and 25 (1)—*Suit to eject mortgage of occupancy holding by lessee thereof without notice of the mortgage.*

Plff. a *bona fide* lessee of an occupancy holding after the execution but before the registration of certain mortgages of those holdings, without notice of the mortgages, sued for possession impleading the mortgagees as defts. to the suit.

*Held*, that the lease in favour of the plff was a valid contract of lease for a period of five years permissible under S. 25 (1) of the Agra Tenancy Act and that the mortgage, being contrary to the express provisions of S. 20 (2) of the Act, conferred no title on the mortgagees and did not affect the plff's rights. (*Piggot and Walsh, JJ.*) **SHEIKH HABEEB ULLAH v. MANRUP.** 43 I. C. 514.

—S. 22—*Occupancy holding—Succession to—Joint cultivation, effect of.*

Several persons were entitled to an occupancy holding though as between the zemindar and the persons entitled thereto, it was one holding of which the rent was jointly paid. One B was in possession of a three eighth share. The plffs. who were the nearest reversioners of B brought a suit against one R to recover possession thereof. B died before the Tenancy Act came into operation and was

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succeeded by his widow, who died after the Act had come into force. The plffs. cultivated the "holding" jointly with B, but they did not cultivate the particular plots constituting B's share.

*Held*, that S. 22 of the Tenancy Act did not apply, and the plffs. were entitled to succeed. (*Richards, C. J. and Banerji, J.*) **BHUP SINGH v. JAI RAM.** 16 A. L. J. 459=46 I. C. 337.

—S. 34—*Occupancy of land without consent of landlord—Ejectment decree in Revenue Court—Usufructuary mortgage of sir before the Act—Mortgage in possession of—Dispossession by owner of equity of redemption.*

Plffs. were in possession of certain plots of sir land under a usufructuary mortgage made prior to the passing of the Agra Tenancy Act. Defts. who had acquired a part of the equity of redemption got into possession of these plots, whereupon the plffs. sued to eject them in the Revenue court. The defts. denied the relationship of landlord and tenant and also raised other pleas. They were referred by the Revenue Court to the Civil Court. The Civil Court held that the plffs. were entitled to remain in exclusive possession as mortgagees and that the defts. had acquired a share in the equity of redemption. *Held*, that the defts. could be ejected under S. 34 of the Agra Tenancy Act.

Per *Walsh, J.*—The words "a person occupying land without the consent of the landlord" in S. 34 of the Agra Tenancy Act mean one who enters into occupation without express consent or without any previous arrangement. 9 A. L. J. 71 foll. (*Piggot and Walsh, JJ.*) **JAGARDEO SINGH v. ALI HAMMAD.**

40 All. 300=16 A. L. J. 249=44 I. C. 919.

—S. 57—*Cutting down of trees, if detrimental to land.*

The cutting down of trees does not raise a presumption that the act is detrimental to the land within S. 57 of the Tenancy Act. (*Piggot, J.*) **MANSUKH RAM v. BIRJRAJ SABAN SINGH.** 40 All. 646=16 A. L. J.

621=45 I. C. 971.

—Ss. 95 and 167—*Jurisdiction—Civil and Revenue Court—Suit for declaration of occupancy rights.*

Where both parties go to Court admitting that there is a plot of land held under occupancy right each claiming to be entitled to the holding, the suit is cognizable by a Civil Court. If the plff. alleges that the defts. and other persons are his *zemindars*, and that he is their occupancy tenant and asks for a declaration to that effect, it would be a suit barred from the cognizance of a Civil Court by Ss. 95 and 167 of the Agra Tenancy Act. (*Richards, C. J. and Banerjee, J.*) **MADAN LAL v. MANZUR AHMAD.** 43 I. C. 632.

## AGRA TENANCY ACT, S. 150.

———S. 150—*Muafi land—Resumption—Proprietor—Perpetual lessee if entitled to resume.*

In S. 150 of the Agra Tenancy Act the Legislature has used the word "proprietor" and not "land-holder," and it may thereby have intended that the right to resume should lie only in the proprietor and nobody else. Consequently, a holder of a perpetual lease of certain land under which the lessor reserved to himself, the right to receive an annual payment together with the right to re-enter in case of default is a proprietor of the mahal for the purposes of S. 150 and entitled to resume. (*Tudball and A. Raoof, J.J.*) *MATA BADAL SINGH v. GOURISH NARAIN SINGH.* 15 A. L. J. 618=46 I. C. 226.

———Ss. 154 and 155—*Resumption—Rent free grant—Portion converted into grove—Character of area not altered—Grant held for fifty years and by two successors of the original grantee—Whether resumable.* See (1917) DIG. COL. 19: *MAHOMED ISAKHAN v. MAHOMED KHAN.* 40 All. 60=15 A. L. J. 357=42 I. C. 956.

———Ss. 156 and 158—*Suit for assessment of rent—Jurisdiction of Revenue Courts.*

In a suit under S. 156 of the Agra Tenancy Act for the assessment of rent of the land in the occupancy tenancy of the deft. who had refused to pay rent, the Court below held that the plff. was not entitled to any remedy under Chap. X of the Agra Tenancy Act, for the reason that the Chapter was headed "Resumption of rent-free grants."

*Held*, that reliance could not be placed upon the headings of chapters or descriptions given of sections in the margin of the same, especially in the case of the Agra Tenancy Act, which could not be said to be a model of good drafting and that the suit did not fall outside the scope of S. 156 of the Agra Tenancy Act. (*Knor, J.*) *AJNAS' KUAR v. PRAYAG SINGH.* 45 I. C. 534.

———Ss. 158 and 167—*Muafi land—Suit for declaration of proprietary title in respect of—Jurisdiction—Revenue Court.*

A suit for a declaration that *muafi* rights have ripened into proprietary rights can only be brought in a Revenue Court, and not in the Civil Court. (*Banerji and Piggot, J.J.*) *NANHU v. THAKURAJ MAHARAJ.* 16 A. L. J. 831=46 I. C. 764.

———S. 164—*Suit for accounts against lambardar—Liability for interest.*

In a suit by a co-sharer against the lambardar for his share of the profits the lambardar is liable to pay interest on the amount of profits awarded to the co-sharer, where it is found

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that the lambardar has falsified the accounts. (*Lundoy, J.*) *DORI LAL v. RAM CHARAN LAL.* 44 I. C. 415.

———S. 164—*Suit for profits—Co-sharer in possession of excess sir and khudkhast land—Calculation of profits.*

Where some of the co-sharers in a mahal are found to be in possession of considerable areas as *sir* and *khudkhast*, in calculating the profits the following matter should be taken into consideration.—(1) Where different co-sharers are entitled to different portions of the mahal as their *sir* and *khudkhast*, each co-sharer will be entitled to the profits of his own *sir* and *khudkhast* and he would not be obliged to account for those profits to other co-sharers, (2) if, on the other hand, any co-sharer had in his hand and in his own cultivation an excess of land, over and above his proper share of *sir* and *khudkhast* he should account for the excess. In this case the quality of the land in excess, will have to be taken into consideration; (3) if some of the co-sharers neglect to cultivate their *sir* and *khudkhast* they cannot call upon the others to account for the profits of *sir* and *khudkhast* of those co-sharers unless such *sir* and *khudkhast* were in excess of their own. (*Richards, C. J. and Banerjee, J.*) *ANGAD SINGH v. ZORAWAR SINGH.* 16 A. L. J. 146. =44 I. C. 522.

———S. 164—*Suit for share of profits from lambardar—Liability of legal representative of lambardar.*

Where during the pendency of a suit for recovery of the plaintiff's share of the profits, the deft. lambardar died and his legal representative was brought on record, the latter is liable not only for the collections actually made by the lambardar but also for the profits which remained uncollected owing to the neglect or misconduct of the lambardar. But this liability is limited to the extent of the assets of the deceased which have come to his hands. (*Banerjee, Piggot and Walsh, J.J.*) *BHARATH SINGH v. TEJ SINGH.* 40 All. 246=16 A. L. J. 193=43 I. C. 636.

———S. 167—*Ejectment suit in Revenue court—Deft. as sub-tenant—Suit in civil court by deft. in prior suit for declaration of title as co-tenant—Maintainability.*

Where a revenue court in a suit for an ejectment decided that B. was A's sub-tenant and accordingly decreed B's ejectment, held that a subsequent suit in the Civil Court by B for a declaration that he was a co-tenant of A was not maintainable having regard to S. 167 of the Agra Tenancy Act. (*Tudball and Abdul Raoof J.J.*) *KISHORE SINGH v. BAHADUR SINGH.* 16 A. L. J. 933=48 I. C. 270.

———Ss. 167 and 95—*Jurisdiction—Civil and Revenue Court—Suit for declaration of right to occupancy holding admitted by both*

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parties to be such—Jurisdiction of Civil Court. See AGRA TEN. ACT. SS. 95 and 167

43 I. C. 652

———Ss. 167 and 65—*Landlord and tenant—Cutting down by tenant of trees on agricultural land—suit for damages—Jurisdiction of civil court.*

The plff. was the landlord and the defts. were occupancy tenants of a certain agricultural holding. The latter cut down two trees within the boundaries of that holding, and a Munsif exercising the powers of a Small Cause Court Judge granted the pliffs a decree for damages in a suit brought for that purpose. *Held*, that the suit was cognizable by a Civil Court. (*Piggot J.*) MANSUKH RAM v. BIRJRAJ SARAN SINGH. 40 All. 646=16 A. L. J. 621=28 I. C. 971

———S. 167—Perpetual lessee assigning right to collect rent from tenant—Suit in Civil Court—Declaration of title and injunction—Jurisdiction. See (1917) DIG. COL. 20: SIDDIGA BIBI v. RAM AUTAR PANDE.

39 All. 675=13 A. L. J. 745=42 I. C. 575.

———Ss. 175 and 177—Order refusing to stay suit—'Decree'—Appeal.

S. 175 of the Agra Tenancy Act applies both to appeals to the Revenue Court and to the Civil Court and an order of a revenue Court staying or refusing to stay suit under para. 18 of Sch. II of the C. P. Code is not a 'decree' within S. 177 of the Agra Tenancy Act and no appeal lies against such an order to the Civil Court. (*Richards, C. J. and Banerjee, J.*) KIRPA DEVI v. RAMCHANDER SARUP. 40 All. 249=16 A. L. J. 231=43 I. C. 531.

———S. 177—"Decree"—Order refusing to stay a suit, not a decree—No appeal. See AGRA TEN. ACT. SS. 175 AND 177 43 I. C. 531.

———Ss. 177 and 178—*Suit in ejectment in Revenue Court—Deft. denying tenancy from plff.—Allegation of lease from other persons—Question of proprietary title in issue in court of first instance—Appeal—Jurisdiction*

Where in a suit for ejectment instituted in the Revenue Court the defts. pleaded that they were not the plff.'s tenants but that they were lessees from other persons and the plff. had no right to sue them, *held*, that this was a question of proprietary title which was in issue in the court of first instance and was in issue in the appeal and hence an appeal lay to the Civil Court. (*Banerjee and Tudball, JJ.*) HAR PRASAD v. TAJAMUL HUSAIN.

16 A. L. J. 239=44 I. C. 720.

———S. 192—Order of remand—Appeal preliminary and final decrees, provision for in the act.

Plff.'s suit to be declared proprietor of a muafi, was dismissed by the 1st court. The

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lower appellate court set aside that decree and allowed the appeal to the extent that it held the plff. entitled to be declared a rent-free grantee of so much of the land as was entered in his name. It then added that "the suit be remanded to the lower court for determination of the revenue payable by the plff. appellant." *Held*, that the order being one of remand no second appeal lay to the High Court and as there was no provision in the Tenancy Act about preliminary or final decrees, the order could not be appealed against as a preliminary decree. (*Knox, A. C. J. and Banerjee, J.*) ANANDGIR v. SRI NIWAS. 13 A. L. J. 711=47 I. C. 1008.

———S. 194—*Suit for rent by co-sharer—Vague allegation as to private partition is not enough.*

A private partition of a vague nature is not enough to take a case out of S. 194 of the Agra Tenancy Act.

In order to entitle a co-sharer to sue separately for rent there must be a special contract clearly setting out the opposition to law as stated in S. 194 (1) of the Agra Tenancy Act. (*Knox, J.*) GOBARDHAN v. PADAM SINGH. 46 I. C. 652.

———S. 197—*N. W. P. and Assam Civil Courts Act (XII of 1887) S. 21—High Court—Notification empowering Sub-Judge to hear appeals from Munsif—Revenue Appeal—Jurisdiction.*

Where the High Court directs by a notification issued with the previous sanction of the Local Government that all appeals from the decrees and orders of a Munsif shall be preferred to the Court of the Subordinate Judge the latter Court is empowered to dispose of appeals preferred to it, quite as fully and effectively as if it is the Court of the District Judge. The power is the same as regards revenue appeals. (*Knox, J.*) PIRTHI SINGH v. LAIQ SINGH. 46 I. C. 736.

———S. 201—*Suit for profits—Plff., not a recorded co-sharer—Procedure.*

Under S. 201 of the Agra Tenancy Act the mere fact that a plff. is not recorded as a co-sharer is not enough to bar him from maintaining a suit for profits. The procedure to be followed in a case in which a plff. is recorded and in a case in which he is not recorded is indicated in the section. In the latter case if an issue as to the plff.'s title arises the Revenue Court should either try it or refer the plff. to a Civil Court. (*Richards, C. J. and Banerjee, J.*) JATMAL SINGH v. SHIB SARAN SINGH. 16 A. L. J. 504=46 I. C. 415.

———S. 202—*Suit brought in Civil Court against defendant as trespasser—Plea of*

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tenancy by defendant—Suit referred to Revenue Court—Objection to jurisdiction overruled—Appeal to District Judge—Jurisdiction.

Deft. being sued in the Civil Court in ejectment as a trespasser, raised the plea that he was a tenant of the plff. The Civil Court referred the deft. to the Revenue Court under S. 202 of the Tenancy Act. A suit was instituted by the deft. under S. 95 of the Tenancy Act for a declaration of the nature of the tenancy. An objection on the score of jurisdiction was overruled by the Revenue Court. The Revenue Court having made a decree, an appeal was preferred to the District Judge. *Held* that no appeal lay to him, an objection on the score of jurisdiction under the circumstances being absolutely untenable. (*Richards, C. J. and Banerjee, J.*) DEO NARAIN SINGH v. SITLA BAKSH SINGH. 40 All. 177= 16 A. L. J. 590=47 I. C. 891.

ALIEN ENEMY—Injury to person or property of enemy residing in British India—Offence—Complaint by alien enemy—Limitation of proceedings—Jurisdiction of Court. See C.R. P. CODE, SS. 253, 433 AND 439.

35 M. L. J. 518

ALIYASANTANA LAW—Mulgeni Tenant—Right to improvements, if can be attached and sold.

The right to improvement of a mulgeni tenant in South Canara may never mature, as the lease is a permanent one: consequently such a right cannot be attached and sold in execution of a decree against the tenant. (*Phillips and Kumaraswami Sastri, J.J.*) ANANTHA BHATTER v. ANANTHA BHATTER. (1918) M. W. N. 857.

ALLUVIAL LAND—Accretions—Proof—Onus—Quantum of proof. See BENGAL REGULATION XI of 1825, 3 Pat L. J. 438.

ALLUVION AND DILUVION—Navigable River—Test of, in India—Grant of land bounded by river—Right of grantee *ad medium filum aquae*—Accretion—Right of riparian proprietor. See BENG. REGN. XI of 1825 22 C. W. N. 872.

AMENDMENT—Decree—Dismissal of appeal for default of prosecution—Application for amendment to be made to first Court. See C. P. CODE, S. 152. 43 I. C. 360

Decree—Clerical errors and accidental slips in decree—Jurisdiction of Court which passed decree—Pendency of appeal—Effect. See C. P. CODE, S. 152. 7 L. W. S.

Execution—Application—Plea of limitation.

The High Court has power, under very exceptional circumstances, to allow amendments in appeal, but it will not ordinarily

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allow an amendment which would defeat the bar of limitation, as by substituting in a later execution application in the column of relief the property comprised in a previous application. (*Abdur Rahman and Kumaraswami Sastri, J.J.*) THIAGARATAN v. KANNUSAMI PILLAI. 43 I. C. 122.

Of plaint—Order allowing—Validity—Application made at beginning of trial—Order made later after hearing evidence. See PRACTICE. 7 L. W. 415.

Amendment of plaint not allowed when, nature of, suit likely to be altered. See PLEADINGS 10 P. W. R. 1918.

ANIMALS FERAE NATURAE—Ownership of—Wild elephant shot by A but found dead in B's land—Ownership of.

A wild elephant appeared in a forest belonging to the plff. and was wounded by his men but it escaped into the deft's forest, where it died after being again wounded by plff's men.

*Held*, that the deft. was entitled to the property in the dead body of the elephant.

Nobody has any absolute property in animals which are *ferae naturae* as best they are only capable of being the subject-matter of qualified ownership or proprietary right. A wild animal is the property of the person in whose forest it happens to be for the time being. So long as it is in the forest or on the land of such person he is entitled to take it and to kill it but when it once chooses to quit his land and go into the land of another, then he ceases to have any property in it and such wild animal becomes the property of that other person upon whose land it chooses to make its temporary abode. (*Mullick and Atkinson, J.J.*) RAJA KISHORE CHANDRA MURDRAJ v. RADHA GOBIND DAS. (1918) Pat. 232.

APPEAL—Arbitration—Award filed under Arbitration Act, S. 11 (2)—Order refusing to set aside award—Appeal whether lies. See C. P. CODE, S. 104 (j). 45 Cal. 502.

Competency of—parties defect of—Suit by persons as proprietors of firm—Death of one respondent—No substitution of legal representative. See C. P. CODE, O. 80, R. 4. 28 C. L. J. 268.

Costs—Order as to—Not appealable when the main order is itself not open to appeal. See C. P. CODE, S. 2 (2) 44 I. C. 690.

Court-fee—Suit for sale on foot of a mortgage—Deft. setting up prior charge—Disallowance of claim—Appeal by deft—Fee payable. See COURT FEES ACT, S. 7, Cl. 4 (C). 16 A. L. J. 81.

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—Criminal Case—Appeal against acquittal—Right of Government. See (1917) DIG. COL. 26 EMPEROR v. ARJAN, 43 P. R. (Gr.) 1917=43 I. C. 245=19 Cr. L. J. 85.

—Damages—Interference with assessment of damages by trial court—Principles. See DAMAGES. 7 L. W. 415.

—Decision of High Court in Land acquisition appeal, not a judgment—Not appealable. See LAND ACQ. ACT, S. 54, 35 M. L. J. 110.

—Decree against several defendants—Separate appeals by them—Court fee on each appeal. See COURT FEE. 91 P. R. 1918.

—Decree under—Right of respondent to support, without filing memo. of objections. See CONTRACT ACT, S. 74. 48 P. W. R. 1918.

—Execution of decree—Application for delivery of possession—Order granting—Review of—Appeal against order on review—Maintainability—Review—Jurisdiction—Review of order granting delivery of possession.

Proceedings for delivery of possession are not proceedings in connection with the execution of a decree and no appeal lies from an order passed in review cancelling a former order for delivery of possession on the ground that the application for delivery of possession was barred by limitation.

A Court has power to review its own order erroneously made delivering possession. 19 C. W. N. 835 expl. 2 Cal. 131 ref. (*Roe and Imam, JJ*) DHANINDER DAS v. BAKSHI HARIHAR PRASAD SINGH. 3 Pat. L. J. 571=48 I. C. 129.

—Ex parte decree—Application to set aside—Limitation—Starting point. See LIM. ACT, ART. 169. 96 P. R. 1918.

—Filed out of time—Right of respondent to file—Memo. of objections. See C. P. CODE, O. 41, R. 22. 35 M. L. J. 235.

—Forum—Execution of decrees for over Rs. 5,000—Order in—Appeal to High Court.

An appeal from an order in execution of a decree for over Rs. 5,000 lies to the High Court and not to the District Court. (*Le Rossignol, J.*) MOHIB-UD-DIN v. PARTAB MAL. 85 P. L. R. 1918=86 P. W. R. 1918=46 I. C. 584.

—Insolvency—Subordinate Judge invested with jurisdiction under S. 3 Prov. Ins. Act. declining to act under S. 43 (2), whether appealable. See PROV. INSOL. ACT, SS. 3, 43 (2) AND 46. 22 C. W. N. 953.

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—Maintainability of—Decree in favour of a person—Adverse finding in spite of the decree—Decree not appealable. See RES JUDICATA. 44 I. C. 723.

—Maintainability of—Legal representative—Decision as to—Order not appealable. See C. P. CODE, O. 32, R. 5. (1918) M. W. N. 198.

—Maintainability of—Person not a party to suit, not entitled to appeal against order affecting him. See C. P. CODE, O. 40, R. 1 (2). (1918) Pat. 123.

—Objection to jurisdiction of trial Court if and when can be allowed in. See C. P. C. S. 21. (1918) M. W. N. 661.

—On ground of limitation—Failure to pay stamp duty on portion of claim—Effect. See PRACTICE. 14 P. W. R. 1918.

—Order of abatement under S. 368—Appeal under S. 583, cl. (19). See C. P. CODE, S. 583, Cl. (18) 129 P. L. R. 1917.

—Order by Agency Munsiff in execution of a decree by Government Agent's Court. See AGENCY RULES GODAVERY 10 AND 16. 34 M. L. J. 473.

—Order dismissing application for final decree for sale under O. 34, R. 5—Appealable. See C. P. CODE, SS. 2, 47, 96 ETC. 35 M. L. J. 552.

—Order dismissing suit for default of prosecution—Maintainability—One of plaintiffs present and applying for adjournment—Application rejected—Effect. See C. P. CODE, S. 2, (2). 4 Pat. L. W. 366.

—Order granting stay of a suit under Arbitration Act—Whether lies—Onus. See C. P. CODE, S. 104 (e). 12 S. L. R. 34

—Order of a single Judge of High Court staying Criminal trial—Appeal against under Cl. 10, L. P. (Patna). See LETTERS PATENT PATNA CL. 10. 3 Pat. L. J. 509.

—Order of remand—Appeal against preliminary decree—No provision in Act. See AGRA TEN. ACT, S. 193 16 A. L. J. 711.

—Receiver—Objection to appointment of—Order on—Appeal, See C. P. C.—OR. 40 R. 1. 3 Pat. L. J. 573.

—Right of—Decree on oath—Appeal by person not party to oath agreement—Maintainability. See OATHS ACT, S. 11. 83 P. R. 1918.

—Right of, only under statute. No Court can entertain an appeal which it is not expressly authorised by law to hear

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(*Mookerjee and Beachcroft, JJ.*) BANDIRAM MOOKERJEE v. PURNA CHANDRA ROY.

27 C. L. J. 115=43 I. C. 753.

——— *Right of, when available — Person aggrieved by the decree entitled to appeal.*

In order to entitle a person to appeal, he must be a party to the suit in which he seeks to appeal and he must be a person aggrieved by the decree. (*Scott Smith, J.*) FOJOO v. KARAM DIN. 82 F. L. R. 1918=84 P. W. R. 1918=45 I. C. 181.

——— Sanction for prosecution—Order granting or refusing sanction. See C. P. CODE S. 195. 35 M. L. J. 454.

——— Sanction to prosecute informantly Dt Magistrate—Information given found to be false—Appeal to Sessions Judge competency of. See C. P. CODE, S. 195 (1), (a). 35 M. L. J. 686.

APPELLATE COURT — Addition of party respondents—Powers as regards—Addition of person not party to suit. See C. P. C. SS. 107. AND 151. 3 Pat. L. J. 409.

——— Damages—Award of, by trial Court—Appellate Court slow to interfere with. See DAMAGES. 7 L. W. 413=23 M. L. T. 312.

——— Discretionary matter—Costs — No interference except where assessment is based on a wrong principle. See COSTS. 46 I. C. 544.

——— Discretionary matter—Costs—Order of first Court as to—No interference on appeal except when lower Court has proceeded on obviously erroneous principles. See COSTS. 22 C. W. N. 372.

——— Discretionary order—Order as to costs—Interference by Appellate Court when there is an improper exercise of discretion. See COSTS. 16 A. L. J. 592.

——— Discretionary relief — Interference with exercise of discretion by first Court, when proper.

It is opposed to sound practice for an appellate court to substitute its own discretion for that of the court from which an appeal has been pre-referred. (*Sir Lawrence Jenkins.*) REH-MAT-UN-MISSA BEGUM v. PRICE.

42 Bom. 380=35 M. T. J. 262=

23 M. L. T. 406=8 L. W. 53=

5 Pat. L. W. 25=20 Bom. L. R. 714=

22 C. W. N. 601=16 A. L. J. 513=

27 C. L. J. 623=45 I. C. 568=

45 I. A. 61 (P. C.)

——— Discretionary relief — Interference with order of trial Court, when.

*Per Mookerjee, J.*—An erroneous exercise of

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discretion may be open to correction by a Court of Appeal which however, on well established principles will be slow to interfere unless either of the parties has been manifestly and unfairly prejudiced. L. R. 5. Ch. D. 342 ref. (*Sanderson, C. J. and Mookerjee, J.*) PREMSUKH DAS ASSARAM v. UDAIRAM GUNGBUX. 45 Cal. 138=22 C. W. N. 204=28 C. L. J. 498=44 I. C. 233

——— Functions of—Appreciation of evidence—Decision of trial Judge, when should be reversed—Oral evidence—Appreciation of—Weight to be attached to opinion of trial Judge.

*Sanderson, C. J.*—Where the documentary evidence is conflicting, great weight should be given to the opinion of the learned Judge who has seen and heard the witnesses.

The Court of Appeal would be more unwilling to set aside a judgment of the lower Court based on oral evidence especially if there was a conflict, than in a case tried on written evidence where the witnesses were not before the Judge, because of the opportunity afforded of judging how far the witnesses were worthy of credit.

*Mookerjee, J.*—The burden lies on the appellant to satisfy the Court that the finding of the trial Court which he assails is not supported by the evidence on the record: (1896) 1 Q. B. 38 and 43 Cal. 893 ref.

*Woodroffe and Mookerjee, JJ.*: Whether a witness is reliable or not may be judged not merely from demeanour but also from the mode and manner in which answers are given. (*Sanderson, C. J., Woodroffe and Mookerjee, J. J.*) MARIAM BIBEE v. SHAIKH MAHOMED IBRAHIM. 28 C. L. J. 305.

——— Interference—Hearing of suit—Production of evidence—Delay in—Discretion, exercise of—Interference by appellate Court—Propriety. See C. P. CODE, O. 13, R. 1.

27 C. L. J. 119.

——— Interference by in matter of discretion. See INTEREST. 21 O. C. 265.

——— Judgment of—Adequate and satisfactory consideration of the points at issue essential—Mere judgment of reversal—Irregularity. See C. P. CODE, O. 41, R. 31.

43 I. C. 973.

——— Power of — Consolidation in Land Acquisition Cases—Inherent power—Exercise of discretion—No request for consolidation in lower court—Whether Appellate Court can order consolidation. See C. P. CODE, S. 151.

34 M. L. J. 279.

——— Powers of—Cross objection against a co-respondent, not related to matter in appeal—Whether Appellate Court can allow. See C. P. CODE, O. 41, R. 22. 28 C. L. J. 123.

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Power of to allow valuation in court below to be reduced to relieve party from liability to pay proper court-fee. *See* COURT-FEES ACT, SCH. II, ART. 11.

3 Pat. L. J. 161.

Power of, to stay sale of immoveable property on application made to it. *See* C. P. CODE, O. 41, RR. 5 and 6.

34 M. L. J. 420.

Question of law raised for the first time in, if can entertain.

*Per Mukherjee, J.* When a question of law is raised for the first time in a court of last resort, upon the construction of a document or upon facts either admitted or proved beyond controversy it is not only competent but expedient in the interests of justice to entertain the plea. (*Sanderson, C. J. Woodroffe and Mukherjee, JJ.*) *SHIB CHANDRA KAR v. DULCKEN.*

28 C. L. J. 123=

48 I. C. 78.

**APPROVER**—Corroboration—Necessity—Conviction on uncorroborated testimony—Legality.

A conviction based on the uncorroborated testimony of an approver is illegal. (*Leslie Jones, J.*) *GURDIT SINGH v. THE CROWN.*

52 P. L. R. 1918=9 P. W. R. (Cr.) 1918=

44 I. C. 967=19 Cr. L. J. 439.

**ARBITRATION**—Award—Appeal—Court acting as arbitrator—Finality of award.

The general principle is that an award is final and cannot be questioned except upon such grounds as corruption or an illegality apparent upon the face of the award, and there is no reason for departing from the principles where the Court itself has been appointed and has accepted the office of arbitrator.

Where the Court itself is appointed to act as an arbitrator, no separate award need be passed inviting the parties to put in objections before passing a decree. Such an award is in itself a decree.

Where in a suit, after the Judge had examined the documentary evidence and inspected the ground the parties agreed that he should give his decision without any witnesses being called, and that they would abide by his decision. *Held.* that the decision was in the nature of an award and that no appeal lay against it. (*Saunders, J. C.*) *MAUNG KALA v. MAUNG MEIK.*

44 I. C. 622.

Award—Application for enforcement of award—Presence of all arbitrators, if necessary. *See* (1917) DIG. COL. 38; *ABU HAMAD ZAHIRA v. GOLAM SARWAR.* 22 C. W. N. 301=25 C. L. J. 386=40 I. C. 422.

Award—Construction of—Restriction on alienation for indefinite period—Parties only bound.

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A term in an award which restricts the alienability of property for an indefinite period which may possibly extend to generations ought not to be held binding upon a person or a class of persons not expressly mentioned as being bound by it. (*Rattigan, C. J. and Shah Din, J.*) *DIWAN CHAND v. HAKIM RAI.*

39 P. R. 1918=37 P. L. R. 1918=

28 P. W. R. 1918=43 I. C. 674.

Award—Costs of reference—Private reference—Arbitrators if empowered to award. *See* ARBITRATION, AWARD, VALIDITY.

27 C. L. J. 104

Award—Criminal Procedure Code, S. 145—Proceedings under—Reference to arbitration and award—Acceptance of, by both parties—Order of Court on award—Validity of. *See* Cr. P. CODE, S. 145.

4 Pat. L. W. 101.

Award—Oral—Award not made a rule of Court, if effective to transfer property—Hypothecation bond of less than Rs. 100 in value—Award effect of, in India.

In pursuance of an oral submission to arbitration by certain members of a family of their claim to various properties, an oral award was given by the arbitrators by which a hypothecation bond of the value of less than Rs. 100 was allotted to the plff. who, however, was not the person in whose favor the bond had been executed. The award was not made a rule of Court nor did the holder of the bond assign it to the plff. In a suit on the bond by the plff. *held.* that the award had the effect of passing title to the plff. who was therefore entitled to sue on the bond.

It is not essential to the validity of an award that it should be in writing.

*Per Seshagiri Aiyar, J. (Napier, J. contra).* In India an award made on a reference to arbitration without the intervention of the Court has the effect of a judgment though not made a rule of Court. (*Seshagiri Aiyar and Napier, JJ.*) *AMIR BIBI v. AROKIAM.*

34 M. L. J. 184=45 I. C. 813.

Award—Decree on—Withdrawal of portion of claim after reference.

It is not open to one of the parties to a suit after having referred all the matters in dispute to arbitration, to withdraw a portion of the claim without the consent of the other party.

An arbitrator, to whom a suit for partition of certain moveable and immoveable properties was referred for arbitration, made two successive awards, the later modifying the earlier. The Court, allowed the plff. to withdraw his claim with regard to matters not decided by the awards, and made a decree setting out both the awards:

*Held.* that the procedure adopted by the Court was improper and that the decree and the awards must be set aside and the case sent

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back to be tried by the Court in accordance with law. (*Chatterjee and Wainsley, J.J.*)  
**PURNA CHANDRA HALDAR v. KUNJA BEHARI HALDAR.** 23 C. L. J. 275=42 I. C. 477

———Award—Existence of, if a defence to a civil suit regarding matter covered by award. See (1917) DIG. COL. 42. **AMAR NATH v. ISHAR SINGH.** 99 P. R. 1917=173 P. W. R. 1917=43 I. C. 350.

———Award—Illegality patent on the face of the award—Effect—Validity of award based on erroneous view of the law—Effect—English and Indian law. See C. P. CODE, SCH. II, 138, 14 (c). 34 M. L. J. 322.

———Award—Review by arbitrator—Jurisdiction. See (1917) DIG. COL. 34. **AMAR NATH v. ISHAR SINGH.** 99 P. R. 1917=173 P. W. R. 1917=43 I. C. 350.

———Award—Suit to enforce—Nature of—Small Cause Court—Jurisdiction—Provincial Small Cause Court Act, Arts. 15 and 24—Effect suit to enforce part of award—Maintainability. See (1917) DIG. COL. 42. **KUNJA BEHARI v. GOSTO BEHARI** 22 C. W. N. 36=27 C. L. J. 426=42 I. C. 390.

———Award—Validity of—All parties to the suit not parties to the reference—Award invalid—Objection to validity of award can be taken at any stage. See C. P. CODE, SCH. II, PARA. (1) 34 M. L. J. 71.

———Award—Validity of—Decision by some only of the arbitrators invalid.

An award made by some only of the arbitrators to whom certain disputes between the parties, were referred, is invalid. (*Kannaiya Lal, A. J. C.*) **GUR BAKSH SINGH v. CHUTTA SINGH.** 5 O. L. J. 471=47 I. C. 960

———Award—Validity of—Omission of one of the arbitrators to sign the award—Minor irregularity.

Where an award is arrived at by the arbitrators of both parties and represents their decision, the failure of the arbitrator of one party to sign, does not render it invalid. (*Walsh, J.*) **MAMPHOOL v. SAHI RAM.** 43 I. C. 154.

———Award—Validity of—Private reference—All arbitrators not taking part in the proceedings up to the delivery of the award—Award invalid on the face of it. See C. P. CODE, SCH. II, PARA. 14 (c). 16 A. L. J. 307.

———Award—Validity of—Public policy—Contravention—Agreement to refer non-compoundable offence to arbitration—Award, not enforceable. See CONTRACT ACT, S. 23. 47 I. C. 506.

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———Award—Validity of—Reference by guardian of minor's interests—Revocation of submission by guardian—Nobility to protect the interests of the minor—Award invalid—Suit by minor to set aside, maintainability of. See C. P. CODE, SCH. II, PARAS. 15 AND 21. 34 M. L. J. 71.

———Award—Validity of—Reference to three arbitrators—Award by two, illegal and liable to be set aside. See C. P. CODE SCH. II PARAS 12 AND 14. (1918) M. W. N. 477.

———Award—Validity of—Written notice to one of the parties, absence of—Award valid in part—Enforcement of—Costs of arbitration—Power to award.

An absence of a written notice to one of the debts does not necessarily invalidate an arbitration proceeding.

Where an order for costs was made in an award made on private reference to arbitration which could be expunged and the remainder of the award would thereby remain unaffected. Held, that the award could be enforced to that extent.

*Quære.*—Where the principle, that when a suit has been referred to arbitrators, they have authority to deal with the costs of the reference and the award can be extended to private reference to arbitration. (*Mookerjee and Beauchroft, J.J.*) **MOHENDRA NATH DAS v. MOHILAL KOLAY.** 27 C. L. J. 102=43 I. C. 770.

———Costs of—Private defence—Arbitrators if can award costs. See ARBITRATION. AWARD. 27 C. L. J. 102.

———Reference—Agreement to refer—Death of two of the arbitrators before application to file agreement was made to the Court—Agreement incapable of performance. See C. P. CODE, SCH. II, PARA. 17 (4) 44 I. C. 866.

———Reference to—Application by some of the parties only—Reference, if legal.

*Quære.*—Whether an order of reference to arbitration made by the Court on the application of the pff. and one of the debts is legal (*Fletcher and Huda JJ*) **HARIDAS DEY v. KAILASH CHANDRA BOSE.** 44 I. C. 480.

———Reference—Arbitrators, power of, to decide question of costs—Scope of their authority.

On an application by the parties to a suit to refer their disputes to arbitrators, an order of reference was made describing the matter in difference as entered in the plaint and in the defendant's written statement. An award was filed granting the pff. an injunction prayed for by him and ordering the debts to pay the pff's. costs.

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*Held.* that as the plaint included a prayer for costs and that as the arbitrators were directed to deal with all the questions raised by the plaint and the written statement for the defence the arbitrators acted within the scope of their authority in deciding the question of costs.

When a reference to arbitration in a suit is general and of the whole case the power of dealing with costs rests with the arbitrators. 91 P. R. 1888 Ref. (*Drake Broekman. J.C.*) *DHARN v. DILDAR KHAN.* 46 I. C. 482

—Reference—Court acting as arbitrator—Award final and not open to appeal. See ARBITRATION, AWARD. 44 I. C. 522.

—Reference to—Criminal Procedure Code, S. 145—Proceedings under—Award—Acceptance of, by both parties—Order of Court thereon, validity of. See Cr. P. CODE, S. 145 4 Pat L. W. 262.

—Reference to—Award out of court—Minor piff. represented by mother and guardian applying to Court for decree in terms of award—Decree passed without reference to O 32, R. 7—Validity. See C. P. CODE G 32 F 7. 20 Bom. L. R. 970.

—Reference—Parties to—All parties to the suit including *ex parte* debts. to be parties to reference through court—Award otherwise invalid. See C. P. CODE, SCH. II, PARA. (1). 43 I. C. 169.

—Reference to—Stay of suit for limited period—Grounds for—Probability of bias of umpire. See ARBITRATION ACT. 12 S. L. R. 41.

—Reference—Subsequent suit on the same subject-matter—Award pending the suit—Validity of—Whether court can pass a decree in accordance with the award—C P. Code Sch. II, paras. 19 and 22—Sp. Rel. Act. S 21. See (1917) DIG COL. 87: APPAYU v. SEENI ROWTHUR. 41 Mad. 115= 33 M. L. J. 177=6 L. W. 243=42 I. C. 514.

—Reference through court—Refusal of one of the arbitrators to act—Appointment of new arbitrator—Power of—Practice. See C. P. C., SCH. II, PARA. 15. 112 P. R. 1918.

—Reference—Validity of—Concurrence of some of the parties only—Reference incompetent—Award invalid even against consenting parties. See C. P. CODE SCH. II PARA. 1. 27 C. L. J. 339.

—Reference to—Validity of—Suit for restitution of conjugal rights—Court if can refer entire suit to arbitration.

Where in a suit for restitution of conjugal rights the Munsiff delegated the entire suit to

## ARBITRATION ACT S. 5

persons appointed by the parties as arbitrators.

*Held.* that the grant or refusal of a decree for restitution being entirely within the discretion of the Court, the Court could not delegate its function to arbitrators and the case should be tried on its merits (*Shadi Lal, J.*) *KALABATU v. PRABH DIAL* 78 P. L. R. 1918= 80 P. W. R. 1918=45 I. C. 163.

—Stay of proceedings—Disputes arising out of a contract providing for reference to arbitration—Contract impeached as fraudulent in suit—Stay of arbitration proceedings pendente lite.

In a contract of purchase and sale of goods between piff. and debts. there was the usual clause for referring disputes arising out of the contract to arbitration. Piff. repudiated the contract on the ground that the broker in the transaction did not disclose that he was a partner of the debt's firm. Debts. maintained that piff. was still bound to take delivery of goods and on piff.'s refusal referred the dispute to arbitrators mentioned in the contract. The piff. filed a suit for a declaration that the contract was not binding on him and obtained an order from Court restraining debts. from proceeding with the arbitration.

*Held.* that as this was a case where the piff. was impeaching the contract on the ground of fraud, the court below was right in staying the arbitration proceedings until the suit impeaching the contract was decided. *Kutts v. Moore* 1. Q. B. 258 Rel (*Sanderson C. J. and Woodroffe, J.*) *GAJANAND MASKARA v. SHEIK TALEB JALALUDDIN.* 22 C. W. N. 535=46 I. C. 5173

ARBITRATION ACT, (IX OF 1899)—Arbitration—Reference—Stay of suit—Grounds for—Probability of bias of umpire.

*Pratt, J.C.* An arbitration tribunal in which the ultimate decision rests with the nominee of a class having a particular interest is not an impartial tribunal. When a Court finds that the agreement for reference to arbitration provides for the appointment of an umpire who will most certainly tilt the scales against one party, the court should retain its jurisdiction to try the suit.

Per *Fawcett, A.J.C.* The court should exercise its discretion in refusing to stay a suit in a sparing and cautious manner and should not do so unless the applicant can establish that there is good ground for apprehending that there will be failure of justice if the reference to arbitration is allowed to proceed. (*Pratt, J. C. and Fawcett, A. J. C.*) *MESSERS. GOVERDHANDAS VISHINDAS v. MESSERS. RAMCHAND MANJIMAL.* 12 S. L. R. 41= 47 I. C. 783

—Ss 5 and 8—Arbitration—Neglect of arbitrator—Reference if revocable without leave of Court—Procedure.

## ARBITRATION ACT, S. 11.

Once a valid submission has been made to an arbitrator, it is irrevocable without leave of the Court, under S. 5 of the Arbitration Act. If the arbitrator refuses or neglects to act, the procedure laid down by S. 9 of the Act should be adopted. So long as the arbitrator holds his mandate unrevoked, the parties cannot appoint a fresh arbitrator. (*Trench A. J. C.*) **DWARAKA PRASAD v. FIRM OF DIPCHAND PARSRAM.** 11 S. L. R. 191=44 I. C. 360.

—S. 11. (2)—Proceedings under—C. P. Code, S. 104 (j), applicability of. See C. P. CODE, S. 104 (f). 45 Cal. 502.

## ARMS ACT (IX OF 1878), Ss. 4. and 19—Arms-Definition.

The definition of "Arms" in the Indian Arms Act is not exhaustive and the true meaning must be arrived at by consideration of the circumstances in each case. Neither the length, breadth nor the form of the blade of a weapon, nor the handle, affords any certain test of its classification as "Arms." Whatever can be used as an instrument of attack or defence, and is not an ordinary implement of domestic purposes, falls within the purview of the Act. 34 C. 749 appr. (*Scott Smith and Broadway, JJs.*) **EMPEROR v. RALLA SINGH.** 32 F. R. Cr. 1918=48 I. C. 436.

## —S. 19 (f)—Minor—Possession of arms without licence—Offence.

A minor who has in his custody and under his control arms without a licence is guilty of an offence under S. 19 (f) of the Arms Act, there being nothing in the Act to prevent a minor being guilty of an offence thereunder. (*Barerjee and Tudball, JJs.*) **EMPEROR v. GHULAM HUSAIN.** 40 All. 420=16 A. L. J. 323=44 I. C. 975=19 Cr. L. J. 447.

## —Ss. 19 (f) and 30.—Power of search—Possession of unlicensed arms—Search by Sub-Inspector without warrant—Officer in charge of reporting station—Legality.

Under S. 30 of the Indian Arms Act, the power of search in respect of an offence punishable under clause (f) of S. 19 of the Act is to be made in the presence of some officer especially appointed by name or in virtue of his office by the Local Government in this behalf, and the provisions of Chap. VII of the Act did not render illegal search made by an officer-in-charge of a reporting station without a warrant from a Magistrate.

A Sub-Inspector of Police who was in charge of a reporting station searched the house of the accused reported as being in possession of arms without a licence. The said officer had not a licence from a Magistrate, but he was specially empowered by the Local Government in virtue of his office to make such a search. *Held*, that the search was not illegal. (*Piggott, J.*) **BABU RAM v. EMPEROR.** 16 A. L. J. 721=47 9. C. 801=19 Cr. L. J. 949.

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—S. 25—Magistrate acting under, whether in executive or judicial capacity. See CR. P. CODE S. 190 (1), (a) (6) AND (7). 35 M. L. J. 686.

**ARREST**—Under warrant not signed by any body—Escape from custody, whether illegal. See PENAL CODE, Ss. 324 AND 353.

(1918) Pat. 285.

**ASSAM LAND AND REVENUE REGULATION (I OF 1886) S. 94—Bengal Estates Partition Act (VIII of 1873), S. 112—Imperfect partition, if can be effected—Mode of partition—Jurisdiction of Civil Court.**

In considering an application for partition of a whole estate questions as to the manner in which the partition is to be carried out must be raised before the Revenue authority.

Certain lands in mouza D were common to taluk A and five other taluks which had also lands and shares in other mouzas in which taluk A had no share in common with the other five estates or taluks or any one of them.

*Held*, that the owner of a more than 8 annas share in taluk A was entitled under S. 97 of the Assam Land and Revenue Authorities, 1886 to claim from the Revenue Authorities an imperfect partition of taluk A as between himself and his co-sharers and obtain the separation and allotment to taluk A of its proportionate share in lands common to that estate and the other estates. The consent of the recorded co-sharers holding in the aggregate more than a half share in the six estates or in the lands common to those estates in mouza D is not necessary. (*Temon and Richardson, JJs.*) **BROJENDRA KISHORE ROY CHOWDHURY v. KALIKUMAR CHOWDHURY.** 46 I. C. 967.

**ASSESSMENT**—Lease of certain lands for crushing salt. Principles of. See RATING. 20 Bom. L. R. 639.

**ASSIGNMENT**—Consideration—Absence of—Rights of assignee of decree to execute. See C. P. CODE, O. 21, R. 16.

(1918) M. W. N. 507.

—Consideration for—Stranger if can question—Assignor denying validity of assignment—Effect of.

As a general rule where an assignee sues for his assignment and proves it, an adverse party cannot take the objection that there was no consideration for the assignment, but the rule is not invariable and does not apply where the transferor being a party to the litigation, does not admit the assignment but on the contrary pleads that it is fictitious and without consideration. (*Know, J.*) **MANGAL PRASAD v. NABI BAKSH.** 43 I. C. 74.

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— Equitable — What constitutes — Authority to collect amount of decree and pay himself out of collections. See *EQUITABLE ASSIGNMENT*. 43 I. C. 335.

— Of property pending suit—Suit decided against assignor—No appeal—Assignee not made a party to suit—Right of assignee to appeal and to continue suit. See C. P. CODE, SS. 143 AND 622, R. 10. 41 Mad 510.

**ATTACHMENT**—Before judgment—Applicability of, O. 21, R. 63. to cases of See C. P. CODE, O. 21, R. 23. 35 M. L. J. 231 (F. B.)

— Before judgment—Cessation of, with dismissal of suit—No revival when decree reversed on appeal. See C. P. CODE, O. 38 RR. 9 AND 11. 44 I. C. 229.

— Before judgment—Dismissal of suit—Omission of court to withdraw attachment—Suit decreed by appellate court—Effect. See C. P. CODE, O. 38, RR. 9 AND 11. 22 C. W. N. 927.

— Before judgment—Object and effect of—Attachment by consent of non-transferable occupancy holding—Objection to sale in execution—Maintainability—Estoppel. See *ESTOPPEL*. 5 Pat. L. W. 135.

— Before judgment—Small Cause Court, jurisdiction of—Attachment of immovable property—Validity. See 14 N. L. R. 1.

— Before judgment—What is—Order before judgment for attachment—Actual attachment after judgment—Validity subsequent dismissal of execution application—Effect on attachment. See C. P. CODE, O. 33, RR. 5 TO 11. (1913) M. W. N. 606.

— Revival of—Sale pursuant to—Sale set aside for reason other than decree-holder's default—Effect on prior attachment—Fresh attachment—Necessity.

Where an execution sale is set aside for any reason other than default on the part of the decree-holder the attachment which had been obtained prior to the first sale revives to support a subsequent application for execution, and no fresh attachment is necessary. 20 W. R. 20, 21 W. R. 135, 31 All. 490, foll. 13 C. L. J. 240, 35 I. C. 280 ref. (*Chapman and Atkinson, J.J.*) *MAHABARAT DUTTA v. SURJA KANTA DE*. 3 Pat. L. J. 310—(1918) Pat 343—45 I. C. 589.

**ATTESTATION**—Mortgage—Execution—attestation before execution—Effect. See T. P. ACT, S. 59. (1913) M. W. N. 853.

**BAILOR AND BAILEE**—Negligence—Onus of proof on pff.—Duty of bailee to produce all

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available evidence See *CONTRACT ACT*, SS. 151 AND 152. 27 C. L. J. 615.

**BENAMI**—Evidence of—Possession—Title-deeds.

Where a purchaser is neither in possession of the property nor of the sale-deed, the purchase is in all probability a *benami* purchase. (*Rea and Coutts J. J.*) *BOBU BISHENDAYAB SINGH v. JAISERI KUER*. (1918) Pat. 323.

— Test of Hindu Law—Father—Purchase of property in name of son—Presumption as to ownership—Transfer by son—Transferee having notice of nature of son's title—Effect—Estoppel—Property purchased by father in the name of his son—Sale by son to a third party—Effect—When vendee has indications of father's title.

Where a father, whether Hindu or Muhammadan, purchases a property in the name of one of his sons the ordinary presumption is that it is a *benami* transaction and not that it is an advancement in favour of that son. 6 M. I. A. 53 (P.C.), 13 M. I. A. 232 (P.C.) and 13 W. R. I (P.C.), ref.

When it was found,

(1) that the father supplied the purchase money of the site; (2) that he was in possession of the title-deed and has produced it; (3) that he was in possession of the property; (4) that he erected a building on it at his own expense; (5) that he received rent for part of the building Held that the sale was really *benami*

Held further, that as the vendee from the son had various indications which should have led him to make inquiries into his vendor's title and received moreover direct notice of the father's claim at the time when the deed was presented for registration, he could not urge that the father was estopped by his conduct from setting up a title as against him. 22 Cal. 909 (919) (P.C.), ref. (*Scott Smith and Shadi Lal, J.J.*) *GHULAM DASTGIR v. TEJA SINGH*. 73 P. R. 1918=159 P. W. R. 1918=47 I. C. 367.

— Test of—Source of purchase money—Possession of real owner—Constructive notice of title.

The source of the purchase money is a very important factor in determining the question whether a transaction is *benami* or not. Actual possession or receipt of rent of the property is another criterion. When the real owner has all along remained in possession and enjoyment of the property, that circumstance is constructive notice of the *benami* nature of the transaction. (*Shadi Lal, J.*) *RAM SARUP v. MAYA SHANKAR*. 46 P. R. 1918=45 P. L. R. 1918=33 P. W. R. 1918=43 I. C. 556.

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**BENAMIDAR**—Execution of decree by benamidar assignee. See C. P. CODE, O. 21, R. 16. 7 L. W. 201.

—*Proceedings and decree against—Real owner when bound—Delivery of symbolical possession—Effect of, on title of real owner.*

Although a decree against a benamidar may bind the beneficiary symbolical possession delivered in execution thereof is of no avail except against the actual party to the suit or the proceeding in execution, and the beneficiary who was no party to either is not affected by it.

*Quere.*—Whether when a money decree has been obtained against the benamidar, the beneficiary is necessarily bound by the sale of the property held in benami in execution of the decree (*Richardson and Beachcroft, JJ.*) SATISH CHANDRA SARKAR v. BROJOGOPAL DUTTA. 22 C. W. N. 807=48 I. C. 104.

—*Right of suit—Extent of.*

The observations of the Privy Council in some cases that the benamidar has no title must be confined to cases where the benamidar sets up a title as against the real owner so as not to allow a third person to delay or evade performing his own undoubted obligations to the real owner of a right or to the benamidar who is suing to enforce the right, even where the suit is in ejectment by the benamidar for possession of immovable property. (*Sadasiva Aiyar and Bakewell, JJ.*) CHELLAM CHETTI v. SRENI CHETTI. (1918) M. W. N. 225=7 L. W. 201=43 I. C. 801.

—*Right to sue—Benami mortgagee, if can sue on mortgage.*

A benami mortgagee can sue on the mortgage though the beneficial owner is not added as a party to the suit. 19 C. L. J. 193; 37 A. 113 foll. (*Spencer and Seshagiri Aiyar JJ.*) SINGA PILLAI v. AYYANERI GOVINDA REDDI. 41 Mad. 435=(1918) M. W. N. 107=43 I. C. 905

[This point is now the subject of a reference to the Full Bench—See also the recent decision of the P. C. in CHOUDHRI GUR NARAIN v. SHEO LAL SINGH. 36 M. L. J. 68.]

—*Right to sue for possession.*

A benamidar is not competent to maintain a suit for possession of immovable property 21 C. W. N. 280; 6 M. I. A. 53; 13 M. I. A. 395; 22 B. 820; 18 A. 69; 43 C. 504 Ref. (*Imam, J.*) GUYAN DHANGER v. GONDER. 45 I. C. 794.

**BENEFIT SOCIETY**—Co-operative Benefit Society—Subscriber's claim for refund of his subscriptions—Maintainability—Conditions

Plaintiff sued for a refund of his subscriptions to the "Committee" managed by defendant on the ground that the latter owing to certain family squabbles refused to accept any more subscriptions from him. It appeared

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that the "Committee" was a sort of Co-operative Benefit Society consisting of 27 members. The *modus operandi* was that each member paid a monthly subscription and that the total subscriptions for each month were collected in a single "pool" and were made over to each subscribing member in turn until all the members had taken it once when the cycle began again.

*Held*, that if it was plaintiff who refused to continue his subscription, plaintiff must prove that he has a right to a refund and if so when, but if the defendant is responsible for the breach, the burden of proving that no refund is claimable lies on her. (*Le Rossignol, J.*) GHULAM HAIDAR v. MUSSAMMAT BHAGAN. 77 P. R. 1918=157 P. W. R. 1918=47 I. C. 415.

**BENGAL AGRA AND ASSAM CIVIL COURTS ACT, (XII of 1887) S. 21 (4)**—Additional Sessions and Subordinate Judge of Jaunpur—Appeals from Court of Munsiff Court of Jurisdiction subordinate to him—Cr. P. Code, S. 195—Whether can entertain application for sanction. See (1917) DIG. COL. 45; EMPEROR v. JAGRUP SHUKUL. 40 All. 21=15 A. L. J. 844=42 I. C. 815=19 Cr. L. J. 4.

**BENGAL CESS ACT, (IX of 1880) S. 20**—Tenant's land entered in road cess return as zerait—No dishonest intention—Whether a suit for rent barred. See (1917) DIG. COL. 46; JOGESWAR SINGH v. RAMOO SINGH. 2 Pat. L. W. 42=43 I. C. 497.

—**S. 20**—Tenant's land entered in part 1 Sch. A—Effect on maintainability of suit for rent—Malik's land. See (1917) DIG. COL. 45; RAM GOBIND CHOWDHRI v. THAKUR DAYAL JHA. 2 Pat. L. J. 558=2 Pat. L. W. 41=43 I. C. 501.

—**S. 20 (b)**—Applicability—Suit for recovery of money value of share of landlord in respect of produce of Bhaol Batal Land. See (1917) DIG. COL. 49 UPENDRA LAL MISSEER v. MOTI THAKUR. (1918) Pat. 166=2 Pat. L. J. 517=2 Pat. L. W. 35=41 I. C. 62.

—**Ss 54 and 56**—Right to recover road cess on basis of re-valuation—No notice under S. 54.

In a suit to recover arrears of road cess payable under the re-valuation of 1907 in respect of certain rent-free lands held by the defts. within the plf's tenure:

*Held*, that the notice required by S. 54 not having been published by the plf. the defts. were not bound to pay the cesses upon the basis of the re-valuation of 1907. (*Richardson and Beachcroft, JJ.*) BARANASHIBASI MUKERJEE v. HARI KRISHNA SHAHA. 441 I. C. 32.

**BENG. COURT OF WARDS ACT S. 6.**

**BENGAL COURT OF WARDS ACT (IX OF 1879).** Ss. 6 (c) and 51—*Suit against disqualified proprietor under Court of Wards—Manager of Court of Wards if necessary party.*

Where a Court of Wards is in possession of the property of a disqualified proprietor under S. 6 (c) of the Bengal Courts of Wards Act, a suit brought against such a proprietor based upon contract may proceed without causing the debt to be represented by the Manager of the Court of Wards. Also a suit for a declaration of title to or for recovery of possession of property which is not in the actual possession and disposal of the Court of Wards under Ss. 25 and 5 of the Act, may proceed against the proprietor alone (*Mullick and Thornhill, JJ.*; *MAHOMED ABUS SALEM v. KAMALMUKHI* 5 Pat. L. W. 92=46 I. C. 316

—S 54—Notice in a civil suit to be served on whom—Irregular service of notice not valid. See (1917) DIG. COL 47; *JANKI KUER v. SRI RAMANAUJEAR*. 3 Pat. L. W. 218=45 I. C. 404.

—S 55—*Manager of Court of Wards—Power to institute suit without Court's sanction—Suit if can proceed without Court's orders.*

The law gives the Manager of a Court of Wards, power to file a suit in anticipation of sanction when the suit would otherwise be barred by limitation. Such a course should be adopted where there is very little time left to get the authority of the Court of Wards.

Though a plaint may be filed in order to prevent a suit from being barred by limitation the suit shall not be proceeded with except under the order of the Court. If a suit be proceeded with without such order, all proceedings taken subsequently to the filing of the plaint, being without jurisdiction, should be set aside.

In the circumstances of the case, the land being chur land, the Manager of the Court of Wards was held justified in instituting the suit without the authority of the Court of Wards, although there was some time between the date of the institution of the suit and the date on which the limitation would expire from the time when the cause of action arose (*N. R. Chatterjee and Richardson, JJ.*) *DIGENDRA CHANDRA SEN v. NBITYA GOPAL BISWAS*. 22 C. W. N. 419=27 C. L. J. 125=43 I. C. 184.

**BENGAL ESTATES PARTITION ACT, (III OF 1876)** S 119—B. T. Act (VII of 1876)—Partition commenced under—Suit for declaration of title to an occupancy holding—Onus of proving partition under new Act, See (1917) DIG. COL. 50; *BALDEO SAHAI v. BRAJNANDAN SAHAY*. (1913) Pat 164=3 Pat. L. W. 266=43 I. C. 359.

—*Partition by Collector—Allotment of complete holdings as far as possible.*

**BENG. LAND. AND TEN. PRO. ACT. S. 9.**

In effecting a partition of an Estate the Deputy Collector allots complete holdings to the various shares, he separates a holding only when it is absolutely necessary to do so. (*Sharfuddin and Roe, JJ.*) *RAI BABU GOLAB CHAND SAHEB v. SYED SAIKA HUSSAIN*. 5 Pat. L. W. 6=36 I. C. 513.

**BENGAL EXCISE ACT (V of 1909)** Ss. 46 and 90—Amending Act VII of 1914, S. 2, cl. 14—Medicinal preparation containing alcohol—Manufacture and sale of. See (1917) DIG. COL. 51 *GANESH CHANDRA SIKDAR v. EMPEROR*. 45 Cal. 82=22 C. W. N. 328=26 C. L. J. 342=30 I. C. 740.

—Ss. 46 AND 83 (a)—*Complaint of offence under S. 46 by police officer below the Station House officer in rank—Jurisdiction of Magistrate to take cognizance of the offence—Criminal Pro. Code. Ss. 530 (p) and 537.*

On the report of a junior officer of the police below the rank of an officer in charge of a Police Station, a Magistrate took cognizance of a case under S. 46 of the Bengal Excise Act and convicted the offender.

*Held*, that the Magistrate's proceedings were void under clause (p) of S. 530 of the Cr. P. Code inasmuch as he was debarred by S. 83 (a) of the Bengal Excise Act from taking cognizance of the case on such a report or complaint and that the defect in the proceedings was not a mere irregularity to which S. 537 of the Cr. P. Code applied. (*Richardson and Huda, JJ.*) *JALALUDDIN PESHAWARI v. EMPEROR*. 47 I. C. 813=19 Cr. L. J. 961.

**BENGAL LANDLORD AND TENANT PROCEDURE ACT. (VIII of 1889)** S 52.—*Transferee of a portion of non-transferable holding, whether can make deposit under.*

Where in execution of a decree for rent the landlord decree-holder proposed to eject the tenant of a non-transferable holding under the provisions of S. 52 of the B. T. Act and to avoid the ejectment, a third person claiming to be a transferee from the tenant sought to make the deposit provided for by the section:

*Held*, that having regard to the principles laid down in 18 C. W. N. 971 (F. B.) the transferee could make the deposit. (*Tennon and Cuming, JJ.*) *KALI KISHORE DAS v. GOPAL RAM SHAHA*. 23 C. W. N. 132.

—Ss. 59, 64 and 65—*Sale of non-transferable holding in execution of a decree for rent, if permissible in Sylhet Dt.—Bengal Ten. Act, if applicable.*

The respondents who were Sannas co-sharer landlords of a jote in the District of Sylhet, obtained a decree for rent in a suit in which the other co-sharer landlords were parties, and applied for execution of the decree by sale of the non-transferable jote of the judgment-debtors. The lower Courts treated the case as

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one falling under the provisions of the B. T. Act :

*Held*, that the case was governed by the provisions of Bengal Act (VIII of 1869) and not the B. T. Act. As the holding was not transferable, the decree-holder cannot obtain satisfaction of his decree by the attachment and sale of the non-transferable holding of the judgment-debtors under the provisions of S. 59 or S. 64 of Bengal Act VIII of 1869. (*Teunon and Newbould, JJ.*) **ALOK CHANDRA PAL v JALURAM NAMASUT**

22 C. W. N. 563=45 I. C. 762.

**BENGAL LAND REGISTRATION ACT (VII OF 1878) Ss. 73 and 81**—*Transferee of usufructuary mortgage from proprietors who had previously granted a patni-lease to tenants—Right to recover rent in excess of share registered—Rent and malikana distinction between—Mortgage if comes under S. 81.*

In a suit by the plff., the transferee of a usufructuary mortgage from the proprietor who had previously granted a patni-lease to the deft. tenant, for arrears of rent the tenant contended that the plff. could not recover rent in excess of the share for which he had registered his name.

*Held*, that the case fell within S. 73 of the Land Registration Act for although the sum recoverable was described in the lease as "malikana" it was in essence "rent" as by summary procedure prescribed in Putni Regulation VIII of 1819.

The plff. though a mortgagee within the meaning of S. 73, was entitled to the benefit of S. 81 of the Land Registration Act, there being no written contract between him and the tenants. (*Mookerjee and Beachcroft, JJ.*) **ISWAR CHANDRA BERA v. KALI CHARAN SANTRA.**

27 C. L. J. 474=43 I. C. 726.

## —S. 81—Scope of.

The written contract mentioned in S. 81 of the Land Registration Act refers to a contract between the person who claims rent as proprietor and the person who is bound to pay rent to him under S. 73 of the Act. (*Mookerjee and Beachcroft, JJ.*) **ISWAR CHANDRA BERA v. KALI CHARAN SANTRA.**

27 C. L. J. 474=43 I. C. 726.

**BENGAL LAND REVENUE SALES ACT (XI OF 1859) Ss. 6 and 7**—*Notices signed by Sub-Deputy Collector, does not vitiate sale.*

The fact that notices under Ss. 6 and 7 of the Act were signed not by the Collector or other officer authorised to hold sales but by a Sub-Deputy Collector on behalf of the Collector does not vitiate the sale. (*Woodroffe, Chitty and Huda, JJ.*) **AMRITA LAL ROY v THE SECRETARY OF STATE FOR INDIA.**

22 C. W. N. 769=28 C. L. J. 51=46 I. C. 447

## BENG. LAND REV. SALES ACT S. 37.

—Ss. 31. and 53—*Revenue sale—Prior encumbrances on property sold—Effect on—Right to sale proceeds—Purchase by recorded proprietor himself—Effect.*

S. 31 of the Bengal Land Revenue Sales Act XI of 1859 does not transfer the charges to which property sold at a revenue sale is subject from the property to the sale proceeds: but as the sale by the Government conveys a title free from encumbrances to the purchaser the mortgagees of the property sold are entitled to claim the same as creditors under the Section and the Court will undoubtedly direct that such claims, in the order of priority, should be satisfied out of the sums in court.

In a case in which the property sold at a revenue sale is purchased by the recorded proprietor himself, the property is acquired under S. 53 of the Act, subject to all the encumbrances existing at the time of the sale which can therefore be enforced against the property. As regards the sale-proceeds however in such a case the recorded proprietor has all the rights given by S. 31 of the Act. (*Lord Buckmaster.*) **TARINI CHARAN SARKAR v. BISHUNCHUND** 34 M. L. J. 361=23 M. L. T.

147=7 L. W. 345=27 C. L. J. 303=

22 C. W. N. 505=(1913) M. W. N. 295=

4 Pat. L. W. 249=16 A. L. J. 271=

20 Bom. L. R. 553=

44 I. C. 304 (P. C.)

—Ss. 33 and 6—*Annulment of sale—Irregularity—Publication in vernacular Gazette, if essential.*

Omission to notify in the vernacular Government Gazette the sale of an estate, the Government revenue of which exceeds Rs. 500 is not an illegality which *per se* vitiates the sale under S. 33 of Act XI of 1859.

*Semle.*—It is a sufficient compliance with para. 2 of S. 6 of the Act if the sale is notified in the Official Gazette published at Calcutta. (*Lord Shaw.*) **SHEIKH SHARFUDDIN v. SAMANTHA RADHA CHARAN DAS.** 35 M. L. J. 644=

16 A. L. J. 913=47 I. C. 995=

43 I. A. 205. (P. C.)

On appeal from.

20 I. C. 423.

—S. 33—*Revenue sale—Suit to set aside—Plff. if can urge grounds not raised before Commissioner*

In a suit to set aside a revenue sale the plff. cannot urge any ground which he did not take in his appeal to the Commissioner under S. 2 of the Bengal Land Revenue Sales Act. (*N. R. Chatterjee and Newbould, JJ.*) **SUKLAL BANIKYA v. BIDRU MINDHU.** 47 I. C. 422.

—S. 37—*Proviso—"Protected interest"—Occupancy raiyat obtaining grant of fixed rent—Occupancy raiyat at fixed rent under old law.*

## BENG. LAND REVENUE SALES ACT S. 37. BENG. MUNICIPAL ACT S. 57.

A person who has already acquired an occupancy right does not by obtaining a grant of fixed rent lose the occupancy right. Such a person is protected from ejectment under S. 37 of the Revenue Sale Law.

A raiyat who has acquired a right of occupancy before the passing of the B. T. Act can retain the privileges of an occupancy raiyat although the rent has been fixed in perpetuity by reason of which he becomes a raiyat holding at fixed rate according to the classification of raiyats in the B. T. Act. (*N. R. Chatterjee and Richardson, JJ.*) **LAKHI CHARAN SAHA v. HAMID ALI.**

27 C. L. J. 284=44 I. C. 543.

—S. 37 Proviso—"Protected interest"—*Settled raiyat holding land in the same village.*

A settled raiyat holding land which was sold for arrears of revenue, in the same village as the village of which he is a settled raiyat under the terms of a permanent lease at a fixed rate of rent, has a protected interest within the proviso to S. 37 of the Revenue Sale Law. (*Fletcher and Richardson, JJ.*) **LAKHI CHARAN SAHA v. MOKAR ALI.**

27 C. L. J. 293=45 I. C. 25.

—S. 37 Proviso—*Raiyats holding at fixed rates, if have protected interest.*

Raiyats holding at fixed rates are persons who have a protected interest within the meaning of the proviso to S. 37 of the Bengal Revenue Sales Act. (*Fletcher and Smither, JJ.*) **KALI PRASAD CHATTERJI v. RASH BEHARI LAIK.**

46 I. C. 254.

—S. 52—Revenue—*Sale of permanent tenure—Howla, if affected.*

Within a resumed *khas mahal* there was a *nimosat taluk* of which the last settlement took place in 1908. Under this *nimosat taluka* there had existed a *howla* from 1888. The *nimosat taluk* was sold in 1912 at a revenue sale under Act XI of 1859.

Held, that the sale of the *nimosat taluka* did not affect the *howla* which had been in existence from before the last settlement of the *nimosat taluka*. (*Chitty and Smither, JJ.*) **SRI SIDHDHAR GHOSE v. KEDARESWAR BISWAS**

45 I. C. 892

—S. 53—Proprietor holding *benami*—*Position of—Adverse possession, if an encumbrance.*

If a proprietor of an estate holding *benami* in the name of another makes default in the payment of revenue and purchases the estate himself when it is sold, he is in the position of a proprietor who has purchased his own estate and the purchase is subject to all the encumbrances existing at the time of the sale. Adverse possession is an encumbrance within the meaning of S. 53 of the Land Revenue Sales Act, and the proprietor of an estate who

has lost some lands of his estate by adverse possession for the statutory period cannot by falling into arrears of revenue and purchasing the estate at this revenue sale get rid of such adverse possession. (*N. R. Chatterjee and Richardson, JJ.*) **HAMDU MIA v. RAMDHAN DHAR.**

43 I. C. 461.

—S. 58—Revenue sale—*Did started by Collector's peon at one notice—Sale at bids falling short of arrears—Collector if legally buy property for the highest bid—Irregularity or illegality.*

Where a revenue-paying estate in arrears having been put up for sale, the peon, a Government official, started the bidding according to the custom as a matter of form by bidding Re 1, and thereafter, other people having bid for the property, the highest bid came up to Rs. 58 which being less than the amount in arrears, the Collector purporting to act under S. 58 of Act XI of 1859 purchased the property for the highest amount bid.

Held (by the majority), that this was a different case from 31 Cal. 1036 and the purchase by the Collector was not in contravention of the letter or the spirit of S. 58 of the Revenue Sales Act (*Woodroffe and Chitty, JJ.*) **AMRITA LAL ROY v. SECRETARY OF STATE.**

22 C. W. N. 769=28 C. L. J. 51=46 I. C. 447.

BENGAL MUNICIPAL ACT (III OF 1884) Ss. 6 (4), 204 and 218—"Patit" land adjoining house but not shown as being enjoyed as part of it, if "house"—Obstruction in front of patit land if punishable.

In the absence of a definite finding that a piece of a *patit* land or orchard adjoining the accused's house was held and enjoyed along with the house or as part of the premises heap of broken pottery stacked on the road and in front of the *patit* land or orchard could not be regarded as an obstruction placed against or in front of the accused's house, within the meaning of S. 204 of the Bengal Municipal Act (*Richardson and Beauchroft, JJ.*) **BHUSAN CHANDRA DUTTA v. CHAIRMAN OF KOTE CHANDPUR MUNICIPALITY.**

22 C. W. N. 376=46 I. C. 298=19 Cr. L. J. 714.

—S. 57—Person holding office of profit—Teacher in a Municipal School—Not eligible for election as a Commissioner—Election Rules, R. 13.

A person who is disqualified under S. 57 of the Bengal Municipal Act is *ipso facto* disqualified for election as a Municipal Commissioner.

A person holding a teachership in a Municipal School is not qualified to be elected as a Commissioner as he holds an office of profit under the Municipality.

Rule 13 of the Election rules means that only those persons should be included in the list of candidates who are qualified to be

## BENG. MUNICIPAL ACT S. 202.

elcted (*Chitly and Wolmsley, JJ.*) LAKSHMI KANTA DE v. THE CHAIRMAN OF THE NAIHATI MUNICIPALITY. 47 I. C. 169.

—Ss. 202, 204 and 233—*Encroachment on street—Erection of structures over portion encroached upon—Action under Ss. 202 and 204, if justifiable.*

A person who has encroached on the surface of a Municipal street by a projection without objection on the part of the municipality, has no right to run up the projection to any height he likes, even though he does not thereby make any further encroachment in breach over the street (*Fletcher and Paxton, JJ.*) BAKHAL CHANDRA DE v. CHAIRMAN OF THE SURI MUNICIPALITY. 47 I. C. 308.

—Ss. 204 and 213—*Patil land adjoining house but not shown as being enjoyed as part of it, if house—Obstruction in front of patil land if punishable. See BENGAL MUNICIPAL ACT, Ss. 6 (4), 204 AND 213.*

22 C. W. N. 376.

—S. 217—*Encroaching on a public road—Proof of.*

Where the petitioner was convicted under S. 217 of the Bengal Municipal Act of encroaching on a public road, upon a finding that the road in question, which was given a name by the Municipality, was made over the petitioner's land to a trenching ground and so used for some time and was subsequently given up with the closing of the trenching ground.

*Held*, that this alone was not sufficient for the conclusion that the road was a public one. (*Stephen and Carnduff, JJ.*) NANDO LAL NEOGY v. BEJOY CHANDRA CHATTERJEA.

22 C. W. N. 599=45 I. C. 518=  
19 Cr. L. J. 742

—Ss. 240, 241 and 242 A—*Construction of platform on open space between house and drain—"Erection of building"—Gaya Municipal Rule 1—If, ultra vires—Statutory rules object and construction of—Notice of removal or demolition under S. 241 (3)—Remedy of party aggrieved—Omission by appeal to Commissioners, effect of—Suit for declaration and injunction against Municipality, maintainability of. See (1917) DIG. COL. 57; CHAIRMAN OF GAYA MUNICIPALITY v. SHAM LAL GUPTA.*

3 Pat. L. J. 33=3 Pat. L. W. 252=  
44 I. C. 713.

—S. 250—*Ghee not for sale if can be seized under—Ghee in the custody of bailee with consent of owner—Return of, to bailee*

Ghee belonging to R was made over by him to an association whose object was to prevent sale of adulterated ghee, for examination. Subsequently R made an application to the

## BENG. PRIVATE FISHERIES ACT S. 3.

Chairman of the Municipality asking that the ghee might be removed to the custody of the Municipality and might be so disposed of that it might not be used for the human consumption if found unfit on chemical examination. The Chairman forwarded the letter to a Magistrate with a request that action might be taken and the Magistrate seized the ghee under S. 250 of the Bengal Municipal Act with the consent of the Secretary of the Association and R.

*Held*, that the association was in possession of the ghee, as a bailee of R and when both the associations and R had parted with the possession of the ghee, the latter could not claim it.

The ghee at the time it was seized not being for sale as fit for human consumption, it could not be seized under S. 250 of the Bengal Municipal Act (*Jwala Prasad, J.*) RAM CHAND MAREHATIA v. RAM PRATAB.

4 Pat. L. W. 62=43 I. C. 756.  
=19 Cr. L. J. 220.

BENGAL N. W. P. AND ASSAM CIVIL COURTS ACT, (XII OF 1987) S. 38—*Order of Dt. Judge—Administrative and not a judicial act—Not open to revision—C. P. Code, S. 115—Govt. of India Act, S. 107. See (1917) DIG. COL. 10; ATUL CHANDRA GUHA IN RE.*

27 C. L. J. 477=42 I. C. 619.

BENGAL PATNI TALUK REGULATION (VIII OF 1819), S. 14—*Money not voluntarily paid to prevent Patni Sale—Suit to recover on the ground of intended sale being illegal if maintainable. See CHOTA NAGPUR ENCUMBERED ESTATES ACT, 1876. 35 M. L. J. 347*  
=22 C. W. N. 1009 (P. C.)

—S. 14—*Payment of rent on receipt of notice under—Suit to recover, if maintainable—Not a voluntary payment.*

Having regard to the nature of the procedure provided by S. 14 of the Patni Regulation a payment of rent by patnidar to his zemindar upon receipt of the notice under that section that the tenure would be sold to realize the rent due does not fall within the rule that the money paid under pressure of legal proceedings is irrecoverable. (*Viscount Haldane*.) RAJAH OF PACHETE v. KUMUD NATH CHATTERJAI.

35 M. L. J. 347=24 M. L. T. 66=

22 C. W. N. 1009=28 C. L. J. 165=

5 Pat. L. W. 64=(1918) M. W. N. 441=

8 L. W. 186=20 Bom. L. R. 856=

16 A. L. J. 569=45 I. C. 827=

45 I. A. 103.(P.C.)

BENGAL PRIVATE FISHERIES ACT (II OF 1889), S. 3—*Conviction under—Boundary of fishery in dispute and bona fides of accused, not determined—Conviction bad.*

The petitioner, a fisherman, was convicted under S. 3 of the Private Fisheries Act for having fished in a river. It was in dispute

## BENG. REGULATION (1801) S. 8.

whether the river appertained to a Khas Mahal or to a Mouzah belonging to the zamindars under the orders of whose ijaradars the petitioner acted. The complainant the ijaradar under the Government produced a Government purchase or extract from a record of-rights prepared under the B. T. Act in evidence.

*Held*, that in the absence of a determination of the true boundary of the fishery and the *bona fides* of the petitioner, the conviction was not proper.

The extract from the record of-rights at most raised a rebuttable presumption in favour of the complainant. (*Teunon and Huda, JJ.*)  
RADHANATH KAIBARTA v. EMPEROR.

22 C. W. N. 742—46 I. C. 689—  
19 Cr. L. J. 769.

**BENGAL REGULATION (1 OF 1801) Ss 8, and 14—Time within which separation to be made—Actual produce in S. 8, meaning of Regulation 8 of 1798, independent Taluk what is.**

That the proprietors of Talook Balaenti, which was established by a decree of the Sudder Dewany Adaulat of 1805 to be an independent talook, having duly applied for the separation of the talook in accordance with the provisions of Regulation 1 of 1801 within a year from the passing of the Act, had not been wanting in diligence in seeking the relief to which they were clearly entitled and that the delay of over 100 years that had occurred was due either to the opposition of the Zamindar or the action of the Revenue authorities, and that the objections of the Zamindar in their present suit to the separation being effected by the Revenue authorities were purely vexatious and designed to prolong litigation.

The "actual produce" on which the assessment of revenue under S. 8 of Regn 1 of 1801 was to be based was "the actual produce" at the time when the proceedings were instituted for the separation of the talook. (*Mr. Ameer Ali.*)  
RANI HEMANTA KUMARI DEBI v. MAHARAJAH JAGADINDRA NATH ROY BAHADUR.  
23 C. W. N. 149 (P. C.)

———(XI of 1825)—Churs forming in non-navigable rivers flowing through or by the side of a permanently settled estate—If resumable and assessable with revenue—Riparian owners right to the middle of the stream—Exclusive right of fishery—Evidence of title in the soil of the river bed—Damodar if a navigable river—Test of navigability.

The test in this country as to whether a river is navigable is whether it allows of the passage of boats at all times of the year. 15 W. R. 210 foll.

The river Damodar was not a navigable river at the date of the Permanent Settlement.

At the date of the Permanent Settlement, the bed of the river Damodar in so far as it

## BENG REGULATION (XI 1825) S. 4.

flowed through the chakla or the Zemindary of Burdwan formed a portion of the estate permanently settled with the predecessor of the Zemindar of Burdwan.

Although an exclusive right of fishery does not of itself pass the right to the soil in the bed of the river, the terms of the grant in this case, being unknown or uncertain, the fact that the grantee had a several right of fishery in the river was held to support his claim to the soil in its bed.

Churs forming in non-navigable rivers flowing through permanently settled estates and forming part thereof are not resumable under Reg. XI of 1825. Before there can be a further assessment of Government Revenue, there must be a "gain" from the public domain.

The right to the soil of a river flowing within the estates of different proprietors belongs to the riparian owners *ad medium filum aquas*.

Where property is bounded by a road or a river, the boundary even if given as the road or the river is the middle of the road or the river as the case may be.

Therefore, a permanently settled estate on the bank of a non-navigable river included half the bed of the river and churs forming on this portion are not assessable with revenue under Reg. XI of 1825, the assessment of the Government revenue on the riparian mouzas having been imposed not only on the mouzas but on the adjoining half of the river bed also. (*Fletcher and Huda, JJ.*) THE SECRETARY OF STATE FOR INDIA v. BIJOY CHAND MAHATAP BAHADUR.  
22 C. W. N. 872.

———S.—4 Accretion—Onus of proving nature of accretion on plaintiff.

In a suit to recover khas possession of certain plots of land as being contiguous accretions to other plots belonging to the plff., the plff. must establish the nature of the accretion. (*Fletcher and Huda, JJ.*) MAHOMED ASHRAF v. UMED ALI SARKAR.  
46 I. C. 555.

———S. 4—Applicability—Effect—Alluvial land—Accretions—Prof—Onus—Quantum.

Where a party can show that *chur* land is in fact reformation *in situ* of land identifiable as his own he is entitled to that land though it may have been for a period submerged. It is not sufficient for such a claimant to show that the accretion is *in situ* of a river bed which has been settled with him. It is necessary for him to show that the land claimed had previous existence and was reformed.

S. 4 of the Bengal Alluvion and Diluvion Regulation, 1825, as a whole, was not intended to apply to land which has been previously in existence as the property of individuals. S. 5 was intended to apply to such land. 13 M. I. A. 467, 4 M. I. A. 403, 3 Cal. 796, 27 All. 655, 10 I. C. 311 ref. (*Chapman and Roe, JJ.*) NANDAKISHORE JAGATI v. NIDHI BIHARA.  
3 Pat. L. J. 438—(1918) Pat. 261—  
5 Pat. L. W. 194—47 I. C. 102.

## BENGAL REGULATION. (1825) S. 4.

In a Ss. 4 and 5—Riparian right—Non-whole river, test of—Right to half the bed of land bounded by a river—Common law of land—Churs—Formation—Right of Government, to levy assessment. See RIPARIAN RIGHTS. 45 I. C. 305.

—S. 4 (1)—Alluvion—Accretion, when can be claimed by owner of adjoining land—Accretion if must be slow and imperceptible—Original boundary line ascertainable effect of.

The only requirement in S. 4 of Bengal Regulation XI of 1825 is that the accretion should be gradual, not that it should be slow and imperceptible. All accessions by gradual alluvion are treated alike irrespective of the rate of formation.

The fact that the original boundary was known or ascertainable does not render the law of accretion inapplicable. 40 Mad. 1083 foll. (Batten, O. J. C.) GOVINDRAO v. GANAPATHI. 14 N. L. R. 97=45 I. C. 425

—S. 4, Sub S. (4)—Alluvion and diluvion—Accretion to tenancy by formation of chur in river—Right to accretion.

Lands which have gradually accreted in a mokurari holding, forming a chur in a small shallow river cannot be claimed by the Zemindar as a portion of his khas patit but belong to the tenant subject to the payment of additional rent in respect thereof. (Fletcher and Huda, JJ) GOBINDA HOTA v. KRISTAPADA SINGHA BABU. 45 I. C. 929.

BENGAL TENANCY ACT, (VIII OF 1835)—Effect. See RES JUDICATA, 3 Pat. L. J. 426.

—Raiyat—Meaning of—Co-proprietary lease by some in favour of the others—Status of lessee—Acquisition of occupancy right by—Suit by others for partition—Claim for declaration that lessee had not acquired occupancy or non-occupancy right—Limitation—Bengal Tenancy Act—Sch. III, art (c)—Effect.

Where some of the co-proprietors of a village granted a lease of their share to S who was also a co-proprietor for a term of years, and certain specified lands in another village were also given out by the same lease which provided that the lessee was to make proper cultivation etc., to bear expenses of thana and Police.

Held, on a construction of the lease that the lease was of a two-fold character (1) it conferred a right upon the lessee to hold possession of certain shares in the village in the place of the lessor i. e. to collect the rents of the same and possibly to have direct cultivation of such lands as the lessee himself could cultivate, (2) it gave the right to cultivate specific lands mentioned therein which were situate in another village. The lessee was therefore a tenure-holder in respect of the share given in lease and a lessee for cultivating purpose in respect of the specific lands mentioned therein and he acquired

## BENGAL TENANCY ACT S. 5.

no rights as a raiyat in respect of unspecified lands in the share of the village leased.

S, being a tenure holder he could not acquire a right of occupancy on the lands in suit comprised in his ijara or farm while holding the village as ijaradar or farmer under clause 3 of S. 22 of the B. T. Act.

The lessors being only part proprietors of the village which has an ijmalī or joint village could not create any right in respect of any specified lands in the village to the prejudice of the other co-proprietors without their consent. The lessee could not acquire a tenancy right as against the other co-proprietors, in as much as he could not hold adversely to himself and other co-proprietors

S, being also a co-proprietor in the village when the lease was executed he could not under clause 2 of S. 22 of the B. T. Act acquire any occupancy right in the village.

S. 22, clause 2 of the B. T. Act is intended to prevent a co-proprietor from acquiring occupancy rights in the lands transferred to him, and although if the village had remained joint S. would have been allowed to remain in possession on paying rent to his co-proprietors, it could not be allowed on a partition

The suit being principally a suit for partition, the claim for a declaration that S had not acquired occupancy or non-occupancy right was ancillary to the principal relief. The suit was not barred by limitation under Sch. III, Art. 1 (a) of the B. T. Act especially when S had not acquired any occupancy or non-occupancy right therein. (Miller, C. J. and Jwala Prasad, J.) STONEWIGG v. DWARKA SINGH. 4 Pat. L. W. 428=45 I. C. 706.

—S. 5—Ejectment—Tenure-holders of raiyats—Entry in record of rights—Area of land—Use of land—Subsequent conduct of lessee—True test for construction of lease. See (1917) DIG. COL. 63; KULWANT SAHAI v. BABURAM TEWARI. 5 Pat. L. W. 311=(1917) Pat. 379=43 I. C. 941.

—S. 5.—Raiyat of tenure-holder—Test of—Intention of contracting parties—Presumption, when applicable—Tenancy, origin of, unknown

The mere fact that a tenant has sub-let his land, does not by itself establish conclusively that his status is that of a tenure-holder and not that of a raiyat. The test to be applied to determine the status of a tenant is the intention of the contracting parties.

In cases where the origin of the tenancy is unknown, the mode of user of the land may furnish a valuable clue to determine the original purpose of the tenancy and where the terms of the grant are ambiguous, evidence of subsequent conduct of the parties may also be admissible; 14 C. L. J. 83 and 15 C. W. N. 896 ref.

## BENGAL TENANCY ACT S. 5.

The presumption laid down in S. 5, sub-section (5) of the B. T. Act is not applicable when the terms of the original grant are known.

It was relied in an *amalnamah* granted on 10, June 1868, that the *mouzahs* mentioned therein were settled with the grantee for bringing them under cultivation. It also specifically directed the grantee to extirpate wild beasts by clearing jungle and raising embankment at his own expense to carry on cultivation and tillage and enjoy the crops thereof. No rent was settled at the time but the *amalnamah* recited that a *pattah* would be granted at the proper rent in the following year. On 14th June 1869 the grantor executed a *pattah* in favour of the grantee. This instrument recited that on the strength of the *amalnamah* the grantee had taken possession of the land exceeding 2,000 *bighas* in area and that he had at his own expense commenced to reclaim jungles to raise embankments and to cultivate the lands. The settlement was made for a term of 19 years for carrying on cultivation at a progressive rate of rent. The document further authorised the grantee to continue to enjoy the profits of the lands by bringing them under cultivation either by himself or by making settlements with tenants and a covenant was inserted to the effect that if the grantee did not cultivate the lands fit for cultivation within the term of the lease he would be liable for compensation for loss that might be sustained by the grantor:

*Held*, that the settlement was of a *raiayat* holding and not of a tenure and that the grantee was a *raiayat*. (*Mookenjee and Walmsley, JJs.*) SECY. OF STATE *v.* DIGAMBAR NANDA. 27 C L J. 334=45 I. C. 43.

—Ss. 5 (1) (4) and 103 B—Tenure-holder or *raiayat*—Lease of over 100 *bighas* of land to non-resident men of means for reclamation—Entry in record of rights—Presumption—Rebuttal.

In determining the status of a tenant, *viz.*, whether he is a tenure-holder or a *raiayat*, two elements have to be borne in mind, firstly, the purpose for which the land was acquired, and, secondly the extent of the tenure or holding. The law assumes the *raiayat* to be the actual cultivator of the soil, either by his own labour or of members of his family or by hired labourers and it assumes also that ordinarily a larger area than 100 *bighas* would make cultivation by the personal agency of the tenant improbable.

Where land amounting to more than 250 acres was leased to a man of means who appeared to be a resident of another place permanently at a fixed rent, with a view to its reclamation at the lessee's expense and by his own efforts "by cultivating it or having it cultivated," *held* that it could not be said that the purpose was, primarily or otherwise,

## BENGAL TENANCY ACT S. 15.

that the demised land should be cultivated by his personal agency.

The lease being at best equivocal, the Courts in India were right in looking to the attendant circumstances to judge of the purposes for which the lease was acquired and to determine the status of the tenant.

In the circumstances the presumption arising under S. 103 B of the B. T. Act from an entry in the record of rights that the tenant was a *raiayat* was rightly held to have been rebutted. (*Mr. Amcer Ali.*) DEBENDRA NATH DAS *v.* BIBUDENDRA MAN SINGH 45 Cal. 305=35 M. L. J. 214=23 M. L. T. 384=(1918) M. W. N. 379=20 Bore L. R. 743=22 C. W. N. 674=5 Pat. L. W. 1=16 A. L. J. 522=27 C. L. J. 543=45 I. C. 411=45 I. A. 67 (P. C.)

[On appeal from 27 I. C. 432.]

—Ss. 5 and 19—*Raiyat* and tenure-holder—Grantee Chur Lands for reclamation and letting at a profit to cultivators—Grantee not a *raiayat*, but a tenure-holder.

Where the appellants' predecessor in 1883 acquired from the Government extensive *chur* lands in Bengal for the purpose of re-claiming them and then letting them at a profit to cultivators and there was some evidence that on occasions prior to 1885 the Board of Revenue and its subordinates had treated the holding as *ryoti* :—

*Held*, that the appellants were tenure-holders within S. 5 of the B. T. Act and that S. 19 which saves occupancy rights accrued to *ryots* prior to the Act, did not apply as neither the appellants nor their predecessor had held a *ryoti* interest in the land. (*Lord Sumner*) RAJANI KANTA GHOSE *v.* SECRETARY OF STATE FOR INDIA. 45 I. A. 190. (P. C.)

—S. 7—Enhancement of rent—Bar of limitation.

In course of proceedings under Chap. X of the B. T. Act the *plff.* applied for the enhancement of the rent whereupon the *def.* asserted that the tenure had been held at a rent which had not been changed since the Permanent Settlement and the rent could not therefore, be enhanced. Thereupon the *plff.* withdrew his application with liberty to sue afresh. More than twelve years thereafter the *plff.* brought a suit for the enhancement of rent of the same tenure under S. 7 of the B. T. Act on a contract embodied in some old *kabulyats*.

*Held*, that the law of limitation presented no bar to a suit of this nature. (*Sanderson, C. J., and Teunon, J.*) BIRENDRA KISHORE *v.* MAHOMED DOULATKHAN. 43 I. C. 59.

—Es 15 and 17—Permanent tenure—Notice of—Succession to, given to landlord, after decision of first court, but before hearing of appeal, effect of.

## BENGAL TENANCY ACT. S. 19.

In a suit for recovery of rent by a person who had succeeded to a permanent tenure the deft. pleaded that the suit was barred by S. 16 of the B. T. Act. on the ground that the provisions of S. 15 had not been complied with, but this objection was not seriously pressed and pending the disposal of the appeal, the provisions of S. 15 were complied with.

*Held*, that the plff. was entitled to recover the rent sued for. 23 Cal. 87 appl. (*Sharfuddin and Roe, JJ.*) NARAYAN PRASAD v. GAJO MAHTON. 3 Pat. L. J. 701.

—S. 19—Applicability—Grantee of *chur* lands from Govt. for reclamation and letting at a profit—No acquisition of raiyati interest—Status of grantee that of a tenure-holder. See B. T. ACT. SS. 5 AND 19.

45 I. & 190 (P. C.)

—Ss. 19 and 181—Ghatwali land—Occupancy right, acquisition of, in—B. T. Act, S. 181—Effect of, not to take away such rights. See B. T. ACT, S. 181. 27 C. L. J. 556.

—Ss. 20 and 21—Lessee of 6 lands expressly stipulating to have the lands to the khas possession of the plff.—Occupancy rights, acquisition of in such case. See ORISSA TENANCY ACT, SS. 154 AND 232. 3 Pat. L. J. 475.

—Ss. 22 (2) and 85—Amending Act (I of 1907)—Purchase of raiyati interest by landlord execution of money decree—Landlord, if can eject under raiyat.

A landlord purchasing raiyati interest in execution of a money decree is in the same position as a private alienee and he cannot insist upon any right which he as landlord might otherwise have had under S. 85 (1) of the B. T. Act to treat the under-raiyat as a mere trespasser.

As regards clause (2) of S. 22 of the B. T. Act the change made by the Amending Act of 1907 has not altered the law as previously understood. A fractional landlord who gets a transfer of an occupancy holding still acquires from the raiyat some sort of tenancy or intermediate interest (except the rights of the occupancy) which prevents him from treating the under raiyat as trespasser. (*Richardson and Walmsley, JJ.*) BABU RAM DHENG v. UPENDRA NATH KOLY. 44 I. C. 922.

—S. 22 (2)—Purchase of non-transferable occupancy holding by co-sharer landlord—No right to exclusive possession.

A co-sharer landlord cannot, by purchasing a non-transferable holding in execution of a decree for the rent of his share, retain exclusive possession as against his co-sharer landlord. S. 22 (2) of the B. T. Act applies only to a case in which a transferable occupancy holding is the subject matter of the purchase. 27 Cal. 473 appl. (*Teulon and Newbould, JJ.*) BIPRO DAS PAUL v. SURENDRA NATH BASU. 43 I. C. 467.

## BENGAL TENANCY ACT. S. 23.

—S. 23—Right of tenant to cut trees—Custom—Occupancy Code, S. 425—Mischief—Sisum tree standing on holding of occupancy tenant, cut by tenant, whether constitutes.

Under S. 23 of the Act a tenant is entitled to cut trees standing upon his holding and he can only be prevented from so doing on the landlord's showing a custom contrary to the right of the tenant, the onus of proving such a custom being on the landlord.

A Sisum tree does not bear any fruit and it is grown only with a view to its being cut when ready for use, and no mischief can be committed by cutting such a tree or its branch unless it can be shown that the tree or branch cut was not fit for the use for which it was cut. 21 W. R. 285 (Cr.) 4 P. L. W. 291 foll.

Where a tree is cut down by the tenant under a claim of right it does not matter whether his motive in cutting the tree was *mala fide* or dishonest. (*Jwala Prasad, J.*) SHAM LAL LOHAR v. EMPEROR. 5 Pat. L. W. 114=46 I. C. 409=

19 Cr. L. J. 729.

—S. 23—Tenure-holder—Right to cut the trees on the land. See PENAL CODE, S. 426. 4 Pat. L. W. 291.

—S. 29—Enhancement of rent as a result of a compromise in prior litigation.

An enhancement of rent of an occupancy holding in excess of that allowed by S. 29 of the B. T. Act agreed to by means of a compromise is illegal. (*Imam, J.*) SHRIKISHUNDAL v. SHEOBALAK GOPE. 4 Pat. L. W. 247=44 I. C. 638.

—S. 29—Holding area of, change of—Occupancy raiyat—Enhancement.

The area of the holding was described in the dakhilas given to the tenant and in the papers kept by the landlord as 7½ bighas and in 1902-03 there was a fresh survey made by the landlord when the area was found to be 9½ bighas. In 1904-05 the tenant agreed to pay him rent at the rate of Rs. 16-14-0 per annum for the holding, as found by measurement in 1902-03. Before 1902-03 the rate was at the rate of Re 1-6½ per bigha but in 1904-05 the rent according to the agreement was at the rate of Re. 12½ as per bigha. In a suit by the landlord for recovery of rent at the rate of Rs. 16-14-0 per annum for three years *Held*, the agreement was made in violation of S. 29, of the B. T. Act. (*Walmsley and Parson, JJ.*) SONAULLA SARDAR v. BHAGABATI DEBYA. 28 C. L. J. 142=48 I. C. 35.

—S. 29—Landlord and tenant—Right of landlord to realise the full nominal rent, though kept in abeyance for some time.

## BENGAL TENANCY ACT. S. 29.

A tenant by a kabulyat agreed to pay rent at the rate of Rs. 37-1-0 per annum subject to a lajat or deduction of Rs. 21-10-0. The kabulyat also contained the following. "If after the expiry of the term I do not within a year deliver a fresh dawl kabulyat for the whole amount inclusive of the sum kept in abeyance I shall pay Rs. 37-1-0 being the full amount of actual rent inclusive of the sum kept in abeyance."

*Held*, that the clause in the kabulyat being a threat that the rent at the full nominal rate would be levied in case the tenant did not execute a kabulyat within a year after the expiry of the term, the landlord's claim to the full nominal rate was inadmissible, as the stipulation in the kabulyat with regard to the deduction to be allowed was a device to evade the provisions of S. 29 of the B. T. Act.

As in cases of this nature each case must depend on its own facts, it would be better in all such cases for the lower courts to record an express finding one way or the other whether or not the agreement was a device to evade the Statute. (*Richardson and Beachcroft, J.J.*) PRODYAT KUMAR TAGORE v. CHUNDRA MOHUN SIL 44 I. C. 374.

—S. 29—Rent—Enhancement of, by more than 2 annas—Invalid.

A kabulyat by which a tenant agrees to pay Rs. 61 in place of Rs. 41 is a void transaction in as much as the enhancement amounts to more than 2 annas in the rupee if there is nothing to bring the transaction within any of the exceptions given in S. 29 of the B. T. Act (*Sharfuddin and Ece, J.J.*) RAM CHANDRA CHANDHURY v. DWARKA NATH CHATTERJEE. (1913) Pat. 26=5 Pat. L. W. 213.

—Ss. 32 and 35—Rent—Enhancement—Decision of Special Judge—Interference under S. 115, C. P. C.

Where the grounds taken in revision are that the limitations put by the Special Judge upon the enhancement applied for under S. 32 of the B. T. Act were based upon an unlawful exercise of the discretion vested in him by S. 35 of the B. T. Act and that the finding arrived at by the Special Judge was based upon evidence not legally admissible and on a complete misunderstanding of that evidence.

*Held*, that with regard to both these points, S. 115 of the C. P. Code does not apply.

It may be that the law enunciated by the Judge was wrong with regard to the discretion vested in him. It may be that the evidence adduced was inadmissible and that it was misunderstood. But these are not errors involving any question of jurisdiction. 22 C. W. N. 50 ref. (*Roe and Jwala Prasad, J.J.*) MAHABANI JANKI KUER v. KUKAR DUSADH. (1918) Pat. 347.

## BENGAL TENANCY ACT. S. 46.

—S. 37—Agreement for enhancement of rent—Ticadar and tenant—Suit by proprietor within fifteen years of agreement for enhancement—If inadmissible

S. 37 of the B. T. Act, bars a suit for the enhancement of rent for 15 years after, in respect of a contract validly made and binding between the parties. If an illegal or invalid contract and one not legally binding is made within 15 years such a contract does not come within S. 37 so as to operate as a bar to the institution of a suit for enhancement of rent. (*Chapman and Atkinson, J.J.*) BUDHAN MAHTON v. MUSAMMAT WAZIRUNNESSA BEGAM. (1913) Pat. 162=4 Pat. L. W. 210=42 I. C. 292.

—S. 40, Sub-E. (3)—Application for commutation of rent—Transfer of, by Sub-Divisional Officer to Settlement Officer invalid.

An application to have the rent commuted to money rent should be entertained and determined on the merits by the officer to whom it was presented by the applicant. The "officer" mentioned in sub-sec. 3 of S. 40 of the B. T. Act is the officer who received the application from the applicant. Consequently the Sub-Divisional Officer cannot transfer an application received by him to a Settlement Officer (*Mookerjee and Walmsley, J.J.*) JADU NATH MANNA v. PRAN KRISHNA DAS.

45 Cal 769=27 C. L. J. 569=46 I. C. 465.

—S. 43—Non-occupancy raiyat—Ejection of, on ground of refusal to agree to enhancement—Tender of an agreement—Proposed agreement—Service of Proof of proposed agreement without stamp if sufficient—Service of notice with copy of the agreement if required—Procedure

The word agreement mentioned in sub-sec. of S. 46 of the B. T. Act cannot be strictly construed because an agreement cannot come into existence unless it has been assented to by both the parties and where it requires to be reduced to writing, until it has been executed. The statute means an agreement proposed by the landlord and the only requisite is that the document containing the terms of the proposed agreement be tendered.

Where a landlord sent a draft of the proposed agreement duly stamped to the Court and the Court served on the tenant a copy identical with the draft but without a stamp on it, and it was said that it was not the original of the agreement that was tendered to the tenant but only a copy and hence there was no valid tender;

*Held*, that there was a valid tender of the agreement as required by S. 46 of the B. T. Act. If the draft had executed the draft tendered to him, it would have been a sufficient compliance with the terms of the section.

## BENGAL TENANCY ACT. S. 42

*Held*, further that there is nothing in S. 46 of the B. T. Act that requires a notice to be served along with the copy of the agreement though it may be convenient to do so. The statute does not make it obligatory. (*Fletcher and Huda, J.J.*) PORT CANNING AND LAND IMPROVEMENT CO. LD. v. NOYAN PARAMANIK. 22 C. W. N. 558=28 C. L. J. 87=45 I. C. 234.

—S. 48—“*Holding at a money rent*”—whether it governs—Landlord and under-raiyat.

The words “holding at a money rent” in S. 48 of the B. T. Act govern the word “under raiyat” just preceding them and not landlord. An under-raiyat holding land on an agreement to pay rent in kind is not protected by the provisions of the section. (*Roe and Swala Prasad, J.J.*) KAILASPATI CHANDHOURY v. MUNESHWAR CHAUDHURY.

3 Pat. L. J. 576=4 Pat. L. W. 109=43 I. C. 985.

—Ss. 49 and 85—*Ejection—Notice—Lease from year to year.*

In 1891 plff. granted an under-raiyati lease to the deft. The lease was not for any specified term, but was described as *karsana patta* (yearly lease.) The plff. stated that she had a raiyati interest in the land and the deft. was enjoined to have an entry made in the Survey and Settlement Record that the grantor possessed a raiyati right and the grantee himself a *karsana* right.

*Held*, that the lease was terminable by a notice to quit under S. 49 (b) of the B. T. Act.

Per *Mookerjee, J.*—It is of the very essence of annual tenancy that it is terminable by the landlord on notice to quit.

S. 49 of the B. T. Act prescribes no form of notice, nor does it give any indication as to the length of notice. An under raiyat is protected from ejection until the end of the agricultural year in which a notice to quit is served upon him by his landlord, and this indicates the time when it becomes obligatory upon him to leave. (*Mookerjee and Beachcroft, J.J.*) CHANDI CHARAN NATH v. SOMLA BIBI. 23 C. W. N. 179=28 C. L. J. 91=44 I. C. 254.

—S. 49—Landlord and tenant—Under-raiyat—Notice to quit by one of several landlords, if valid.

A notice to quit served on an under-raiyat signed by only one of the landlords is not invalid in law, even where there is no evidence to establish that it was signed by the landlord on behalf of himself and the other landlords. (*Fletcher and Huda, J.J.*) JAKHER MOHAMMED MANDAL v. KHATIR MOHAMMED SHAIKH. 23 C. W. N. 76=46 I. C. 264.

## BENGAL TENANCY ACT. S. 50.

—S. 49. Notice to quit by several joint-landlords—Notice signed by one, if valid

A notice under S. 49 of the B. T. Act purporting to emanate from three landlords but in act signed by one of them is a proper notice to quit.

There is no necessity that the notice should be signed by the landlord at all. It is sufficient that the notice is sent at the instance of the landlord calling upon the under-raiyat to quit the land. 29 Cal. 231 foll. (*Chitty and Smither, J.J.*) MAFEDUL SHA FAKIR v. MAHARUDDIN. 44 I. C. 49.

—S. 49—Suit for ejectment on the ground that debts are under raiyats—Defence of permanent occupancy raiyat. See (1917) DIG. GOL. 72: KULWANT SAHAI v. BABU RAM TEWARI. (1917) Pat. 379=5 Pat. L. W. 311=43 I. C. 941.

—Ss. 49, 113 and 183—Under-raiyat—Acquisition of occupancy right by custom or usage—Status of under-raiyat with occupancy right—Ejection of such raiyat—B. T. Act, if applicable.

An under-raiyat can acquire a right of occupancy by custom or usage, and on acquisition of such occupancy right continues to be an under raiyat and is not liable to be ejected under S. 49 of the B. T. Act. 19 C. W. N. 246. ref. (*Fletcher and Huda, J.J.*) GOPAL MANDAL v. JAPAI SANKHARI. 22 C. W. N. 618=28 C. L. J. 84=45 I. C. 545.

—Ss. 50 (1) (2) (3) and 105—Presumption in favour of raiyat, if rebutted by acquisition of non-transferable holding as representing new tenancy—New *habutiyat* not varying the rent but stating it to be variable if rebuts presumption.

Where in a proceeding instituted by the landlord for the settlement of fair rent under S. 105 of the B. T. Act, the landlord contended that the presumption arising under S. 50 sub-Sec. (2) to the benefit of which the tenant was *prima facie* entitled was rebutted by the acquisition of non-transferable holdings which represented the creation of the new tenancy.

*Held* that the purchaser of a non-transferable occupancy holding cannot claim recognition by the landlord as a matter of right out if he obtains recognition from the landlord whether by payment or otherwise, then in the absence of special circumstances he is admitted into the original tenancy with all its incidents and becomes the successor in interest of the vendor.

Per *Richardson, J.*—Clauses (1) and (2) of S. 50 of the B. T. Act assume the continuity and the identity of the tenure or holding through

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out the whole period from the permanent settlement onwards.

In view of cl (3) in the case of a raiyat the rule and the presumption contained in cls (1) and (2) apply to land which at the time when the question arises, may form part of the raiyat's holding. The rule and the presumption may thus be applicable to several parcels of land of which the holding consists when the question arises. Part of the holding may be inherited land. Part may have been acquired by purchase from another raiyat. In either case the raiyat may tack on his own occupation of the land at an unvaried rent to the occupation of an unvaried rent of his predecessors in interest, who, as regards land acquired by purchase from another raiyat, will include his vendor and his vendor's predecessors.

The inclusion in a *kaluliyat* executed subsequently to the creation of the holding of a condition purporting to make the rent variable without any variation in fact does not affect the presumption arising under cl. (2) of S. 50. The true question in such cases is whether the instrument on which the landlord relies is merely confirmatory of the pre-existing interest or tenancy or whether it creates a new tenancy, and in the case of raiyati holdings, this question must be considered with reference to the provision contained in cl (3) (*Leannon and Richardson, JJ.*) *ABHOYA SANKER MAZUMDAR v. RAJANI MANDAL.*

22 C. W. N. 904=47 I. C. 359.

———S. 50. (2)—*Fixity of rent—Presumption of—Non-payment of rent for some years, effect of.*

A tenant can claim the benefit of the presumption arising under S. 50 clause (2) of the B. T. Act, although there was no payment of the rent for some of the twenty years immediately before the institution of the suit (*Fletcher and Richardson, JJ.*) *KISHOR GOBINDA CHOUDHRY v. GOUR GOPAL DASS.*

27 C. L. J. 281.

———S. 50 (2)—*Kabuliyat of 1840 containing express stipulation to pay enhanced rent at Parganah rate—Presumption, rebuttal of.*

A *kabuliyat* of 1840 by which the tenant expressly stipulated to pay enhanced rate according to the Parganah rate rebutted the presumption arising from payment of the same rate of rent during 20 years before the suit. (*N. R. Chatterjee and Newbould, JJ.*) *UPENDRA NATH GHOSH v. DWARANATH BISWAS.*

22 C. W. N. 322=44 I. C. 593.

———S. 50 (2)—*Presumption—Amalgamation of several tenures and stipulation to pay enhanced rent by tenant—New tenancy.*

Where four originally separate tenures were in 1853 amalgamated and by a *kabuliyat* of

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that year the tenant expressly stipulated to pay enhanced rent.

*Held*, that the presumption under S. 50 (2) of the B. T. Act arising from proof of payment of rent at the same rate for 20 years before the suit was rebutted. (*N. R. Chatterjee and Newbould, JJ.*) *UPENDRA NATH GHOSH v. GOPI CHARAN SAHA.*

22 C. W. N. 321=44 I. C. 595.

———S. 50 (2)—*Presumption—Rebuttal of, by statement in rent receipts that holding is sarasari—Uniform rent for 50 years.*

The mere statement in some rent receipts that a holding is *sarasari* is not sufficient to rebut the presumption arising under S. 50 (2) of the B. T. Act from the fact that the rent has been unchanged for more than 50 years. (*Fletcher and Panton, JJ.*) *SATISH CHANDRA MUSTAFI v. ABDUL MAJID MUHAMMAD.*

37 I. C. 780.

———S. 50 (2)—*Presumption of if arises, when there is an alteration in the area of the holding—Duty of tenant to produce rent receipts. See (1917) Dig. COL. 73; MADU SUDEN MULLICK v. JAMIRUDDIN SHEIKH.*

22 C. W. N. 999=41 I. C. 767.

———S. 50 (2)—*Presumption under—Sub-division or amalgamation of old tenure—Presumption, if affected—Execution of fresh kabuliyat in respect of old tenancy—Effect of.*

A mere sub-division of an old tenure or amalgamation does not necessarily mean the creation of a new tenure so as to destroy the presumption under S. 50 (2) of the B. T. Act regarding fixity of rent.

A tenant proved that he had paid rent at a uniform rate for over 20 years. The landlord showed that subsequent to the Permanent Settlement the tenant had executed a *kabuliyat* in which he agreed to accept a fresh lease at a *jama* which might be assessed in future upon a measurement of the *jote* :

*Held*, that the presumption arising under S. 50 (2) of the B. T. Act from payment of rent for over 20 years was rebutted. (*Fletcher and Huda, JJ.*) *PROSONNA DEB ROYKOT v. SAFURUDDIN AHMED.*

46 I. C. 433.

———S. 50 (2)—*Rent—No attempt to enhance rent for 20 years—Presumption—Contract defining terms of tenancy—Assertion of higher rights.*

If a landlord abstains from enforcing enhancement for twenty years or more, this in itself confers no right upon the tenant, but merely gives rise to a presumption under S. 50 (2) of the B. T. Act. Where the relationship of landlord and tenant is founded upon a contract, a mere assertion by the tenant in the absence of a clear statutory provision to the

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contrary cannot confer upon him rights other or higher than those embodied in the contract. (*Sanderson, C. J. and Teggan, J.*) BIRENDRA KISHORE MANUKYA BAHADUR v. MAHOMED DOULAT KHAN 43 I. C. 59.

—S. 50 (2)—Tenants producing rent receipts showing payment of uniform rate of rent for 20 years—Presumption that tenancy commenced from permanent settlement—Onus on the landlord to show that the former owners of the land were not predecessors. See (1917) DIG. COL. 74: GOPAL CHANDRA BANERJEE v. MAHOMED SOLEMAN MULLICK.

22 C. W. N. 126=43 I. C. 356

—S. 52—Landlord and tenant—Holder of temporary tenure—Alluvion and diluvion—Contract not to apply for reduction of rent

Apart from any question of contract S. 52 of the B. T. Act is applicable both to tenure-holders and to raiyats. But a tenure holder is at liberty to contract himself out of his right to apply for a reduction of rent under S. 52.

In the case of a holder of a temporary tenure, S. 52 of the B. T. Act must be read subject to the terms of the contract between him and his landlord. (*Richardson and Beachcroft, JJ.*) SECRETARY OF STATE FOR INDIA v. KAMAL KRISHNA PAL.

44 I. C. 222.

—Ss. 52 and 195—Patnidar—Right to apply for abatement of rent.

A patnidar is entitled to make an application under S. 52 of the B. T. Act for the abatement of rent, S. 195 of the Act does not prevent S. 52 from applying to the case of a patnidar. (*Fletcher and Huda, JJ.*) MAHARAJAH RANJIT SINHA v. ABDUR RAHIM KHAN CHOWDHRY.

45 I. C. 190

—S. 52—Rent—Claim for additional rent in respect of excess area comprised within boundaries specified in pattah.

Where rent is fixed for the whole area within the boundaries specified in a pattah, the landlord is not entitled to additional rent on account of excess area merely because the area within the boundaries specified in the pattah is more or considerably more than the area stated therein. He may however claim additional rent for excess lands outside the boundaries (*Richardson and Beachcroft, JJ.*) MAN JANALI DEBI v. KAILASH NATH MITTRA.

44 I. C. 24.

—S. 52—Rent, enhancement of—Onus—"Area for which rent had been previously paid" meaning of.

The question in every case coming under S. 52 of the B. T. Act the landlord being the

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claimant, is whether the tenant is in possession of land "in excess of the area for which rent has been previously paid by him."

The burden of proving an increase in "the area for which rent has been previously paid" is on the landlord. He may generally discharge the burden in two ways:—

(1) By proving that the tenant is in possession of excess land outside the boundaries of the land originally settled with him for instance land obtained by encroachment of alluvial increment

(2) By proving that at the original settlement of the land the rent was fixed at a rate per bigha or other unit of measurement or at differential rates according to the quality of the land and so forth, that in fact and substance the agreement was that the tenant should pay at that rate or at those rates for all the lands of which he was put in possession according to its true area and by further proving that the existing rent is less than the rent payable under such agreement.

It is in connection with this second method of proving a right to increase of rent, that question may arise under clause (2) of S. 52 as to the conditions of the tenancy and whether the rent originally fixed was or was not a consolidated rent for the whole area. The rent might be a consolidated rent even if it was calculated at so much per measured or estimated bigha. The question depends upon the true intention of the parties to be gathered in the absence of a written instrument, from all the circumstances. When however, it is proved that the tenant is holding land outside and beyond the original boundaries, the question as to the rent being a consolidated rent cannot well arise except possibly in connection with land gained by alluvion

The words "the area for which rent has been previously paid" mean the area with reference to which the rent previously paid has been assessed or adjusted. (*Richardson and Welmsley, JJ.*) DHRUPAD CHANDRA KOLEY v. HARI NATH SINGHA ROY. 22 C. W. N. 826 =27 C. L. J. 563=45 I. C. 660

—Ss. 52 (5) and 105—Proceedings under—Appellate Court—Power of, to allow deduction on measurement—Mode of calculation of excess area.

In an appeal arising out of a proceeding under S. 105 of the B. T. Act the Appellate Court is entitled to allow a deduction on the measurement on the ground that the measurement was not a scientific one.

S. 52 (5) of the B. T. Act is an enabling section authorising the Court to calculate additional rent for excess area in the way laid down, if it thinks that to be the most

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convenient way of arriving at what is the fair and equitable rent between the parties. It does not preclude the Court from adopting other methods of calculation for the purpose of arriving at what is the proper excess rent. (*Fletcher and Smither, JJ.*) MIDNAPORE ZEMINDARY CO., LTD. v. KRISTO PROSAD SUKUL. 46 I. C. 544.

—Ss. 60 and 72—Suit for rent by assignee of an ijara—Plea of payment to purchaser of proprietary interest. See (1917) DIG. COL. 76; MUKDUMAN v. KHAIRAT AHMED. 3 Pat. L. W. 225=43 I. C. 132.

—S. 66—Application for extension of time after expiry of time originally fixed—Maintainability of.

It is open to a Court to grant an extension of the time limited by S. 66 of the B. T. Act, even where the application for the extension is made after the expiry of the period prescribed by the section. (*Teunon and Newbould, JJ.*) SARADA CHARAN BASAR v. JURO RAM MANDAL. 44 I. C. 473.

—S. 66—Suit for more than one year's rent—Decree for ejectment on default of payment if proper.

If in a suit under S. 66 of the B. T. Act the landlord asks for more than one year's rent, he disentitles himself to the remedy under the Section.

A decree under S. 66 of the B. T. Act directing that the landlord should be entitled to recover possession of the land if four year's arrears of rent decreed in the suit is not paid, is bad. (*Wainsley and Panton, JJ.*) MUKTA KESHI DEBI v. JIRI BALA DEBI 47 I. C. 1006.

—S. 66 (cl) 2—Non-occupancy raiyat—Ejectment of—Decretal amount—Payment by under-raiyat—Validity.

S. 66, clause (2) of the B. T. Act contemplates that the payment made, to be a good payment, must be a payment by or on behalf of the judgment-debtor. The Court cannot, therefore, accept the tender of the amount by an under-raiyat in order to prevent the non-occupancy raiyat. (*Teunon and Newbould, JJ.*) BROJENDRA NATH MITRA v. ARMAN SHEIK. 27 C. L. J. 478=44 I. C. 977.

—S. 67—Rent—Interest on, date of accrual of.

Interest on rent accrues, not from the expiration of the dates on which the instalments are payable according to the lists stipulated in the contract of lease, but from the expiration of the quarters of the agricultural year in which the instalment falls due. (*Fletcher and Huda, JJ.*) SRISH CHANDRA RAY v. JADU NATH KUNDU. 45 I. C. 532.

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—S. 74—Abwab—Peishkush—Legitimate origin of payment if can be inferred from antiquity and purpose of payment.

The levy of peishkush by the proprietor of an estate from the misfidars (holders of resumed lakheraj lands) and lakherajdars is not illegal, as peishkush cannot be regarded as an imposition in the nature of an abwab but a right to it is an interest in the land to which a title may be made out by prescription.

From the peculiar situation and character of the lands of the estates and the antiquity and the purpose of the payment of peishkush, it may be inferred that a right to levy it had a legitimate contractual foundation at its inception. (*Richardson and Beachcroft, JJ.*) LAKSHMI NARAYAN RAI v. THE SECRETARY OF STATE. 22 C. W. N. 821=23 C. L. J. 285=44 I. C. 497.

—Ss 76 and 155—Erection of a dwelling-house by tenants—Improvement. See (1917) DIG. COL. 79; MAHADEO RAI v. SHEOGULAM MAHTO. 2 Pat. L. J. 634=45 I. C. 332.

—S. 85—Lease in contravention of—Right of grantor to question lease.

Per *Beachcroft, J.*—A sub lease by a raiyat for a period exceeding nine years, whether registered or not, is void, and can be questioned by the grantor or a person claiming through him.

Where a raiyat giving a permanent sub-lease in contravention of the provisions of S. 85 (2) of the B. T. Act induces his lessee to accept it on the faith of a representation that his own status is such as to validate such a sub-lease, he cannot afterwards be allowed to prove in a suit against his sub-lessee that his status was other than it was in the first instance represented to be. (*Mookerjee and Beachcroft, JJ.*) CHANDI CHARAN NATH v. SOMLA BIBI. 22 C. W. N. 179=23 C. L. J. 91=44 I. C. 254.

—S. 85—Lease to under-raiyat for term exceeding nine years—Under-raiyat in possession on basis of lease—Right to sue for possession on declaration of title. See (1917) DIG. COL. 80; GOUR MONDAL v. BALARAM PLANJI. 22 C. W. N. 61=43 I. C. 864.

—S. 85 (2)—Under-raiyati lease—Sanba san lease—Provision for holding from generation to generation—Permanent lease—Registration in contravention of S. 85 (2)—Lease if operative as against grantor.

A permanent under-raiyati lease registered in contravention of S. 85 (2) of the B. T. Act is not operative even as against the raiyat who granted it.

A registered under-raiyati lease, among other things provided for the holding, passing from generation to generation and for being sold by the under-raiyati described itself as a

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*samba san* (year to year) lease and stipulated that if the under-raiyat ever reduced the rent by raising any objection he would be liable to eviction without notice.

Held, that the under-raiyati lease was a permanent lease and as such contravened the provisions of S. 85 of the B. T. Act, and, was, therefore, invalid. (*Walmisley and Panton, JJ.*) KARIM BAKSHA v. ABDUL JABBAR MIAJI. 47 I. C. 416.

—S. 86—Non-transferable raiyati holding—Sale of a portion by raiyat—Subsequent surrender of same to landlord—Landlord if may evict transferee—Fraud—Knowledge.

*Per Teunon, J.*—Irrespective of fraud, collusion or knowledge a landlord who accepts from a raiyat the surrender of a portion of the holding after the same had been sold by him, is not entitled to eject the transferee. The raiyat's rights in the portion having been extinguished, by the surrender or grant to the landlord, the latter took nothing.

Sale of a part of a holding may be reasonably argued to be an incumbrance or limitation of the raiyat's rights in the whole and should therefore operate to prevent a surrender whether of the whole or of the part.

*Per Richardson, J. (Contra).* On the authorities sale of a part of a raiyati holding is not an incumbrance within the meaning of cl. (6) of S. 86 of the B. T. Act.

On the authorities the landlord (apart from fraud) has the right to re-enter if the whole or if a part of a non-transferable raiyati holding be relinquished or surrendered by the raiyat after the same has been sold by him. (*Teunon and Richardson, JJ.*) SHEIKH DUSTAR ALI v. RAM KUMAR GOPE 22 C. W. N. 972

—S. 86 (6)—Sale of portion of non-transferable raiyati holding—Tenant surrendering same and taking resettlement of rest—Implied surrender, landlord if may evict purchaser.

Where a raiyat expressly surrendered a part of the non-transferable holding which, prior to such surrender, he has sold, and took a new settlement of the remainder:

Held, that this operated as a surrender of the whole holding (express to a portion and implied as to the rest) and as no fraud on the part of the landlord was established, he was entitled to evict the purchaser from the portion sold. (*Woodroffe, Chitty and Huda, JJ.*) SHAIKH TAMIJ MUNSHI v. BROJENDRA KISHORE ROY CHOWDHURY. 22 C. W. N. 967=46 I. C. 862.

—S. 86 (6)—Vendee of portion of non-transferable raiyati holding—Eviction of by landlord in whose favour vendor surrenders the portion after sales.

A raiyat who has sold a portion of his non transferable occupancy holding has parted

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with all his rights in the portion in favour of the purchaser, and has no interest in it to surrender.

Moreover, surrender may be looked upon as a transfer or grant and whatever binds the raiyat binds the landlord in whose favour he surrenders.

The landlord cannot on accepting a surrender of a part of the holding sold by the raiyat sue to eject the transferee. (*Woodroffe and Mookerjee, JJ.*) ANANDA MOHAN ROY CHOWDHURY v. GURUDAYAL SAHA. 22 C. W. N. 935.

—S. 87—Landlord and Tenant—Abandonment of holding—Landlord's right of entry.

Where a holding has in fact been abandoned the landlord is entitled to re-enter without having recourse to the provisions of S. 87 of the B. T. Act. (*Teunon and Richardson, JJ.*) WAHIDALI BHUYA v. MAHAMAD ANSAR ALI. 47 I. C. 147.

—S. 87—Mortgage of non-transferable occupancy holding—Abandonment—Landlord, right of, to recover possession.

A usufructuary mortgagee of a non transferable holding is entitled to maintain his possession against the landlord unless there has been an abandonment of the holding within S. 87 of the B. T. Act or a relinquishment or a repudiation of the tenancy. (*Fletcher and Huda, JJ.*) PRIONATH BOSE v. KUSUM KUMARI DASSI. 47 I. C. 332.

—S. 88—Express consent in writing what is—Rent receipts whether evidence of—Rent Roll, meaning of—Jamawasil Bak—whether rent roll—Presumption. See (1917) DIG. COL. 82. RAJANI SUNDARI DASSI v. HARA SUNDARI DASSI 22 C. W. N. 693=41 I. C. 501.

—Ss. 88 and 161—Holding at fixed rent—Transfer—Failure to pay landlord's fee—Acquisition of title by adverse possession against tenant—Incumbrance.

A sale of the whole of a raiyati holding at fixed rent is not invalid merely because the landlord's fee is not paid. But when the sale is only of a part of such a holding the landlord is not bound to recognise the purchaser, as such a sale constitutes a division of the holding.

A title acquired by adverse possession against a tenant is an incumbrance within S. 161 of the B. T. Act. 14 C. L. J. 136 rel. (*Walmisley and Panton, JJ.*) FAZAR ALI MISTRI v. AMIE BUKSH MIAN. 47 I. C. 334.

—Ss. 88 and 188—Sub-division of holding—Recognition of, by landlord—Express consent in writing—Rent receipts—Acting on

## BENGAL TENANCY ACT, S. 88.

*the strength of the sub division—Part performance—Equities—Effect of.*

Where a holding has been sub divided and the landlord has accepted rent in respect of the sub-divided portions separately and granted receipts showing the area of each part and the rent.

*Held*, that it was a recognition of the sub-division of the holding under S. 88 of the B.T. Act.

Mere acknowledgment of a receipt of rent less than the total jama without any indication that it is in respect of a portion only of the holding cannot constitute a consent to a division of the holding even when continued over a number of years but it should clearly appear on the face of the receipt itself that the rent is paid in respect of a particular portion only of the holding this may be sufficient acknowledgment to bind the landlord.

It has been held in a long line of decisions, that in regard to receipts granted by gumastas the onus of showing that the gumasta had no authority to recognise a distribution of rent or division of tenancies lies upon the landlord.

Consent in writing under S. 88 of the B.T. Act may be given by means of a rent receipt and in each case the adequacy of the consent must be gathered from all the circumstances.

S. 88 of the B.T. Act enacts under what conditions a division of a tenure or holding is binding upon the landlord, which means a sole landlord or whole body of landlords where there are more than one, so that divisions which would not bind the whole body of landlords would not come under the scope of the enactment

Applying the principle that equity will not fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon, *held*, that the landlord having acted upon the contract whereby the holding was divided as disclosed by the rent receipts, he cannot take advantage of the defects, if any, in the form in which his consent was signified so as to bar the enforcement of the contract (*Dawson Miller, C. J. and Mullick, J.*) SRIKISHUN PRASAD PANJIAR v. MUSAMMAT JEONASI KUER. (1918) Fat 210=

4 Pat. L. W. 316=45 I. C. 294.

*S. 88—Suit by landlord for ejectment of purchasers of an occupancy holding—Decree for ejectment on failure of debts to attorn within a fixed time.*

S. 88 of the B.T. Act does not warrant a decree for ejectment in a landlord's suit for ejectment of the purchasers of a holding on their failure to jointly and severally attorn to the landlord within a time to be fixed by the Court. (*Walmsley and Ponton, JJ.*) GIRIBALA DAS v. KUDRUTULLA PABAMANICK.

47 I. C. 576.

## BENGAL TENANCY ACT, S. 103 B.

*S. 98 — Remuneration of common manager—Power of District Judge to fix and direct payment—Suit for arrears of pay on basis of order—Limitation.*

Under S. 98 of the B. T. Act, the District Judge has ample powers to pass orders with respect to the remuneration of the common manager. Therefore, no question of limitation arises in a suit brought by a retired common manager to recover arrears of his pay on the basis of an order made by the Dt. Judge directing its payment (*Fletcher and Smither, JJ.*) TRAILOKYA NATH ROY CHOWDHURY v. DURGA NATH BHATTACHARYA

46 I. C. 686.

*Ss. 102 (dd) and 106—Suit under S. 106—Dispute between neighbouring proprietors—Question for determination.*

In a suit under S. 106 of the B.T. Act to amend a Record of Rights in which the dispute is between two neighbouring proprietors, and which comes within the provisions of S. 102 (dd), the only question between those rival proprietors that can be gone into, is to the question as to which of them was in possession of the land in question at the date of the final publication of the Record of Rights. (*Fletcher and Huda, JJ.*) MAHARAJ BAHADUR SINGH v. BHAGAWAN.

45 I. C. 781.

*S. 103 B.—Record of Rights—Entry in, as raiyat—Presumption rebutted by proof of original mode and the purpose of acquisition. See B. T. ACT, SS. 5 (1) (4) AND 103 B.*

22 C. W. N 674 (P. C.)

*S. 103 B.—Record of Rights—Entry in land, as liable to assessment—Presumption of correctness—Onus on tenant to disprove it by evidence. See LIM. ACT, ART. 130.*

22 C. W. N. 685.

*Ss. 103 B., 161 and 167—Sale of patni—Rent-free lands in patni, if an encumbrance—Record of rights—Entry in—Onus.*

Plff. in execution of a rent decree purchased a patni taluk created in 1807. Within the patni there were certain lands in the possession of the deft. which were recorded in the settlement records as rent-free lands. In a suit to eject the deft. on the ground that his interest was an encumbrance within S. 161 of the B. T. Act.

*Held*, that the deft.'s interest could not be deemed to be an encumbrance unless it was shown that the zemindar was in possession of those lands at the time when the patni was granted.

Having regard to S. 103 B. of the B. T. Act and the pleadings of the plff. and to the fact that there was no evidence to show that any rent had ever been realised in respect of those lands and that the deft. and his predecessors in-title had been in possession for a long

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period without payment of rent, it was incumbent upon the plff. to show that the zemindar was in possession of the lands in dispute at the date of the creation of the patni and that the incumbrance of the debt came into existence after that date (*N.R. Chatterjee and Greaves, JJ.*) *BIPRODAS PAL CHOWDHURY v. KEDAR NATH ROY.* 47 I. C. 765.

———S. 103 B (3)—Entry under—Notice of proof, correctness, of.

If it is established that the only evidence whereon the entry in sub-section (3) of S. 103 B of the B. T. Act, was made by the Settlement Officer does not support his conclusions, that is the strongest possible proof that the entry is incorrect. The party is not limited to a particular mode of proof, he can prove *alimunde* that the entry is in fact, incorrect. He can prove that the material whereon the Settlement Officer, based his decision, does not in law justify his conclusion as to the relative rights and the obligations of the parties. (*Mookerjee and Walmsley, JJ.*) *BAGHA MOWER v. RAM LAKHAN MISSER.*

27 C. L. J. 107=41 I. C. 804.

———Ss. 104 H, and 111 A.—Scope of S. 104 H—Suits under, Limitation—Reliefs outside S. 104 H, but within S. 111 A—Limitation Act, Art. 120.

S. 104 H of the B. T. Act only refers to suits by a person aggrieved by an entry of a rent settled in a Settlement Rent Roll prepared under S. 104 F to 104 H or by an omission to settle such a rent and suits, falling under that section, are governed by the special limitation provided in that section.

Where reliefs are claimed which are outside the scope of S. 104 H and fall within the proviso to S. 111 A, the limitation applicable is that provided by Art. 120 of the second schedule to the Lim. Act. 15 C. W. N. 896 foll. (*Woodroffe and Huda, JJ.*) *RAJANI KANTA MOOKERJEE v. SECRETARY OF STATE FOR INDIA.* 45 Cal. 645=47 I. C. 820.

———S. 104 H—Suit under—Court, what to determine.

In a suit under S. 104 H of the B. T. Act it is not sufficient for the Court to hold that the entry in the Settlement Rent Roll as to the status or the rent is erroneous. The Court must determine affirmatively the exact conditions and the incidents of the tenancy as also the rent to be settled on such basis. (*Mookerjee and Walmsley, JJ.*) *SECRETARY OF STATE FOR INDIA v. DIGAMBAR NANDA.*

27 C. L. J. 334=45 I. C. 43.

———S. 104 H—Suit under—Limitation—Notice given to Secretary of State—No Deduction of time spent in.

In a suit under S. 104 H of the B. T. Act against the Secretary of State, the plff. is not

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entitled to exclude from the period of limitation provided by that section the period of two months during which a notice given to the Secretary of State for India under S. 80 of the C. P. Code is current (*Fletcher and Huda, JJ.*) *SECRETARY OF STATE FOR INDIA v. LAKH. NARAIN DAS.* 46 I. C. 899.

———Ss. 104 H, 184 and 185—Suit under S. 104 H period for—No extension by reason of S. 15 (2) of the Lim. Act. See LIM. ACT. S. 15, SUB-SEC. (2). 27 C. L. J. 374.

———S. 104 J—Rent settled—Presumption as to correctness of.

The words "shall be deemed to have been correctly settled" used in S. 104 J of the B. T. Act, do not merely give rise to a presumption, that can be rebutted but create an irrebuttable presumption as to the correctness of rent settled in accordance with the provisions of Ss. 104 A to 104 F of the B. T. Act. (*Fletcher and Huda, JJ.*) *BAIKUNTHA NATH GHOSH v. SODANNANDA MOHAPATRA.* 46 I. C. 287.

———S. 105—Application to settlement of fair rent presumption under S. 50—Whether rebutted to acquisition of non-transferable holding. See B. T. Act, S. 50 22 C. W. N. 204.

———Ss. 105 and 109 A—Decision of Settlement Officer—Appeal against schedule directed to be prepared by judgment—Limitation for filing appeal.

Where a Settlement Officer, in an order on an application for the settlement of fair rents under S. 105 of the B. T. Act arrived at certain findings and laid down certain principles, in accordance with which fair rents were to be ascertained and entered in schedule directed to be prepared by the order.

*Held*, that limitation for preferring an appeal against the decision of the Settlement Officer began to run from the date on which the schedule was signed by the Settlement Officer, and not from the date on which the order was made, inasmuch as the schedule settling the rents was clearly a part of the decision and in fact read with the order was the decision. (*Teunon and Newbould, JJ.*) *DHARANIA KANTA LAHIRI CHAUDHURI v. AMIR SHEIKH.* 44 I. C. 152.

———Ss. 105 and 188—Application under S. 105—Dismissal by lower appellate Court as against a party for non-prosecution—Joint decree—All necessary parties not before court—C. P. Code O. 22. R. 9. See APPEAL.

28 C. L. J. 201

———S. 105—Application under, but withdrawn—Effect—Subsequent suit, maintainability of—Rent, non-payment for a period—No bar to landlord's right to have rent assessed and recover—Limitation—Lim. Act, Art. 130.

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An application made under S. 105 of the B. T. Act but withdrawn is to be treated as one never made.

Hence although an application under S. 105 was previously withdrawn, without liberty to make a fresh application, a subsequent application under the same section is maintainable. 40 Cal. 428 foll.

The mere non-payment of rent for a certain period does not bar a landlord's right to have the rent assessed and to recover rent from his tenant. Art. 130, Sch. to the Lim. Act applies after the tenure is found to be rent-free. (*Teunon and Richardson, J.J.*) SRIMATI KAMINI SUNDARI CROUDHURANI v. ABDUL HABIB MOULVI. 28 C. L. J. 254=47 I. C. 420.

—S. 105—Enhancement of rent after sale of tenure—Liability of purchaser—Sale, setting aside of.

The plff. purchased a tenure at an auction-sale. The sale proclamation stated the rent to be Rs.64 but at the time of the plff's. purchase there was pending a proceeding under S. 65 of the B. T. Act for the enhancement of rent on the ground of excess in area by which the rent was enhanced after the plff's purchase to Rs. 270 without the plff. having been made a party to the proceeding. *Held*, that as the plff. did not prove that he did not know of the proceeding for enhancement of rent at the time of his purchase, he was bound by the result of the proceeding.

Even if the plff. had established that he did not know of the proceeding to enhance the rent at the time of the purchase, his right would have been to have the whole sale set aside; but he could not hold the property and at the same time refuse to pay the enhanced rent. (*Fletcher and Huda, J.J.*) RASIK CHANDRA MUKHOPADHYA v. SHYAMA KUMAR TAGORE. 46 I. C. 136.

—S. 105—Proceedings under—Appellate court, power of, to allow deduction on measurement—Mode of calculation of excess area. See B. T. ACT, SS. 52 (5) AND 105. 46 I. C. 544.

—Ss. 105 A, 107 and 109—Decision of revenue Court that relationship of landlord and tenant does not exist—Res judicata in subsequent suit for ejectment.

Where in a proceeding under S. 105 A of the B. T. Act it has been found that the relationship of landlord and tenant does not exist between the parties, that decision operates as *res judicata*, and the defts. are not entitled, in a suit for ejectment by the landlord to re-agitate the question. 35 Cal. 239 and 29 Cal. 707 dist. 19 C. L. J. 457 ref.

The words "shall be final" were imported into S. 107 with a view to give finality to a decision arrived at by a Revenue Officer or by the Special Judge on appeal. (*Mullick and*

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(*Atkinson, J.J.*) MAHENDRA NARAYAN RAY v. GIRISH CHANDRA KAR. 3 Pat. L. J. 379. =46 I. C. 125.

—Ss. 105 A and 109—Settlement Officer—Inquiry as to Settlement of rent—Decision on status of tenant—Civil Courts barred from questioning decision of Settlement Officer.

A Settlement Officer, when hearing an application for settlement of rent, has jurisdiction to enquire as to whether a tenant belongs to the class to which he was shown in the record-of-rights. It is not competent to a Civil Court under S. 109 of the B. T. Act to enquire into the status of a tenant, which was the subject of enquiry before a Settlement Officer. (*Fletcher and Teunon, J.J.*) BEPIN KRISHNA KUMAR v. HARI DAS GHOSE. 27 C. L. J. 210=44 I. C. 562

—S. 106—Appeal—Forum—Suit instituted before the Settlement Officer—Transfer to Civil Court—Appeal to Special Judge or Subordinate Judge.

Where a suit, instituted before a Settlement Officer under S. 106 of the B. T. Act was transferred under the first proviso of that section to a competent Civil Court being the Court of the Munsif.

*Held* that, although the suit was originally instituted before the Settlement Officer, an appeal would not lie to the Special Judge against the decision of the Munsif, but the competency of the Civil Court would be ascertained under the C. P. Code, and the attributes of the competency of that Civil court would follow from the transfer, and as such the Subordinate Judge had the jurisdiction to hear the appeal against the decision of the Munsif. (*Fletcher and Richardson, J.J.*) KSHIROD v. GOUR. 27 C. L. J. 281. =38 I. C. 94.

—Ss. 106 and 109—Dismissal for default—Subsequent suit—No bar of *res judicata*.

A proceeding under S. 106 of the B. T. Act which is dismissed for default does not operate as a bar to a subsequent suit by virtue of the provisions of S. 109 of the Act.

S. 109 of the B. T. Act in order to operate as a bar to a subsequent suit presupposes the existence of a decision by the Settlement Officer on the merits of the claim. (*Atkinson, J.*) BIBI SALEHA v. AUTU RAM. 43 I. C. 973.

—S. 106—Entry in record of rights—Correction of—Plff. and deft. recorded as joint landlords—Suit for partition—Onus of proving that entry is wrong.

The names of the plff. and his co-share deft. No. 7 were entered as joint landlords in

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the record of rights. It was found that there had been a partition between them long before the record of rights and that the plff. had been in sole possession since the partition.

*Held*, that though there was nothing to show what was the precise result of the partition, still in the absence of any evidence on deft's side to show that the plff.'s possession was as a co-sharer on his behalf, the plff. should be recorded as the sole landlord. (*Chitty and Walmsley, J.J.*) **BROJENDRA KISHORE ROY CHOWDHURY v. JUGENDRA KISHORE ROY CHOWDHURY.** 47 I. C. 5.

—Ss. 106, and 111 A—Record of rights of Suit for alteration in second of two records—rights—Maintainability—Limitation. See RECORD OF RIGHTS. 3 Pat. L. J. 361.

—S 106—Suit for declaration that lands are brahmottar and rent free—Long possession without payment of rent—Presumption of *Lakhiraj*—Rebuttal of, by Pergamah register, Konongo register, etc.

The Plffs. who were recorded under the Settlement Proceedings as persons in possession of a number of plots, each less than 50 bighas in area, without payment of rent but as liable to pay rent, instituted suit under S. 106 of the B.T. Act and proved long possession without payment of rent. The deft. produced the Pergamah Register, the Konongo Register, and the Thak Map and the Settlement to show by omission of entries of *lakhirajas* therein that no *lakherjas* existed in the village.

*Held*, that long possession without payment of rent raises a presumption of *lakherjas* right. (*Mookerjee and Walmsley, J.J.*) **BIPRADAS PAL CHOUHURY v. MONORAMA DEBI.**

45 Cal 574—22 C. W. N. 396.  
—47 C. 49.

—S. 109 A. Sub S. (3)—Second Appeal—High Court—Question of fact—No jurisdiction to disturb—Power of High Court subject to limits prescribed by S. 584 of the C. P. Code of 1882 (S. 100 of C. P. Code, 1903.)

The right of appeal to the High Court by S. 109 A sub-section 3 of the B.T. Act 1885 is subject to S. 584 of the C. P. Code 1882 and can only be exercised upon the grounds therein mentioned. The High Court has therefore no jurisdiction under the sub-section to set aside the decree of a Dt. Judge upon the ground that he had applied the wrong standard of measurement to land of which the rent was in question. (*Lord Buckmaster*) **NAFAR CHANDRA PAL v. SHUKUR.** 45 I. A. 185. (P.G.)

—S. 111 A—Wrong entry in record of rights—Suit for declaration in respect of, maintainability.

Where there was a final publication of record of rights in 1888-89 and in a subsequent proceeding, an objection to the draft record was overruled by the Settlement Officer in 1905 and the record of right finally published in 1906, and the plff. aggrieved by the last entry brought his suit in 1907 for a declara-

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tion that the survey entry of 1906 was incorrect he having title and possession in respect of a portion of the disputed lands by virtue of his purchase in 1885 and title by prescriptive adverse possession in respect of the remaining portion.

*Held*, the suit was maintainable under S. 111A of the B. T. Act and S. 42 of the Specific Relief Act. (*Dawson Miller, J. J. and Mulla, J.*) **SHEIKH LATAFAT HUSSA-IN v. KUMAR KALIKA NAND SINGH.**

(1918) Pat. 225—3 Pat. L. J. 361—  
4 Pat. L. W. 303—45 I. C. 432.

—Ss. 113 and 183—Under raiyat—Acquisition of occupancy right by custom or usage—Under raiyat continues to be such and is not liable to be ejected. See B. T. ACT, Ss. 49, 113 AND 183. 22 C. W. N. 515.

—S 116—*Khudkash* land—if *Zerai*.

*Khudkash* does not necessarily mean *zerai* or private lands of the proprietor within the meaning of S. 116 of the B. T. Act. (*Jwala Prasad, J.*) **DEONATH-MISRA v. AMAR SINGH.** 45 I. C. 418.

—S. 116—Non-occupancy raiyat—Lessee under term-expired lease of proprietor's *zerai* land—Suit in ejectment—Limitation—Tenancy Act, Sch III, Art. 1 (a)—Effect. See (1917) DIG. COL. 88; **JANKI SINGH v. JAGANNATH DAS.** (1917) Pat. 318—  
3 Pat. L. J. 1—42 I. C. 177—44 I. C. 94.

—S. 147 A. (2)—Compromise—Repudiation of by some of the parties before decree—Power of Court to record compromise.

A court is empowered to enquire into and give effect to a lawful compromise, adjustment or satisfaction of a suit by the parties even where one of the parties repudiates or retracts from it in Court.

Clause (2) of S. 147 A of the B. T. Act empowers a Court to give effect to a compromise and to pass a decree accordingly even if the parties subsequently retract from it. (*Fletcher and Huda, J.J.*) **SARADA PRASAD ROY v. ANANDA MOHY DATTA.** 46 I. C. 228

—S. 148 A—Co-sharer landlord—Suit for rent—Nature of decree.

Co-sharer landlords who, by arrangement with the tenants, collect their shares separately, and have in previous years brought separate suits for the recovery of their dues, are competent to sue jointly for the total amount due to them under the terms of the original lease, which can be enforced by all the co sharers together without the consent of the tenants. But if a plff. seeks to avail himself of the special provisions of S 148 A of the B. T. Act, he must in the plaint seek to recover the entire amount due to himself and the co-sharers.

The nature of a decree to be made in the suit depends upon its true character. If it is a suit for the share of the rent recoverable by the plff. separately by reason of the fact that he has on previous occasions collected the

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share of the rent separately from his co-sharer the decree will be a money decree: if, on the other hand, it is a decree in a suit properly framed under S. 148 A the decree will operate as a rent decree, capable of execution under the special procedure prescribed by the B. T. Act.

Where the plff. throughout the plaint proceeded on the allegation that he had previously collected his share of the rent respectively and in the first prayer clause, actually sought to recover that share, and in a second alternative clause stated that if it was found that the tenant had not paid the rent due to his co-sharer, he might be granted leave to amend the plaint so as to secure a decree for the entire sum.

*Held*, that this was not a plaint in a rent suit of the character contemplated by S. 148 A. of the B. T. Act. (*Mookenjee and Walmsley, JJ.*) **RAI BAIKANTHA v. RAMAPATI.**

27 C. L. J. 101.—45 I. C. 767.

—S. 149—Scope of—Plea of tenant if must be valid in law—Payment of amount claimed in court—Suit by 'third person' if rendered infructuous by plff. in rent suit obtaining a decree.

The word 'pleads' as used in S. 149 of the B. T. Act does not mean that the tenant should set up a valid plea or a plea that is open to him in accordance with law. Whether the plea is good, bad or indifferent if the tenant hands in the amount claimed, the Court will serve notice on the third party and unless the third party brings his suit within three months, the plaintiff in the first suit will be entitled to the money.

A suit instituted in accordance with clause 93) of S. 149 of the B. T. Act by the "third person" mentioned in that section is not rendered infructuous by the fact that owing to the Court's delay, before that suit is tried out, the plaintiff in the original rent suit gets a decree against the defendant. (*Fletcher and Huda, JJ.*) **HEMANTA KUMAR KAR v. BIRENDRA NATH ROY.**

47 I. C. 1003.

—S. 153—Appeal, maintainability of—Question of title raised but not decided.

Under S. 153 of the B. T. Act, it is not sufficient merely that there should be a controversy on the question of title as between parties having conflicting claims to land but the section requires that some question of title should be decided as between such parties. Therefore, where in a suit for rent the lower Court does not decide the question of title which is raised between parties having conflicting claims thereto, no appeal lies under S. 153 of the B. T. Act. (*Richardson and Beachcroft, JJ.*) **JILLOE RAHMAN v. ABRAHIM KHAN.**

44 I. C. 558.

—S. 153—Rent—Suit—Second appeal, if competent, when claim is for less than Rs. 100.

In a suit for rent where the amount claimed does not exceed Rs. 100, no special appeal lies to the High Court where the only question

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decided in the suit is whether the relation of landlord and tenant exists between the parties (*Fletcher and Huda, JJ.*) **JAHIRAL HAQUE v. SADAR ALI.**

47 I. C. 105.

—S. 153—Second appeal—Issue as to whether land is held on *naqdi* or *bhawli* rent—Conflicting claims to title to land between one of the parties and a stranger.

In a case where the question is whether the deft. is liable to pay *naqdi* or *bhawli* rent, a Second Appeal is not barred by S. 153 of the B. T. Act.

In a case where there is a conflicting claim to title in and between one of the parties in suit and a stranger no second appeal lies under S. 153 of the B. T. Act. (*Jwala Prasad, J.*) **SHEIKH WAZIR ALI v. MUSSAMMAT MAHIMMUNISSA.**

4 Pat L W 72=

43 I. C. 777.

—S. 153 (b) Appeal—Decision of Dt. Munsif dismissing rent suit on the ground that relationship of landlord and tenant had not been proved.

Where in a suit for rent for less than Rs. 50 the Dt. Munsif dismissed the suit holding that there was no relationship of landlord and tenant between the parties in respect of the jama sued for, *held* that the decision of the Dt. Munsif was not appealable (*Newbould and Parrott, JJ.*) **MUKUNDA LAL ROY v. BHABASUNDARI DEBYA.**

47 I. C. 922.

—S. 155—Notice under—Sufficiency of.

If the misuse complained of in a notice under S. 155 of the B. T. Act, is in fact incapable of remedy the notice is sufficient although it does not require the tenant to remedy the misuse. A suit based on such a notice will not fail for want of a proper notice. (*Teunon and Newbould, JJ.*) **BEPIN BEHARY CHAKRABARTY v. SIB CHARAN CHAKRABARTY.**

43 I. C. 801.

—S. 158—Failure to give notice—Sale if valid.

S. 158 B. of the B. T. Act imperatively requires the giving of notice to the co-sharer landlords before the sale of a holding in execution of a rent decree obtained by one co-sharer and the failure of the Court to serve such notice renders the sale invalid. (*Fletcher and Newbould, JJ.*) **SARIP LOCHIN v. TILOTTAMMA DEBI.**

43 I. C. 3.

—Ss. 159 Proviso Cl. (b) and 179—Darpadnadar and padnadar—Contract of permanent tenancy—Validity—Effect—Binding nature on representatives of grantor and grantee.

S. 179 of the B. T. Act controls (b) of the proviso to S. 159.

It is competent for the padnadar and the darpadnadar to enter into a contract of permanent tenancy, subject to the restriction that subordinate interests carved out by the padnadar will be extinguished on a sale of his under-tenure for arrears of rents. This restriction runs with the land, and is operative not only between the grantor and the grantee

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but also between their representatives in them. The condition in the lease is not an absolute restraint on alienation, and is for the benefit of the lessor (*Mockerjee and Beachcroft, JJ.*) MADHU SUDAN MAHTO v. MIDNA PORE ZEMINDARI CO.

27 C. L. J. 511=46 I. C. 129.

—S. 161—Incumbrance—Acquisition of title by adverse possession against tenant holding at fixed rate. See B. T. ACT, SS. 83 AND 161. 47 I. C. 334.

—Ss. 11 and 167—Incumbrance—Interest of mortgagee-purchaser if an incumbrance.

The interest of a mortgagee of a part of a holding who has purchased the holding in execution of his mortgage decree is an incumbrance within S. 161 of the B. T. Act. Such a mortgagee-purchaser cannot be ejected by the purchaser of the holding in execution of a rent decree until his incumbrance is annulled under the provisions of S. 167 of the B. T. Act. 13 I. C. 785 and 16 C. W. N. 259 foll. (*Fletcher and Huda, JJ.*) INDRA NARAYAN RAY v. NABIN CHANDRA BANERJEE.

47 I. C. 847.

—S. 161—Incumbrance—Interest of purchaser of a portion of non-transferable occupancy holding if and without S. 161.

An incumbrance implies a limitation of the rights of a tenant and not a total extinction of them. A landlord purchaser at a sale in execution of his rent decree is not required to annul the interest of a purchaser of a portion of a non-transferable occupancy holding. 11 C. L. J. 18 foll. (*Chitty and Walmsley, JJ.*) FAZARALI MAHALDAR v. PORRO MIAN.

28 C. L. J. 266=48 I. C. 300

—Ss. 161, 163 (2) and 167—Mortgage of shore of holding, if incumbrance to be annulled.

A mortgage of a portion of a non-transferable occupancy holding is an incumbrance within S. 161 of the B. T. Act and a purchaser of the holding at a rent sale under S. 163 (2) (b) of the Act takes the property subject to the mortgage, unless it is annulled by him in the only mode provided by law, namely, under S. 167 of the Act.

In a suit by the mortgagee to enforce his bond against the tenants of the holding and the purchaser at the rent sale the landlord is not a necessary party. (*Walmsley and Greaves, JJ.*) PRAN KRISHNA PAL v. ATUL KRISHNA MUKERJEE. 22 C. W. N. 662=

46 I. C. 176.

—S. 163 (2)—Mortgage of non-transferable occupancy holding—Incumbrance—Purchaser of the holding at a rent sale—S. 163 (2) (b) of the Act, takes subject to the mortgage. See B. T. ACT, SS. 161, 163 (2) and 167.

22 C. W. N. 662.

—S. 167—Annulment of incumbrances—Procedure to be strictly followed—Service of notice, entry in order sheet if sufficient proof of—Single suit for rent of entire taluk, after

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same was split up—Consequential sale if rent sale.

The destruction of valuable incumbrances is a very severe measure which the law allows only if a certain procedure is strictly followed, and when a party wishes to enforce that severe measure he must show that he has strictly followed the procedure laid down.

An entry in the order sheet that notice has been served is not sufficient proof of service of notice. 7 C. L. J. 262 ref.

Where it appeared that what was formerly once a taluk was split up into several taluks, a sale of the entire taluk in execution of a decree obtained in a single suit for rent due upon the entire taluk was not a sale for the arrears of rent within the B. T. Act (*Chitty and Smith, JJ.*) PRAFULLA NATH TAGORE v. SHITAL KHAN. 22 C. W. N. 788=47 I. C. 97.

—S. 167—Ejectment—Purchaser seeking to annul the Sub tenancy—Sale of superior tenancy for arrears of rent—Adverse possession against Sub-tenant—Incumbrance—Notice. See (1917) DIG. COL. 117; BRUSAN v. SRIKANTA. 45 Cal. 756=21 C. W. N. 155=

23 C. L. J. 435=33 I. C. 957.

—S. 167—Incumbrance, annulment of—"Date of Sale" meaning of See (1917) DIG. COL. 93; NANDA LAL BANERJEE v. UMETH CHANDRA DAS. 45 Cal. 151=

22 C. W. N. 86=26 C. L. J. 328=40 I. C. 579.

—S. 167—Purchasers in execution of decree for rent and a decree on a mortgage—Absence of notice of annulment of mortgage—Effect of.

A subsequent purchaser of a holding under a mortgage decree cannot oust a prior purchaser under a rent decree even when there has been no notice under S. 167 of the B. T. Act annulling the mortgage. The former is merely in the position of a second mortgage who has a right to redeem the latter. (*Roe and Coutts, JJ.*) SURAT LAL CHOWDHURY v. MUELI-DHAR. 46 I. C. 921.

—S. 167 and Ch. XIV—Sale of an under tenure, under—Effect of the sale in case the landlord ceased to be the sole landlord at the date of sale—If the sale passes the under-tenure to the purchaser free of incumbrances—Effect of the cessation, partial or entire of the interest of the landlord on his right to enforce realisation of arrears of rent by sale of the tenancy—Propriety of applying isolated dicta from judicial precedents to cases where the facts are different in essential particulars. See (1917) DIG. COL. 98; SYEDUNNESSA KHATUN v. AMIRUDDI. 45 Cal. 294=

21 C. W. N. 847=25 C. L. J. 622=41 I. C. 353.

—S. 169 (1), cl. (c)—Decree for rent sale in execution of—Sale proceeds, disposal of—Arrears of rent, since the institution of the suit—Interest on such arrears, if can be paid out of the surplus sale proceeds. See (1917) DIG. COL. 94; PRAFULLA NATH TAGORE v. MATABADDIN MANDAL. 22 C. W. N.

323=26 C. L. J. 322=42 I. C. 884.

## BENGAL TENANCY ACT S. 171.

—Ss. 171, 166 and 167—“Interest voidable on sale” meaning of—Right of reversioner or donee from tenant to deposit.

The words “interest voidable on the sale” in S. 171 of the B. T. Act are confined to such interests as the auction purchaser might by due application under Ss. 166 and 167 of the Act avoid or annul. 40 I. C. 257 (F. P.) foll. A reversioner or donee from a tenant of a holding has no such interest as to entitle him to make a deposit under S. 171 of the B. T. Act. (*Roe and Imam, JJ.*) GOPAL RAY v. HITNABAYAN SINGH. 3 Pat. L. J. 145=

4 Pat. L. W. 34=43 I. C. 23.

—S. 173—Execution sale—Order setting aside sale on the ground that auction purchaser was benamidar for one of the judgment-debtors—No appeal. See C. P. CODE, S. 47 AND O. 21, R. 90. 46 I. C. 745.

—S. 174—Deposit—Amount of—Decree amount and costs.

The amount of money required to be deposited by the judgment-debtor under S. 174 of the B. T. Act is the amount recoverable under the decree with costs, and not the amount specified in the proclamation as under O. 21, R. 89 of the C. P. Code. (*Imam and Thornhill, JJ.*) MAKRU RAI v. SARJUG PERSHAD. 47 I. C. 654.

—S. 174—Suit to set aside order under, maintainable—C. P. Code, O. 21, R. 92 (3), Provisions of, not applicable. See (1917) DIG. COL. 96. GULAB CHAND ROY v. SHEIK FIDA HASSIAN. 3 Pat. L. J. 122=3 Pat. L. W. 264=44 I. C. 532.

—Ss. 181 and 19—Ghatwali land—Occupancy right acquisition of.

From 1853 to 1885 ghatwali lands were subject to the acquisition of occupancy right. S. 181 of the B. T. Act does not take away such rights acquired or enjoyed. 31 Cal. 1021, 1 C. L. J. 138, 5 C. L. J. 53 and 33 Cal. 630 dist. (*Richardson and Beachcroft, JJ.*) SITIKANTHA ROY v. BIPBADAS CHARAN. 22 C. W. N. 763=27 C. L. J. 556=46 I. C. 485.

—S. 181—Jagir Khudkast, if a service tenure.

“The words”  *Jagir khudkast land* “do not necessarily mean a service tenure within the meaning of S. 181 of the B. T. Act. (*Jwala Prasad, J.*) DEONATH MISRA v. AMAR SINGH. 45 I. C. 418.

—S. 182—Homestead of raiyat—Section, if applicable.

Whether the homestead of a ryot is or is not part of an agricultural holding the B. T. Act applies to it by virtue either of the general provisions of the Act or of the special provision to be found in S. 182 (*Trimon and Richardson, JJ.*) RAI CHARAN KARMAKAR v. SUB RAM PARAI. 46 I. C. 489.

## BENGAL TENANCY ACT SCHED. III.

—S. 182—Occupier of homestead for more than 12 years, if a raiyat.

Before a person can become a settled raiyat of a village he must be a raiyat. Mere occupation of a homestead in a village for more than 12 years would not make the occupier a settled raiyat of the village. (*Chitty and Wainmsley, JJ.*) KAMAL SAIDYA v. GANESH CHANDRA BISWAS. 47 I. C. 829.

—S. 183—Under-raiyat—Acquisition of occupancy right by custom or usage—Under-raiyat continues as such and not liable to be ejected. See B. T. ACT, Ss. 49, 113 and 183. 22 C. W. N. 618.

—S. 183—Suit to assess rent—Maintainability of, at the instance of one of the co-sharer landlords.

A suit to assess rent is consistent with and arises out of the general law and the revenue system of the country, and is not one which the landlord is “required or authorised” to do under the B. T. Act within the meaning of S. 188 of that Act. A co-sharer landlord is therefore entitled to institute such a suit. Had S. 188 of the B. T. Act applied, the fact that the pld. had joined his co-sharers as defts. would not have justified the Court in entertaining the suit “on principles of justice and equity.” (*Richardson and Beachcroft, JJ.*) DHANANJOY MANJHI v. UPENDRANATH DEB SARBADHI-KARY. 22 C. W. N. 685=46 I. C. 428.

—S. 195—Patnidar—Right to apply for abatement of rent. See B. T. ACT, Ss. 52 AND 195. 45 I. C. 190.

—Sch. III, art. 4 (a) and 60 proprietors of an estate—Suit by some against others for partition—Claim in suit for declaration that defendant has not acquired occupancy or non-occupancy right under lease in his favour by plaintiffs—Limitation. See BENGAL TENANCY ACT, RAIYAT. 4 Pat. L. W. 428.

—Sch. III, Art. 3—Applicability—Dispossession by a tenant under authority from landlord.

Art. 3 Sch. III of the B. T. Act has no application in a case where the dispossession was by a tenant under an authority conferred by the landlord. 18 C. L. J. 86 foll. (*Fletcher and Huda, JJ.*) KEDAR NATH MONDAL v. MOHESH CHANDRA KHAN. 23 C. L. J. 216=46 I. C. 787.

See UNDER LIMITATION ALSO.

—Sch. III, Art. 3—Dispossession of tenant by landlord—Suit to recover possession of holding—Recognition of ryots’ interest.

After the dispossession of a ryot by some of the co-sharer landlords his right to redeem the holding was recognised by the Court in a mortgage suit by another of the co-sharer landlords.

## BENGAL TENANCY ACT SCHED III.

*Held*, that such recognition by the Court did not extend the period of two years' limitation which the ryot had under Art. 3. Sch. III of the B. T. Act for bringing a suit for recovery of the possession of the holding. (*Fletcher and Huda, JJ.*) GIRISH CHANDAR MITTRA v. GIRIBALA DEBI.

28 C. L. J. 219=45 I. C. 937.

—Sch. III, Art. 3—*Suit by raiyat to recover possession of holding from auction purchaser—Limitation applicable.*

The limitation prescribed by Art. 3 Sch. III of the B. T. Act does not apply to a suit by a raiyat to recover possession of his holding from an auction-purchaser of the holding in execution of a rent decree. (*Fletcher and Huda, JJ.*) GANESH CHANDRA MOHAJAN v. BERAJA SUNDARI.

46 I. C. 975.

—Sch. III, Art. 6—*Execution Application—Rent decree—Dismissal of execution application for default—Fresh application, if a continuation of the old one.*

A rent decree was obtained on 14-3-1911. Application for execution was made on the 6th March 1914 and the sale took place on the 26th April 1914. On the application of the judgment-debtor the sale was set aside on the 16th September 1914. On the 28 September 1914 the execution case was dismissed in these terms: "sale set aside decree-holder taken no further steps. Case dismissed for default." The decree holder appealed from the order setting aside the sale but the appeal was dismissed on the 2nd January 1915. On the 16th February 1916 the decree-holder filed a fresh application for execution.

*Held*, that the application for execution made on the 6th February 1916 was time barred under cl. (6) of Sch. III of the B. T. Act; that the previous application ended with the order of the 26th September 1914 and there was no continuity between the application and the application made on the 16th February 1916. 13 C. W. N. 521 dist. (*Richardson and Walmsley, JJ.*) MIND NAPORE ZAMIN-DARY CO., LTD v. DINANATH SAHU.

22 C. W. N. 766=45 I. C. 712.

—Sch. III, Part III Art. 6—*Amending Act (I of 1907)—Execution of decree by co-sharer landlord—Limitation.*

The three years rule of limitation set out in Schedule III, Part III, Art 6 of the B. T. Act is applicable to the execution of a decree obtained by a co-sharer landlord for a sum not exceeding Rs. 500 after the enactment of the amendment. 10 C. L. J. 463; 18 C. L. J. 81 ref. (*Teunon and Newbould, JJ.*) BYANKESH CHUKERBUTTY v. UDAY CHAND.

43 I. C. 737.

BENGAL UNITED PROVINCES AND ASSAM CIVIL COURTS ACT (XII OF 1887) S. 21 (a)—District Judge—Appeal in a case of valuation of over Rs. 5,000—Decree in—Validity. See JURISDICTION, WANT OF.

4 Pat. L. W. 46.

## BERAR LAND REVENUE CODE, S. 78.

BENGAL VILLAGE CHAUKDIARS' ACT (VI OF 1870), Ss. 50 and 51—*Legal effect of resumption of Chaukidari chakran lands and subsequent transference thereof to Zemindars—Zemindars if acquire a new title—Patnidar if bound to ask for a fresh settlement.*

Where chaukidari chakran land forming part of lands settled in patni was resumed by Government under the provisions of the Village Chaukidari Act and was subsequently transferred to the Zemindar who thereupon settled such lands with the plifs. who were third parties.

*Held*, that the Zemindar was not competent to make a settlement with the plifs. and that under the grant which the plifs. obtained they had acquired no right as against the patnidars 21 C. W. N. 609 foll.

*Held*, also that the transfer of the lands by the Government, subsequent to resumption, did not create a new estate in the Zemindar but the estate thus taken by him was in confirmation and by way of continuance of his existing estate. 42 Cal. 710, 10 M. I. A. 16 foll. (*Mockerjee and Walmsley, JJ.*) SOURENDRA MOHAN SINHA v. RAJENDRA NATH ROY.

22 C. W. N. 660=

28 C. L. J. 160=48 I. C. 435.

—Ss. 50 and 51—Object and scope of—Zemindar's title to Chaukidari Chakran lands—Settlement before resumption proceedings—Validity of. See (1917) DIG. COL. 101; SHIB CHANDRA BANERJEE v. SURENDRA CHANDRA MANDAL.

45 Cal. 513=41 I. C. 759.

—S. 51—Chaukidari chakran land—Resumption—Transfer to Zemindar—Tenants, position of. See CHAUKIDARI CHAKRAN LAND.

27 C. L. J. 560.

BERAR INAM RULES, R. 14 (2)—Applicability—Temporary alienation or lease—Sanction of Deputy Commissioner—Necessity. See HINDU LAW—RELIGIOUS ENDOWMENT.

14 N. L. R. 12.

BERAR LAND REVENUE CODE (1896), Ss. 4, 5, 86, 87 and 205—Recognised division of survey number. What is—Officer in charge of Record of Rights, if can recognise division. See (1917) DIG. COL. 102. SURYAKHAN v. RENAI.

14 N. L. R. 51=42 I. C. 447.

—Ss. 78 and 79—Notice not acted on for a year—Fresh notice if necessary.

If a notice has been duly served under S. 78 of the Berar Land Revenue Code, in the absence of waiver, the person so served is not entitled to a fresh notice under S. 79 merely because more than one year has elapsed since the time when in accordance with the notice the tenant should have vacated the land.

S. 78 Sub-Ss. (4) and (8) are not restricted to the tenancies mentioned in sub-S. (2) of

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that section, but the enhancement contemplated therein can be decreed only if the judgment of the court be just and reasonable.

A notice to quit under S. 79 of the Berar Land Revenue Code, unconditionally determines the tenancy, but a notice under S. 78 (8), if not complied with, is not intended to have that effect inasmuch as the tenant has the right to appeal to the Court for a decision as to whether in its opinion the enhancement is just and reasonable.

A tenant is to be evicted for not paying the enhanced rent only after it has been determined to be just and reasonable by the court (*Mitra, A. J. C.*) *NARAYAN v. SYED BAHADUR.* 44 I. C. 723

—S. 78 (2)—*Ante-ijara tenancy—Presumption—Onus.*

It is the tenant who wants to remain on the land in spite of the landlord's wishes to the contrary that has to prove the circumstances which entitle him to do so. He has therefore, to prove, in the case of an ante ijara tenancy in Berar, that no satisfactory evidence of the commencement of his tenancy and of the period agreed upon between the landlord and tenant for its duration is forthcoming.

If he fails to do so no presumption under S. 78 (2) of the Berar Land Revenue Code can be made in his favour. (*Kotwal, O. A. J. C.*) *ABDULLA KHAN v. ABHIMAN.* 44 I. C. 531.

—S. 78 (2)—*Applicability and effect—"Antiquity" Meaning—Proof of commencement of tenancy—Applicability of two tenants in Izara Villages.*

One of the conditions essential to the applicability of S. 78, clause 2, of the Berar Land Revenue Code to a tenancy, is that by reason of the antiquity of the tenancy, no satisfactory evidence is forthcoming as to its commencement.

The word "antiquity" in clause (2) must be construed with reference to the nature of the history of the country where the land is situated and to the possibility of getting evidence, and not in its commonly accepted meaning of absolute antiquity.

S. 78, clause (2) does not contemplate proof of the commencement of the tenancy in a particular year, much less on a particular date. If it can be proved with certainty that the tenancy did not commence till after a certain definite point of time, then it cannot be said of such a tenancy that evidence of its commencement has been lost by reason of its antiquity. A tenant of such a holding is therefore not protected by S. 78 (2).

S. 78 (2) practically becomes inapplicable to izara villages as a result of this decision. (*Mitra, O. A. J. C.*) *PARASHRAM v. BAPU.* 14 N. L. R. 111.

## BERAR MUNICIPAL LAW, S. 85.

—S. 79 (2)—*"Annual Tenancy." Meaning of—Tenancy for a year—Notice to quit, if essential.*

The expression "annual tenancy" as used in S. 79 of the Berar Land Revenue Code is meant to cover tenancy from year to year only and not a tenancy lasting for a year only. No notice by either party to a contract of tenancy for one year is, therefore, necessary to determine the tenancy. (*Kotwal, O. A. J.*) *KESHAO v. MANSHA.* 14 N. L. R. 129—44 I. C. 212.

BERAR MUNICIPAL LAW (1886) Ss. 42 and 44—*Tax—Notification of—Civil Court if entitled to declare tax illegal—Scavenging tax—Liability to pay when arises*

S. 44 (9) of the Berar Municipal Law precludes a Court from holding that a tax which has been duly notified has not been legally imposed. A defect in the constitution of the Committee which imposed the tax is a mere informality and is protected by sub-S. (9).

S. 42 of the Berar Municipal Law shows that the condition of taxation of a building or shop for scavenging purposes is a provision by the Committee for scavenging service and not the actual rendering of it in respect of a latrine existing in the building or shop. (*Kotwal, A. J. C.*) *TAHER ALI v. THE MUNICIPAL COMMITTEE, DHAMGAON.* 46 I. C. 682.

—Ss 85, 86, 116 and 130 *Application for permission to build—No order on—Erection of steps and balcony projecting over street—Encroachment—Notice to show cause not tantamount to notice to remove—Daily fine when proper.*

The owner of a plot applied for sanction to build a house but the municipal committee passed no orders thereon within one month. Thereupon he built steps over a road side drain and a balcony eleven feet high projecting over it without the written permission of the Committee. The Committee thereupon issued notice to the former to show cause why the balcony and steps should not be removed and why he should not be prosecuted. The applicant was then prosecuted on a complaint made by the Secretary duly authorised by a resolution of the Committee and was convicted of two offences, one in respect of the steps and the other in respect of the balcony, under rule 10 read with rule 30 of the rules framed under S. 16 of the Berar Municipal Law and fined Rs. 25 on each count. The steps and the balcony were ordered to be removed within eighty days, on failure of which he was ordered to pay a continuing daily fine of Re 1.

Held, that the notice to show cause was not a notice to remove the obstruction as required by S. 85 (2) of the Berar Municipal Law.

S. 86, sub-S. (2) contemplates a notice issued personally to an individual.

S. 85 of the Berar Municipal Law merely requires a person intending to erect or re-

**BERAR MUNICIPAL LAW, S. 116.**

erect any building to give written notice of his intention to the Committee, but the mere fact that such a permission was applied for and no order prohibiting the erection was passed within one month does not place the applicant in the same position as if written permission was accorded to him by the Committee as required by S. 86. So far as the encroachments dealt with by S. 86 are concerned, they are not in themselves punishable though declared unlawful by that section, but it is disobedience to the order of the Committee for their removal under S. 180 which has been made punishable. (*Mitra, A. J. C.*) **RADHAKISAN v. MUNICIPAL COMMITTEE AMROATI.** 14 N. L. R. 157=44 I. C. 744=19 Cr. L. J. 392.

—**Ss. 116 and 138—Rules framed under—Ultra vires if consistent with the other provisions of the Act.**

When a Statute expressly deals with any matter and lays down certain procedure, it is not competent to a corporation to repeal any of the provisions of the Act under which power to make rules has been given.

The rules framed under S. 166 of the Berar Municipal Law must be consistent with the act. The effect of rule 10 framed under S. 116 of the Berar Municipal Law is to do away with the notice required by S. 128, and the rule is, therefore, *ultra vires*. (*Mitra, A. J. C.*) **RADHAKISHAN v. SECRETARY OF STATE FOR INDIA.** 14 N. L. R. 157=44 I. C. 744=19 Cr. L. J. 392.

—**Ss. 132 and 133—Balcony eleven feet high not an encroachment—Daily fine if justifiable.**

A balcony eleven feet high above the level of a street is not an encroachment within the meaning of S. 162 of the Berar Municipal Law.

S. 133 of the Berar Municipal Law makes an encroachment punishable without a notice of removal being issued to the offender. That section does not, however, justify a daily fine but only allows a fine which may extend to Rs. 50.

The policy of the Berar Municipal Law is not to authorise a daily fine except in cases of contumacy, that is disobedience of a lawful order. (*Mitra, A. J. C.*) **RADHAKISAN v. SECRETARY MUNICIPAL COMMITTEE, AMROATI.** 14 N. L. R. 157=44 I. C. 744=19 Cr. L. J. 392.

—**S. 151—Complaint—Formalities of.**

All that S. 151 of the Berar Municipal Law lays down is that a Court shall not take cognizance of an offence under the Berar Municipal Law, except on the complaint of the Committee or of some person authorised by the Committee in their behalf. The complaint need not specify the section or rule of the Berar Municipal Law which has been broken. It need only state facts and it is for the Court to decide under what section or rule an offence has been committed. (*Mitra, A. J. C.*)

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**RADHAKISAN v. MUNICIPAL COMMITTEE, AMROATI.** 14 N. L. R. 157=44 I. C. 744=19 Cr. L. J. 392.

**BERAR PATELS AND PATWARIS LAW (1900), S. 9—Endowments of Patwari office—partition of, improper.**

Under S. 9 of the Berar Patels and Patwaris Law, 1900, emoluments of a Patwari are to be enjoyed solely by the person for the time holding the office. There cannot be a partition or an assignment of the emoluments. (*Mitra, A. J. C.*) **SHIVARAM AMBADAS v. SHRIDHAR SHIVRAM.** 43 I. C. 137.

**BETTING—Gaming—Distinction between—Betting not punishable under Criminal Law. See GAMING ACT, S. 13.** 14 N. L. R. 137.

**BILL OF LADING—Liability of carrier—Limitations on, by bill of lading—Validity of conditions.**

It is open to a carrier by sea to limit his liability by a writing such as the bill of lading. Consequently the following conditions in a bill of lading are perfectly valid:—

(1) that the Company shall not be liable for any damage caused by sweating, fomenting, heat, boilers, or storage whether arising or not from the negligence of the persons in the service of the Company;

(2) that the liability of the Company shall absolutely cease when the goods are over or beyond the side of the Company's own ship level with the rail; and

(3) that the Company shall not be liable for any damage capable of being covered by insurance. (*Hayward, A. J. C.*) **MOOSAJI ARMED, & CO. v. ASIATIC STEAM NAVIGATION CO. LTD.** 45 I. C. 168.

**BLOWING HOT AND COLD—Estoppel. See ESTOPPEL.** 21 O. C. 188.

**BOMBAY BHAGDARI ACT (V OF 1862) S. 3—Recognised Sub-division of a narva dismemberment of—Compromise as to, void.**

S. 3 of the Bhagdari and Narvadari Act, 1862, renders void a compromise the effect of which is to dismember the recognised sub-division of a Bhag. (*Batchelor, A. C. J. and Kemp, J.*) **NAGAR KASHI PATEL v. BAI DHULI.** 20 Bom. L. R. 342=45 I. C. 577.

**BOMBAY CITY MUNICIPAL ACT, (III OF 1888), Ss. 140 cl. 143 1 (a) and 2 (d)—“Charitable purposes” in S. 143 (2) (d) of the Act meaning of, Hostel of a college exempt from taxation—Fee paid by a student residing in a hostel if rent within S. 143 (2) (d), Indian Universities Act (VIII of 1904), Ss. 21 (1) (cl.) (f) 25 (1) and (2) (m). A special case may be reopened by consent.**

The part of a hostel of a college occupied by the students and the Superintendent of the hostel is occupied for charitable purposes within the meaning of S. 143 (1) (a) of the City of Bombay Municipal Act, and is, there-

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fore, exempt from general taxation leviable under S. 140 (c) of the City of Bombay Municipal Act 16 Bom. 217 ref.

Where a part of the hostel of a college was occupied by a Professor and Asst. Superintendent of the hostel :—

*Held*, that such part of the hostel of a college was liable to be rated for general tax leviable under S. 140 (c) of the City of Bombay Municipal Act, unless it was shown that the duties of the Professor and the Assistant Superintendent for purposes of supervision, physical welfare and education of students, were such as to make their presence on the premises absolutely necessary. **BENT v. ROBERTS** 3 Ex. D. 66 ; *Oxford Rate S. El. and Bl.* 184 ref.

The extra fee paid by a student residing in a hostel of a college is not 'rent' within the meanings of S. 143 (2) (d) of the City of Bombay Municipal Act.

Where a special case is stated to the Court by consent of parties it can only be reopened by mutual consent. (*Kaji ji, J.*) **MONIE v. SCOTT.** 20 Bom. L. R. 839= 47 I. C. 642.

—————**ACT (III OF 1888 AND V OF 1905), Ss. 296, 297, and 301—Acquisition of land—Powers of Municipality—Formation of regular line—Public Street—Collateral object—Basis of compensation.**

Acting under Ss. 297 and 299 of the Bombay City Municipal Act the Commissioner prescribed line on one side of a public street so that land belonging to the appellants fell within it, and having served them with notice, took possession under S. 301. The Commissioner wished to acquire the land for the purpose of widening the street in connection with a contemplated bridge carrying the street over certain level crossings. The appellants contended that the procedure under Ss. 297, 299 and 301 was inapplicable and that the proceedings were *ultra vires* and that the land could only be acquired subject to payment of compensation under the Land Acquisition Act, 1894:—

*Held*, that by Ss. 297 and 299 of the Act the powers could be exercised although the motive of the Commissioner, who acted in good faith and in the discharge of his duties, was not to reserve the regular line of the street, and that consequently the compensation payable to the appellants was to be calculated according to S. 301 of the Act, and not under the Land Acquisition Act.

Even if it were proved that the creation and preservation of a regular line on one side of the road was not part of the Commissioner's object, though it was certainly an incidental result of his scheme, there is nothing in the Act which either entitles the appellants to investigate his motives or has the effect of invalidating his action on account of the purpose with which he in fact prescribed the regular line of

**BOMBAY DT. MUNICIPALITIES ACT, S. 92.**

the street in 1909. (*Lord Sumner.*) **NARMA v. MUNICIPAL COMMISSIONER FOR BOMBAY.**

42 Bom. 462=23 C. W. N. 110=

20 Bom. L. R. 937=(1918) M. W. N. 840=

8 L. W. 548=24 M. L. T. 297=

43 I. C. 63=45 I. A. 125 (P.C.)

—————**Ss. 305, 3, (U) (W) (X) (Y)—Leveling and drawing of private streets—Street sewer by the Municipality—Street if includes houses on either side.**

In 1883 or thereabout the Municipality of Bombay constructed a sewer along two lanes in Bombay known as the Hanuman cross-lanes ; it received sullage water from houses on either side of the lanes. The Municipality issued a notice in 1916 calling upon the owners of the houses on either side of those lanes to level, metal, drain and light the lanes under the provisions of S. 305 of the City of Bombay Municipal Act, 1888. On failure to comply with the notice, the owners were prosecuted, the Municipality contending that the notice was proper, inasmuch as the sewer laid in the lanes did not make them public streets on either side of the street.

*Held*, (1) that S. 305 of the City of Bombay Municipal Act had no application to the two lanes in question, for they having been street sewered by the Municipality in 1883, were public streets within the meaning of S. 3 (x) of the Act and (2) that the term "street" included houses on either side of it and was not restricted only to the road way. (*Shah and Marten, JJ.*) **EMPEROR v. RAMBAO VISH-VANATH.** 20 Bom. L. R. 620=

46 I. C. 519=19 Cr. L. J. 743.

**BOMBAY CIVIL CIRCULARS, Ch. II, Cl. 91 Sub. Cl. 16—Decree—Execution proceeding transferred to Collector—Application for leave to bid at auction to be made to Collector and not to Courts—Set off whether can be allowed** See C. P. CODE, S. 20. 20 Bom. L. R. 708.

**BOM. DT. MUNICIPALITIES ACT (III OF 1901), Ss. 92 and 96—Reconstruction of old building—Omission to give notice—Offence.**

The reference to S. 92 in S. 96 clause (1) of the Bombay Dt. Municipal Act does not govern the whole of the clauses but is limited to the clause describing projecting portions of buildings in respect of which the Municipality are empowered by that section to enforce a removal or set-back, so that notice or permission is requisite in case of all buildings whether on a public road or in a private *mahala*.

S. 96 of the Bombay District Municipal Act does not empower the Municipality to deprive owners of the legitimate use of their land or to refuse permission to build at all, but it does not confer on the Municipality a very wide power of regulating buildings. The object of the power is to secure the safety and sanitation of buildings to be newly erected. This power, though an encroachment on

## BOM. DT MUNICIPALITIES ACT, S 96.

private rights, is not inconsistent with the Act. (*Pratt, J. C. and Hayward, A. J. C.*) KHUSHALDAS MOOLCHAND v. EMPEROR.

11 S. L. R. 90=44 I. C. 346=  
19 Cr. L. J. 330.

—S. 96 (2) (3)—Notice of new buildings—Permission to build privy—Cannot be revoked subsequently—Injunction.

The plff. applied on 1-12-1913, to the deft. Municipality for permission to build a privy on his own land, which permission was granted on the 19th idem. The Municipality gave notice to the plff. on 6-1-1914 requiring him not to build the privy until further orders. The plff. sued for cancellation of the last named order and for a perpetual injunction restraining the Municipality from preventing the plff. in the work of constructing the privy:—

Held, that the first order made by the Municipality to build the privy was a final order under S. 96 (2) of the Bom. Dt. Municipalities Act and that the subsequent order which purported to be provisional in its character was, therefore, not legal; and that consequently the plff. was entitled to the injunction claimed he having commenced the work within a year within the meaning of S. 96 (4) of the Bombay District Municipalities Act. (*Shah and Marten, JJ.*) VITHAL v. THE ALIBAG MUNICIPALITY. 20 Bom. L. R. 756=47 I. C. 145.

—S. 69 (5)—Notice of new building—Permission once granted cannot be rescinded. See (1917) DIG. COL. 105. KAREEM RANJAN KHOJI v. EMPEROR. 19 Bom. L. R. 65=39 I. C. 298=10 Cr. L. R. 95.

—Ss. 113, 122 and 170—Bye-laws of Surat Municipality 3 and 10—Projection into a public street—Shop-board, projection of into public street, without permission of Municipality—Liability—Bye-law providing for charging of fees for projection not ultra vires.

The accused, who occupied a shop abutting on a public street, projected a shop-board in front of his shop into the public street, without the permission of the Municipality. He was prosecuted for making the projection without permission and without paying fees prescribed in that behalf (bye-law No. 10 of the Surat City Municipality). It was contended that the bye law was ultra vires the Municipality.

Held, that the accused, in erecting the shop-board without paying the prescribed fee, had contravened bye-law No. 10 and that the bye-law was not ultra vires the Municipality (*Shah and Marten, JJ.*) EMPEROR v. NAGIN DAS CHEHABIDAS. 42 Bom. 454=20 Bom. L. R. 388=43 I. C. 503=19 Cr. L. J. 599.

—S. 160 (3)—Land Acquisition Act (I of 1894), S. 23 (2)—Award of compensation by Dt. Court—Increase of market value—Revision—Chief Court.

Under S. 160 (3) of the Bombay District Municipal Act, the matter of the compensa-

## BOM. HEREDITARY OFFICERS ACT, S. 11-A.

tion is to be determined by the District Court, which decides the question in the exercise of its jurisdiction as a Civil Court. Its proceedings are therefore, subject to revision by the Judicial Commissioner's Court under S.115 of the C. P. Code.

The word 'procedure' in S. 160 (3) of the Bombay District Municipal Act is used in its popular and not in its strictly legal sense, and a District Court in awarding compensation under that section has power to award 15 per cent. of the market value in addition to such value. (*Pratt, J. C. and Crouch, A. J. C.*) HYDERABAD MUNICIPALITY v. MOORJINAL MUSHTAKRAM.

11 S. L. R. 93=44 I. C. 363.

BOMBAY DISTRICT POLICE ACT (IV of 1890) S. 43—Order of ejectment by Dt. Magistrate—Revision—Remedy of aggrieved party.

An order passed by Dt. Magistrate under S. 43 of the Bombay District Police Act is an executive order and not the order of an inferior Criminal Court, and consequently cannot be interfered with by the High Court in revision even though it is ultra vires.

The aggrieved party has in such a case a remedy under Ss. 43 (2) and 50 of the Bombay District Police Act by petition to the Commissioner.

A District Magistrate has no jurisdiction to eject any person from property under S. 43 of the Bombay District Police Act without first taking temporary possession himself and his order of ejectment or exclusion can only operate for the period of his temporary possession. (*Pratt, J. C. and Hayward, A. J. C.*) DHABAMIBAI v. EMPEROR. 11 S. L. R. 128=45 I. C. 396=19 Cr. L. J. 533.

—S. 44, Cl. (1)—Religious procession—Maintenance of order—Order by Dt. Magistrate, form of.

An order passed under S. 44 of the Bombay District Police Act should indicate the person or parties who are affected by it and also the occasion to which it intended to apply. (*Heaton and Shah, JJ.*) EMPEROR v. ABDUL HAMDI RAJABALI. 20 Bom. L. R. 114=44 I. C. 390=19 Cr. L. J. 36.

—S. 61 (b)—Religious man going about the streets in state of nudity. See (1917) DIG. COL. 105; EMPEROR v. MAULA BABA FAKIR. 19 Bom. L. R. 907=43 I. C. 332=19 Cr. L. J. 108.

—S. 61 (b)—Vehicle—Meaning—Bicycle a vehicle. See (1917) DIG. 105 EMPEROR v. KIKAN BHAI. 41 Bom. 464=19 Bom. L. R. 349=40 I. C. 289=10 Cr. L. R. 14.

BOM. HEREDITARY OFFICERS ACT, (III OF 1873), S. 11: A—Application to the Collector to take action under, not a civil proceeding. See LIM. ACT, S. 14. 20 Bom. L. R. 913.

## BOM. LAND REVENUE CODE, S. 3.

—S. 18. See JURISDICTION, CIVIL COURTS. 20 Bom. L. R. 993.

**BOMBAY LAND REVENUE CODE, (V of 1879) Ss. 3 (20) and 217—Alienated village—Introduction of survey settlement—Holders of land become occupants.**

The plff., who was the Inamdar of a village, claimed to have Mirasi rights over certain lands in the village alleging that the defendants were his annual tenants. The grant to the plff. was not merely of the Government's right to receive the land revenue but of the entire property in the soil. At the introduction of the survey settlement into the village in 1880, the defendants were entered in the Settlement Register as Khatedars, and since 1880 they cultivated the lands and paid to the plff. only a sum equivalent to the annual assessment. They contended that they had the same rights in respect of the lands as holders of lands in the unalienated villages:—

*Held*, that though the grant to the plff. was of the entire property to the soil, the lands in question were still "alienated" within the meaning of S. 3 (20) of the Bombay Land Revenue Code; and that the defendants were entitled to the rights of occupants in unalienated villages, by virtue of S. 217 of the Code. (*Batchelor, A. C. J. and Marten, J.*) **DADOO v. DINKAR.** 20 Bom. L. R. 887=47 I. C. 745.

—S. 48—Extra assessment—Bombay Act (I of 1865) S. 35—Conversion of land from agricultural to non-agricultural uses—Use of land for brick-kiln—Levy of fine by Collector for conversion under S. 35 of Bombay Act (I of 1865)—Building of chappars on land—Revision of survey—Assessment of land as agricultural land—Erection of substantial buildings—Building fines—brick-kiln.

On conversion of his land from agricultural to non-agricultural uses by establishing a brick-kiln in 1872, the plff. was called upon by the Collector to pay thirty times the assessment as fine for the conversion under S. 35 of Bombay Act I of 1865. About that time or shortly afterwards the plff. erected some huts on the land. At the Revision of Survey which took place in 1889, the land was assessed as agricultural land. Sometime between 1897 and 1901 the plff. erected a substantial building on the land. In 1912, the Collector having levied building fine from the plff. the latter filed a suit to recover it back.

*Held*, that though the levy of additional assessment under S. 35 of the Bombay Act I of 1865 might have protected the plff. against its enhancement before the Revision Survey of 1889, still S. 48 of the Revenue Code, 1879, rendered him liable to pay extra assessment for the conversion in use which took place after the date of the Revision Survey of 1889. (*Beaman and Heaton, J.J.*) **MAHMAD BHAI v. THE SECRETARY OF STATE FOR INDIA.** 42 Bom. L. R. 126=20 Bom. L. R. 22=43 I. C. 744.

## BOM. LAND REVENUE CODE, S. 217.

—Ss. 74 and 76—*Rajinama—Kobuliyat—Registration if necessary—Registration Act, S. 90.*

In cases governed by the Bombay Land Revenue Code, 1879, Rajinamas and Kobuliyats need not be registered. Though they cannot in themselves be documents of transfer, they are fairly conclusive evidence that a transfer in fact has been made. (*Beaman and Heaton, J.J.*) **NARSO RAMAJI KULIRANI v. NAGAVA ISHVARAPPA.** 42 Bom. 359=20 Bom. L. R. 358=451 I. C. 492.

—S. 85—Suit by superior holders to recover dues from inferior holder—Civil Court—Jurisdiction. See (1917) DIG. COL. 103; **VISWANATH GANESH v. SAKHARAM.** 42 Bom. 49=19 Bom. L. R. 820=43 I. C. 995.

—Ss. 144 and 160—*Talukdar—Grant of Village Lands rent free by—Payment of mohad Jama by Talukdar to Govt.—Attachment of Village by Govt. for non-payment of assessment—Right of Govt. to recover proportional assessment from holders of rent-free lands.*

The plff. held rent-free lands from the Talukdar of a village, who paid the Government assessment for the village in a fixed lump sum. On failure to pay assessment, the village was attached by the Government, under S. 144 of the Bombay Land Revenue Code, 1879. The Collector having levied proportional assessment from the plff. under S. 160 of the Code, the plff. sued to restrain him from doing.

*Held*, that the Government had the right to levy the assessment on the lands of the plff. in the village, for the grant of lands rent free by the Talukdar did not affect the right of Government to assess the lands. (*Beaman and Heaton, J.J.*) **TULLA v. THE COLLECTOR OF KAIRA.** 20 Bom. L. R. 748=47 I. C. 117.

—S. 203—*Executive order of Revenue officer—Right of appeal by aggrieved person not party to enquiry.*

Under S. 203 of the Bombay Land Revenue Code the right of appeal against an executive order of a Revenue Officer is vested in every person aggrieved by the order, irrespective of his being a party to the enquiry wherein the order was passed. (*Pratt, J. C. and Hayward, A. J. C.*) **MULCHAND TILOKCHAND v. MUREDALI SHEERMAHOMED.** 11 S. L. R. 124=45 I. C. 335.

—S. 217—*Kadin inamdar—Alienation of the soil—Right to enhance rent.*

The Inamdar, to whom the Government has granted all its rights in the soil in a village where a survey settlement has been introduced is entitled to raise the rents of the permanent tenants when such permanent tenancies commenced before the alienation. (*Beaman, J.*) **PANDU v. RAMCHANDRA.** 42 Bom. 112=20 Bom. L. R. 16=43 I. C. 738.

## BOM. PREVENTION OF GAMBLING ACT.

**BOMBAY PREVENTION OF GAMBLING ACT (IV of 1887) Ss. 8 and 6:**—Gambling—Property liable to be forfeited. *See* (1917) DIG. COL. 109; *EMPEROR v. RASUL GULABKADIA*. 19 Bom. L. R. 352=40 I. C. 311=10 Cr. L. R. 11.

**S. 12—** Betting on Horse races—Record of Bets on pieces of paper—Instruments of gaming. *See* (1917) DIG. COL. 109; *EMPEROR v. VITHALDAS*. 19 Bom. L. R. 830=42 I. C. 920=19 Cr. L. J. 8.

**BOMBAY GAMING ACT (III of 1895) Ss. 1 and 2—**Pakka Adatias—Position of. *See* CONTRACT ACT, S. 30. 34 M. L. J. 305 (P.C.)

**BOMBAY SURVEY AND SETTLEMENT ACT (I of 1865) Ss. 37 and 38—**Khoti village—Dunlop's proclamation—Introduction of survey settlement in the village—Tenants of Khoti registered as Khatedars—Fixity in the amount of rent payable—Kabuliyats passed by Khots to Govt.—Teak trees on varkas lands—Sale by Govt. to Khatedars—Khot's right to *sole proceeds*

In certain Khoti villages, within the area to which Dunlop's proclamation applied, Survey Settlement was introduced in 1835-36; and a revised settlement was made in 1902. The Khots thereupon passed annual Kabuliyats to the Government, one of the clauses of which gave to the Khots right to one-third of the sale proceeds of teak trees in the villages, standing on lands not belonging to the Dharekaries.

On Varkas lands in these villages the Khots used to pay a certain fixed amount to the Government every year and recover the customary dues from those who were in occupation of the lands prior to the settlement of 1867-68. After the settlement they recovered from the occupants the fixed assessment and the *dayda*. Later on, Government sold teak trees which grew on certain lands in those villages to the registered Khatedars, who cut and removed the same. The Khots claiming that they were governed by the Dunlop's proclamation sued Government to recover the sale proceeds on the ground that they were the owners of the trees; and relying on the strength of the clause in the Kabuliyat, claimed in the alternative one-third of the sale proceeds:—

*Held*, by *Heaton, J.*—that as between the Khots and the Government the matter was concluded by the Kabuliyat and the Khot could not obtain more than one-third of the proceeds of the sale of the trees:

*Held*, by *Shah, J.*—(1) that the Dunlop's proclamation could apply to Varkas lands in a Khoti village; but if any person claimed the benefit of the Proclamation he could prove that the land, on which the trees stood, was his in a popular sense, i.e. it was sufficiently marked out as being in his permanent occupation in his own right so as to make it properly describable as his land; (2) that assuming that the Khot had a right to the trees on Varkas lands under the proclamation that

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right was unaffected by the Kabuliyats which regulated only those rights which a Khot enjoyed and which would come to an end if he ceased to be the Khot; (2) that it was quite possible, on evidence, to hold that the Khots were in permanent occupation of the lands in question or that they had such interest in the lands as would enable them to obtain the benefit of the Dunlop's Proclamation; (3) that the Khot had no claim to the teak trees under S. 40 of the Land Revenue Code and they had failed to prove that they were entitled to the benefit of Dunlop's Proclamation in respect of the Varkas lands in question. (*Heaton and Shah, JJ.*) *SADASHIV v. SECRETARY OF STATE*. 20 Bom. L. R. 141=44 I. C. 572.

**BOMBAY VATAN ACT (V OF 1886) S. 2—**Vatan *Jivak Badal* grant—Personal *inam* without condition of service—Right of daughter of last Vatanadar to inherit.

In a dispute as to the existence of a Vatan held on service tenure, the Govt. admitted, when announcing the settlement, that the grant had been made *Jivak Badal*, in other words, personal *inam* without condition of service. The plf. who was the daughter of the last male Vatanadar, having sued to recover her share in the Vatan, it was contended that the plf. who was a female was barred from inheritance by S. 2 of the Bombay Vatan Act. *Held*, overruling the contention, that S. 2 of the Bombay Vatan Act was no bar to plf., inasmuch as the property in suit was not service *inam* to which alone the Vatan Act of 1886 extended. (*Scott, C.J. and Shah, J.*) *DWARKADAS v. BAI JEKORE*. 20 Bom. L. R. 983.

**BOMBAY VILLAGE POLICE ACT (VIII of 1867) S. 15—**Police *patel*—Trial of case on commission—Power to fine complainant—False complaint.

A Police Patel, to whom a commission has been issued under S. 15 of the Village Police Act has no power to inflict any fine on the complainant for bringing a false complaint. (*Shah and Keay, JJ.*) *MAGANLAL KHEMCHAND In re*. 20 Bom. L. R. 600=

46 I. C. 415=19 Cr. L. J. 735.

**BOUNDARY—**Dispute as to—Onus of proof, question of, immaterial—Whole evidence to be considered—Def't. in possession of disputed plot—Onus on plf. *See* BURDEN OF PROOF. 27 C. L. J. 599.

**BRITISH BALUCHISTAN REGULATION (IX OF 1896) S. 10—**Matter in issue "finally decided"—Meaning—Suit—Appeal—Matters decided in suit but reserved by Appellate Court not *res judicata*—Appeal—Judgment in—Effect on judgment of Court below. *See* (1917) DIG. COL. 111. *ABDULLAH ASGHAR ALI KHAN v. GANESH DAS*. 45 Cal. 442=

(1918) M. W. N. 7=132 P. L. R. 1917=7 L. W. 62=22 C. W. N. 421=34 M. L. J. 12=

## BUDDHIST LAW.

3 Pat. L. W 331=19 Bom L. R. 972=  
25 C. L. J. 566=15 A. L. J. 889=  
22 M. L. T. 451=123 P. W. R. 1917=  
42 I. C. 959. (P. C.)

**BUDDHIST LAW — Burmese — Adoption—  
Divorced woman if can adopt.**

Under the Buddhist Law as regards the power to adopt a woman who is divorced from her husband and has divided the joint property with him is in the same position as a single woman. An adoption is to a great extent a matter of intention and where an attempted adoption by a married woman causes a divorce between her and her husband but the intention to adopt continues after the divorce and full effect is given to it, there is good adoption without any formal declaration (*Twomey, C. J. and Ormond, J.*) AUNG MA HAING v. MI AH BAN.

11 Eur. L. T. 65=  
9 L. B. R. 163=45 I. C. 737.

—Burmese — Adoption — Kittima son — Proof of adoption—Separation of adopted child from adoptive parents when works forfeiture—More sons than one if may be adopted. See (1917) DIG. COL. 112; MAUNG THWE v. MAUNG TUN PE 45 Cal. 1=22 C. W. N. 97=27 C. L. J. 68=29 Bom L. R. 69=22 M. L. T. 411=(1918) M. W. N. 9=11 Bur. L. T. 29=42 I. C. 863 (P.C.)

**—Burmese—Breach of promise of marriage—Liability of minor—Personal liability.**

There is nothing in Burmese Buddhist Law to prevent a youth from contracting a valid marriage without his parents' consent at any time after he is physically competent for marriage.

Burmese Buddhist Law provides for the payment of compensation by the defaulting suitor in cases of breach of the marriage and the minority of the youth is no defence to a suit for compensation since the only age of minority recognised by Burmese Buddhist Law in matters of marriage is, in the case of a boy, the age below which he is physically incompetent to marry.

There is no reason why a suit for compensation for breach of promise of marriage under the Burmese Buddhist Law should not be brought against a minor so long as it is brought in the manner prescribed in O. 32 of the C. P. Code and there is nothing in law to prevent a personal decree being given against a minor for compensation in such a suit. (*Herald, A. J. C.*) MAUNG NYEIN v. MA MYIN.

3 U. B. R. (1918) 75=46 I. C. 421.

**—Burmese — Divorce—Isolated act of cruelty if enough.**

Under Burmese Buddhist Law a divorce on the terms of a divorce by mutual agreement may be allowed to a wife on proof of a single act of cruelty on the part of the husband. (*Pratt, J. C.*) MA SEIN PHAW v. MG. BA ON.

46 I. C. 144

## BUDDHIST LAW.

—Burmese — Divorce — Re-union, after separation—Effect—Second divorce — Rights of parties

When the parties to a divorce re-unite after separation there is a complete restoration of the status *quo ante*; and they stand on the same footing as if there had been no divorce.

The status of the parties at the time of the first marriage is to be taken as the starting point in determining their rights on the second divorce. If at the time of the first marriage they were *nge lin nge maya* (*Bachelor and Spinster*) they are to be regarded as such on their re-union.

In a case of divorce between a man who had been married before and a woman who had not, the woman must be looked upon as in the same position as if her husband had not been previously married and the partition of property should be regulated accordingly. (*Mc Coll, A. J. C.*) MI SAING v. NGA YAN GIN.

11 Bur. L. T. 89.

—Burmese—Divorce—Second marriage without chief wife's consent, if entitles her to divorce.

The chief wife of a Burmese Buddhist may object to her husband taking a second wife, and may claim a divorce if he does so without her consent. Her right, however, is subject to certain exceptions mentioned in S. 217, 332 265-67 and 311 of the Digest, wherein the husband is allowed to take a second wife when the first wife is barren or has borne only female children or is suffering from certain diseases.

In the case of such a divorce the property should be partitioned as in the case of the divorce by mutual consent. 8 I. C. 715 diss. (*Twomey, C. J. Ormond, Maung Kim and Rig, J.J.*) MAUNG HME v. MA SEIN. 45 I. C. 953.

—Burmese—Marriage—Dissolution of—Wife living away from husband for over a year on account of her husband's cruelty.

The rule of Burmese Buddhist Law that a marriage is dissolved by the wife voluntarily deserting the husband for one year does not apply where the wife has been compelled to leave her husband because of his cruelty. (*Ormond, J.*) MA THEIN ME v. PO GYWE.

10 Bur. L. T. 212.

—Burmese—Marriage of minor girl—consent of father, if necessary.

There cannot be a valid marriage of a minor Burmese Buddhist girl without her father's express consent. (*Twomey, C. J. and Ormond, J.*) MAUNG BA HAN v. MA TIN.

45 I. C. 831.

—Burmese—Succession—Non attendance at death-bed if a ground of exclusion.

Mere non-attendance on a deceased during his or her illness is not sufficient to exclude those who would ordinarily inherit from him or her. The law requires that on the part of the person sought to be excluded, there must

## BUDDHIST LAW.

be conduct such as constitutes an intention on his part to destroy the natural tie between him and the deceased. (*Maung Kim, J.*)  
**MAUNG NGE v. MAUNG ZIN BA.**

44 I. C. 239.

— *Burmese—Succession—Pongyi, right of, to inherit to lay relatives*

A Pongyi or *rahan* divests himself of all worldly possessions at the time of his ordination and thereafter is incapable of inheriting property from his lay relatives. (*Herald, J.C.*)  
**MAUNG PWE v. U INGYA.**

3 U. B. R. (1912) 91=47 I. C. 681

— *Burmese—Succession—Right of the eldest *aurasa* son to a fourth share on his father's death—Whether it is a vested right or a mere option—Period within which it may be asserted—Lim. Act. Art. 123. See (1917) DIG. COL. 114: MAUNG TUN THA v. MA THIT.*

44 Cal. 379=21 C. W. N. 527=

26 C. L. J. 169=15 Bur. L. T. 138=

32 M. L. J. 71=21 M. L. T. 97=15 A. L. J. 96

=19 Bom. L. R. 294=38 I. C. 809.

44 I. A. 42 (P. C.)

— *Burmese—Succession—Suit by step-mother for share in property of step-father—Maintainability of Lim. Act. Art. 123.*

It is only where a step-father dies leaving no natural issue and no widow surviving him that the children of his deceased wife by a former husband are entitled to his property under Ss. 294 and 215 of the Digest.

According to the ordinary rules for partition between a step-father and step-children, the latter can, immediately on their mother's death, claim a share of the property acquired jointly by their mother and step-father during their marriage. Such a claim, if not made within 12 years of their mother's death, would be barred under art. 123 of Sch. I of the Lim. Act.

In respect of their mother's *Thinthi* property, however, the claim can be made by the step-children even on the subsequent happening of their step-father's death. (*Thomey, C. J. and Ormond, J.*) **SAN PE v. MA SWEZIN.**

9 L. B. R. 176=47 I. C. 139.

— *Ecclesiastical matters—Decision of—Authorities governing.*

Question of Buddhist Ecclesiastical law which came before the Civil Courts must be determined not merely by the canonical text of the Vinaya i.e., the Palidaw, but the Atthagatha and other commentaries must also be considered and the provisions of the *Dhammavatsa* should also be taken into account as throwing a valuable light on the established custom of the country. (*Thomey, C. J. and Maung Kim, J.*) **U. AWBATHA v. U. THU DATHANA.**

45 I. C. 923.

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**BURDEN OF PROOF**—Application for stay of a suit under Arbitration Act—Onus on plff. to prove that he is not bound by agreement to refer. See C. P. CODE. S. 104 (e).

12 S. L. R. 34.

— *Bailor and bailee—Negligence—Onus on plff. to prove negligence of bailee. See CONTRACT ACT, SS. 151 AND 152.* **27 C. L. J. 615.**

— *Boundary—Dispute as to—No question of onus—Defendant in actual possession—Onus on plff.*

In those cases where scientific accuracy in regard to boundaries cannot be attained and especially in cases where the disputed line of division runs between waste lands which have not been the subject of definite possession the ordinary rule in a suit the onus falling on the plff. has no application. The parties to the suit are in the position of counter-claimants and it is the duty of the deft. as much as the plff., to aid the courts in ascertaining the true boundary referred to.

When the deft. in a suit for recovery of possession of land, even where the question is a question of boundaries, is clearly shown or found to have been in actual possession of the disputed area, the burden falls on the plff. to establish his title. (*Rich. Nelson and Walmesley, JJ.*) **MAHARAJA SIR MANINDRA CHANDRA v. SARADINDA RAY.**

27 C. L. J. 599=

45 I. C. 408.

— *C. P. Code, O. 21 R. 63—Possession, proof of—Effect of shifting of onus. See (1917) DIG. COL. 116: MAUNG PO HNIN v. MA HNYEIN.*

10 Bur. L. T. 228=

37 I. C. 767.

— *Compensation—Improvements—See Mal Comp. for Tenant's Improvements Act S. 3, etc.*

35 M. L. J. 219

— *Confession—Retraction of by accused—Ill-treatment and inducement by police—Onus of proof.*

Where an accused when retracting a confession alleged ill-treatment and inducement by the Police to extract the confession, the onus is on him to prove such ill-treatment and inducement. (*Chitly and Smither, JJ.*) **EMPEROR v. KABILI KATONI.**

22 C. W. N. 809=47 I. C. 811=

19 Cr. L. J. 959.

— *Consideration—Pre-emption suit—Onus on plff. to show that price recited in sale-deed is excessive. See PRE-EMPTION. PURCHASE MONEY.*

16 A. L. J. 533.

— *Conversion from Hindu to Islam—Retention of Hindu Law and usage—Onus on person setting up. See C. P. LAWS ACT, S. 5.*

44 I. C. 436.

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— Custom—Family usage in derogation of law—Onus on person setting up. See CUSTOM, PROOF OF. 34 M. L. J. 48.

— Custom—Male proprietor—Alienation of property—Suit to set aside on ground that it was ancestral—Proof.

The onus of proving that a particular property was ancestral in the hands of the last male owner lies on the person who claims it as such. (*Scott Smith, J.*) MUSSAMMAT RAM KAUR v. ACHHIN. 35 P. L. R. 1918=91 P. W. R. 1918=47 I. C. 17.

— Damages for illegal seizure of cattle—Onus of proving illegality on person alleging.

In a suit for damages for wrongful seizure of cattle the burden lies on the deft. to prove that the seizure was legal. (*Mittra, A. J. C.*) MADHURAO v. ABDUL GAFUR. 44 I. C. 241.

— Discharge—Shifting of onus—Evidence Act, S. 114—Trial Judge's estimate of testimony, value of, in doubtful cases.

In a suit to enforce a mortgage bond, in which the defence sought to prove that the debt had been discharged by payments endorsed on the bond, the trial Court, on a review of the evidence, held that the endorsements were fictitious and decided in favour of the plff. But the High Court on appeal was of opinion that the plff. had failed to discharge the burden which rested on him to prove his case and dismissed the suit.

Held, by the Judicial Committee, that though the initial burden of proof rests on the appellant in such a case as this one, both on general grounds and by reason of the provisions of S. 114 of the Evidence Act, this burden is one which shifts easily as the evidence is developed and their Lordships did not attach much importance in this case to the question on whom the initial onus lay.

That the evidence in this litigation, taken as a whole, was of such a character and so full of doubtful statements that it could only be weighed adequately by the Judge who had seen the witnesses; and the balance of probabilities in this case also being in their Lordship's opinion on the side of the conclusion reached by the Trial Judge was restored. (*Viscount Haldane*) KUNDAN LAL v. MUSSAMMAT BEGAM-UN-NISSA. 22 C. W. N. 937=8 L. W. 233=47 I. C. 337 (P. C.)

— Discharge—Unregistered bond—No demand for thirty years—Presumption of discharge.

Plff. the assignee of an unregistered mortgage bond of the year 1879 for Rs. 99, sued to enforce the bond and claimed Rs. 687-12-1 in respect of it, or in default, foreclosure of an occupancy land. The time fixed for payment expired in 1882.

Held, that under the circumstances a heavy onus lay on the plff. to prove not only the

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execution and the consideration of the bond, but also that on the date of the suit it was still unpaid, and that the conclusion that the debt must have been forgiven by or paid to the original creditor was almost irrebuttable. (*Stanyon, A. J. C.*) RAMPRASAD v. KISHORE LAL. 46 I. C. 657.

— Ejectment—Determination of tenancy—Allegation of—Onus on person setting up determinable tenancy. See EJECTMENT. 7 L. W. 194.

— Ejectment—Determination of tenancy—Denial of title by defendant—Onus on plff. to prove right to eject. See EJECTMENT. 46 I. C. 238.

— Ejectment suit—Proof of title—Onus on plff.

In a suit in ejectment, the plff. must prove good title, there is no onus on the deft. to prove title relatively good or bad at all.

Where the plff., in an ejectment suit, fails to prove title, the fact that he was once in possession within twelve years of suit does not throw the onus of proving good title on the deft. (*Begman and Hutton, JJ.*) BAPUJI NARAYAN CHITNIS v. BHAGWANT BALWANT CHITNI. 42 Bom. 357=20 Bom. L. R. 346=45 I. C. 550.

— Estoppel—Onus on person pleading.

The onus of proving an estoppel falls upon the person setting up the estoppel. (*Fletcher and Smither, JJ.*) MAHARAJAH BIRENDRA KISHORE MANIKYA BAHADUR v. BAIKUNTA CHANDRA DEB. 46 I. C. 474.

— Foreign judgment—Suit on plea of want of jurisdiction—Onus of proof. See C. P. CODE, S. 14. 24 M. L. T. 244

— Forgery—Charge of offence of—Prosecution—Onus of Proof—Duty to adduce best evidence. See PENAL CODE, SS. 467, 471. (1918) Pat. 36.

— Fraud—Declaration that decree was obtained by—Suspicious circumstances about fraud.

In a suit for a declaration that a decree in a certain rent suit was fraudulent; the plff. is to prove that the rent decree is fraudulent and collusive. If that fact is not proved the plff. fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plff. as with the denial of the deft. the plff. fails for the very simple reason that the plff. is bound to establish the affirmative of the proposition. (*Sanderson, C. J. and Mookerjee, J.*) AMJAD ALI HAZI v. ISMAIL. 27 C. L. J. 137=44 I. C. 504.

— Fraud and collusion—Attachment by decree-holder of decree of judgment-debtor.

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—Application by judgment-debtor to enter up satisfaction—Objection by attaching decree-holder of fraud and collusion. *See* C. P. CODE, S. 115. 35 M. L. J. 253

—Fraudulent execution sale—Application to set aside—Limitation—Decree-holder's plea based on judgment-debtor's knowledge of fraud—Onus of proof. *See* C. P. CODE, S. 47 and O. 21, R. 22. 27 C. L. J. 528

—Grant of land bounded by non-navigable river—Right of grantee to bed of river *ad medium filum aquæ* presumption—Buttall of—Onus—*See* GRANT, CONSTRUCTION 35 M. L. J. 159 also 46 I. C. 395.

—Hindu joint family—Suit for partition—Separate property. *See* HINDU LAW JOINT FAMILY. 20 O. C. 393.

—Hindu Law—Joint Family—Father—Sale of family property in execution of decree against son's suit to recover his share of property sold—Onus of proof. *See* HINDU LAW, JOINT FAMILY. 7 L. W. 407.

—Hindu Law—Re-union—Onus heavy on those setting-up—Mere living together insufficient. *See* HINDU LAW-PARTITION. 5 Pat. L. W. 127.

—Hindu Law—Sanyasam, essentials of—Onus of proof on person setting up relinquishment and abandonment. *See* HINDU LAW, SANYASAM. 43 I. C. 167.

—Hindu Law—Separation—Re-union—Proof of. *See* HINDU LAW, PARTITION. 5 Pat. L. W. 127.

—Hindu Law—Stridhanam—Yautaka—Onus on person setting up. *See* HINDU LAW STRIDHANAM. 45 I. C. 879

—Hindu widow—Compromise of litigation—Collusion, allegation of, by reversioners—Onus on them. *See* HINDU LAW, WIDOW. 47 I. C. 697.

—Immaterial when there is evidence on both sides.

The question of the burden of proof retains little, if any, importance when there is evidence on both sides. (*Richardson and Beachcroft, J.J.*) BASIRUDDIN v. MOKIMA BIBI. 22 C. W. N. 709=44 I. C. 915.

—Insolvency—Purchase of whole of insolvent's assets just prior to insolvency—Onus on purchaser to show that purchase can stand. *See* PRES. TOWNS INSOL. ACT, SS. 36 AND 9 Etc. 22 C. W. N. 335

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—Insolvency—Transfer by insolvent impugned by creditors—Onus of proving validity on transferee. *See* PROV. INS. ACT, S. 36 44 I. C. 915.

—Joint Hindu Family—Mortgage by manager who is not father—Proof of necessity—Onus on transferee. *See* HINDU LAW, MIT-AKSHARA. 34 M. L. J. 221. (P. C.)

—Landlord and Tenant—Trespass by tenant on land of stranger—Encroachment *prima facie* for benefit of landlord—Onus of proving the contrary on the tenant. *See* LANDLORD AND TENANT, TRESPASS. (1918) M. W. N. 38.

—Legitimacy—Posthumous son—Succession to a large estate—Onus on plff. *See* LEGITIMACY. 44 I. C. 57.

—Materiality of, after whole evidence gone into. *See* HINDU LAW, APPLICABILITY. 46 I. C. 926.

—Mortgage—Redemption—Proof that mortgage is subsisting.

Where both plff. and deft. relied only on one mortgage and the only question is whether it is subsisting or not, the burden of proof is on the deft. as he must be deemed to be aware of the date of the transaction 26 A. 313, 316; 1 A 117; 38 All. 540 foll. (*Seshagiri Aiyar and Napier, J.J.*) P. V. MADHAVAN VYDIAR v. LAKSHMANA PATTAB. (1918) M. W. N. 139=7 L. W. 284=44 I. C. 447.

—Mortgage—Registration—Property not in existence—Fraud on Registration Law—Onus to prove the existence of property mentioned in mortgage deed—Estoppel if could be invoked to defeat provisions of statute.

The predecessors of defts. respondents executed a mortgage in favour of the plff. appellants on 15th April 1902. The mortgaged properties included a plot of rent-free land in Burdwan Dt. as described in the mortgage deed. The deed of mortgage was registered at Burdwan. One of the defts. denied the existence of such a plot of land and contended that it was a fictitious plot mentioned in the said deed of mortgage in fraud of the law of registration and that registration was thus invalid and so the plffs. could not get any relief in respect of the same. In a suit on the mortgage.

*Held*, that the onus lay on the defts. to disprove the existence of the plot of land in 1932.

*Held, further*, that the defts. failed to discharge the onus and therefore the suit should be decreed with costs.

There can be no doubt about the general rule that the principle of estoppel cannot be

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invoked to defeat the plain provisions of a statute. 29 Cal. 654 and 18 C. W. N. 817 P. C. dist.

*Quære.*—Whether the plffs. in the present case were invoking an estoppel to defeat the provisions of the Registration Act (*Sanderson C. J. and Woodroffe, JJ.*) SUDHIR CHANDRA SETT v. SYED ABDULLA-UL-MUSAVI. 22 C. W. N. 894=43 I. C. 520.

—Negligence—Bailment—Onus on plff. to prove negligence of bailee. See CONTRACT ACT, SS. 151 and 152. 27 C. L. J. 615.

—Offence of forgery—Onus if any, on accused charged with commission of. See PENAL CODE, SS. 468 ETC. (1918) Pat. 36.

—Onus on purchaser to show that purchase can stand. See PRES. INS. ACT, SS. 36, 9 ETC. 22 C. W. N. 335.

—Partition—Joint mitakshara Hindu family—Proof of separation. See HINDU LAW, JOINT FAMILY. 5 Pat. L. W. 122.

—Partnership—Dissolution—Proof of—Onus on person setting up.

The onus of proving that a partnership had been dissolved by consent and that the amounts had been settled rests on the person alleging it. (*Wilberforce, J.*) SUNDAR SINGH v. DALIP NGH. 46 I. C. 467.

—Purdanashin—Gift by—Validity. See PURDANASHIN. 4 Pat. L. W. 417.

—Railway—Loss of goods—Risk note B for less freight—Proof of negligence of railway or theft—Onus on consignee. See RAILWAYS ACT, SS. 72 (2) AND 76. 22 C. W. N. 622.

—Recitals in deed—Onus of proving incorrectness of recitals on executant.

The onus of proving that a document to which a person has affixed his signature does not contain a correct statement of the facts and of the intentions of the parties is on the person who makes the allegation. (*Roe and Jwala Prasad, JJ.*) MT. RAMDEI v. CHANDRABALI. 4 Pat. L. W. 237=44 I. C. 399.

—Resumption—Grant—Onus on grantor to show right to resume. See GRANT, CONSTRUCTION. 20 Bom. L. R. 779.

—Sale of goods—Breach of contract of—Buyer's suit for damages—Proof by plff. See CONTRACT ACT, S. 73. ill. (a). 23 M. L. T. 320.

—Service of notice under Bengal Public Demands Recovery Act, Ss. 10 and 31

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—Proper Service—Onus See PUBLIC DEMANDS RECOVERY ACT, SS. 10 and 31. 45 Cal. 496—

—Specific performance—Suit for by prior contractee—Subsequent purchaser without notice—Onus of proof on latter. See SP. REL. ACT, SS. 27 (b), 4 Pat. L. W. 152.

—Suit by unsuccessful claimant. See C. P. CODE, O. 21, R. 63. 34 M. L. J. 295.

—Transferee from mortgagee by conditional sale—Whether takes an absolute interest—Intention. See LIM. ACT, ART. 134. 34 M. L. J. 431.

BURMA EXCISE ACT (Yof 1917) S. 37—*Tari, possession of, in a place where there is no tree-tax—Offence*

Where the tree-tax system is not in force the law does not prohibit or restrict the manufacture of tari. S. 27 of the Burma Excise Act does not, therefore apply to the possession of tari manufactured in such a District. (*Saunders, J C.*) EMPEROR v. NGA POH KYAN. 3 U. B. R. (1918) 86=47 I. C. 870=19 Cr. L.J. 870.

BURMA GAMBLING ACT, (I OF 1899) Ss. 13. and 3 (1) (b)—Raffle, whether offence. See (1917) DIG. COL. 122, KESVAIER v. EMPEROR. 10 Bur. L. T. 268= (1916) II U. B. R. 137=39 I. C. 329.

BURMA LAWS ACT (XIII of 1898) S. 13—*Applicability of—Chinaman professing Buddhism—Confucianism and Buddhism—Chinese Customary Law—Applicability of—Adoption.*

Confucianism and Buddhism are not mutually exclusive religions. The former does not render a man incapable of following the latter religion as well.

It is not necessary for the application of S. 13 of the Burma Laws Act that the person whose religion is under consideration should have been born a Buddhist, Mahomedan or Hindu, as the case may be. A Chinaman who professes to be a Buddhist is a Buddhist within the section.

Where on the death of a Chinaman professing Buddhism plff. claimed to succeed him as his adopted son.

*Held*, that the question of the plff's. adoption should be determined in accordance with the Chinese Customary Law. (*Twomey, C.J. and Ormond, J.*) KYIN WET v. MA GYOK. 9 L. R. B. 179=47 I. C. 148.

BURMA MUNICIPAL ACT (III of 1898) Ss. 2 (6) and 142 (b)—*Lodging house, meaning of—Receiving lodgers.*

A lodging-house need not be left in lodgings; it is still a lodging house if it is occupied to any extent in common by any members of

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more than one family. The persons living in the lodging house are lodgers, whether they pay rent or not and the owner of the lodging house receives them when he allows them to occupy the building. (*Saunders, J. C.*)  
**AMANATH MISTRY v. EMPEROR.**

44 I. C. 674=19 Cr. L. J. 370

**CALCUTTA MUNICIPAL ACT (III OF 1889)**  
**S. 56—Corrupt practices—No provision for—Legislative interference necessary for.**

There is no provision regarding corrupt practices in elections in the Calcutta Municipal Act. The necessity of providing for the effect of such practices on the validity of an election pointed out. (*Chatterjee, J.*) **MONORANJAN MUKERJEE v. AROJO GOPAL GOSWAMI.**

22 C. W. N. 678=46 I. C. 729.

—S. 56, SCH. V. R. 2—Nomination paper—Description of candidate—Rai Bahadur So and So if sufficient description—Delay in presenting the petition—Effect. See SP. REL. ACT, SS. 45 AND 50. 22 C. W. N. 551.

—Ss. 299 and 593—Service of notice on one co-owner if good.

Service of a notice under S. 299 of the Calcutta Municipal Act upon one of the co-owners of the property in the manner provided in S. 593 is effectual against the other co-owners. (*Teunon and Newcoud, J.J.*) **THE CORPORATION OF CALCUTTA v. MEMANGINI DASSI.**

44 I. C. 413

—S. 341—Fixture, meaning of—Platform, forming part of main building.

A platform projecting on a public street but forming part of the main building and resting on its own foundation, is not a fixture within S. 341 of the Calcutta Municipal Act. (*Chatterjee and Sheepshanks, J.J.*) **ASHUTOSH SADUKHAN v. THE CORPORATION OF CALCUTTA.**

28 C. L. J. 494.

—S. 557 (D)—Presumption—Holding consisting of two plots—Partition of—Among owners—Separate assessment refused by Corporation—Separate proceeding for acquisition, if legal—Estoppel.

Where two plots which originally formed one holding and were covered by one assessment had been partitioned amongst the owners, and one of them applied to the Corporation for the separate assessment of his separate plot, and the separation was refused by the Corporation, and the Corporation subsequently acquired the two plots in separate proceedings:

*Held*, that the Corporation was not estopped by having assessed the plots as one, from proceeding to acquire the land in separate proceedings, although the effect of the action of the Corporation has been to deprive the owners of the benefit of the presumption raised under S. 557 clause (d) of the Calcutta Municipal Act. (*Chatterjee and Greaves, J.J.*)

## CALCUTTA MUNICIPAL ACT, SCHED. V.

**SHOSHI LAL DAS v. THE SECRETARY OF STATE FOR INDIA.** 28 C. L. J. 144.

—S. 557, Cl (d)—Municipality if may acquire different portions of a holding by separate proceedings.

A holding within the Calcutta Municipality which was the subject of a single assessment, having been partitioned amongst its owners, the owner of one of the partitioned shares, applied for separate assessment of his share, but that application was refused and the Municipality then proceeded to acquire the two portions under the Land Acquisition Act by two separate proceedings.

*Held*, that there was no legal bar to the Municipality proceeding in this manner and thereby depriving the owners of the several shares of the benefit of S. 557 (d) of the Calcutta Municipal Act (*Chatterjee and Greaves, J.J.*) **SHAM LAL DAS v. SECRETARY OF STATE FOR INDIA.** 22 C. W. N. 538=46 I. C. 138.

—S. 559—By-laws s3 and s5 framed under S. 556—Continuance of performance at theatre after 1 A. M.—Joint proprietors of theatre if liable on conviction to pay fine each up to Rs 20—Criminal and Civil liability, distinction between—Indemnity or punishment—Intention of legislature. See (1917) DIG. COL. 125; **AMRITA LAL BOSE v. CORPORATION OF CALCUTTA.** 44 Cal. 1025=26 C. L. J. 215=21 C. W. N. 1016=42 I. C. 305=10 Cr. L. R. 31.

—Sch. V., R. 2—Election of commissioner—Register of valid nomination paper—Candidate description of—Description in the letter, whether sufficient—Proposer, seconder and approver—Proposer or seconder whether can be an approver—Approver being a firm name, effect of.

The appellant, a candidate for Municipal election, sent in his nomination papers consisting of a letter signed by himself addressed to the Chairman of the Corporation of Calcutta and three forms of a nomination paper all stitched together. The first form contained the name and address of the candidate and also the statement that he was Voter No. 1553 of Ward No. 6. It also contained the signatures with names and addresses of the proposer, seconder and of 18 approvers, the seconder being one of the approvers and the approver No. 15 being the name of a firm. The two forms did not contain the name either of the candidate, the proposer or seconder, but contained the signatures of some approvers:

*Held*, that the nomination paper was invalid in law inasmuch as it did not contain the description of the candidate Sch. 5 R. 2 of the Calcutta Municipal Act contemplates that a nomination paper should be self-contained and complete in itself and so the latter could not be taken as part of the nomination paper:

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*Held also*, that the 2nd and 3rd forms could not be taken as part of the nomination paper inasmuch as they did not contain the name of the candidate.

*Held further*, that the nomination paper was bad in law inasmuch as it did not contain the signatures of 18 approvers in addition to those of the proposer and seconder.

It is clear from Sch. 5 R. 2 that if a person signs a nomination paper of a candidate, either as a proposer or seconder, he cannot also sign it as approver.

Signature of approver No. 15 not being that of an individual was bad in law and should be rejected.

*Per Woodroffe, J.*—Alternative nomination papers may be sent to the Chairman, so that if one is held, either in whole or in part, to be invalid, the other may be used. In such case, however, each nomination paper should be complete in itself.

A candidate may also send in a nomination paper with names of more than 18 voters as mentioned in the rule, in order to meet the case of possible objections to any of the voters whose names appear upon the paper. In such a case more than one nomination paper may be used, but the papers must be connected (otherwise than as here by mere pinning together). That connection is effected by placing on each paper the name, description and address of the candidate as appearing on the first paper. (*Sanderson, C. J. and Woodroffe, J.*)  
**NARENDRA NATH MITTER v. RADHA CHURN PAL.**  
 22 C. W. N 943=28 C. L. J.  
 289=48 I. C. 314.

See ALSO.

22 C. W. N. 957.

**CALCUTTA POLICE ACT (IV of 1866) S. 54 A**  
 —Possession of stolen property — Condition precedent.

The preliminary condition which must be fulfilled before effect can be given to S. 54 A is that there must be reason to believe that the property found in the accused's possession was stolen property.

In the present case the High Court acquitted the accused on the ground that the reasons given by the Magistrate were not sufficient. (*Newbould and Huda, JJ.*)  
**SUKHU KALWAR v. EMPEROR.**  
 22 C. W. N. 936=28 C. L. J.  
 262=47 I. C. 687=19 Cr. L. J. 933.

**CANON LAW**—Established church, if subject to the ordinary Courts — Roman Catholic Church not an established Church—Voluntary associations — Rules binding on.  
**ECCLIASTICAL LAW.**  
 35 M. L. J. 497

**CANTONMENTS ACT (II of 1902)—S. 231 (2)**  
 —“Absence”—Meaning—Absence for nine days—Effect.

In construing the word ‘absence’ a larger or more restricted meaning should be given

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according to what the court believes the intention of the legislature was in framing the particular provision in which the word was used.

An absence of nine days is such an absence as is contemplated by S. 231, (2) of the Cantonment Code. (*Pratt, J. C. and Fawcett, A. J. C.*)  
**HOTCHAND v. EMPEROR.**  
 12 S. L. R. 40=  
 47 I. C. 874=19 Cr. L. J. 974.

**CARRIER—Liability of, for non-delivery of goods—Landing agent or carrier—Continuous contract—Privity of contract**

In the case of continuous carriers the authorities establish (1) that when goods have to be carried with the aid of different transport agencies in order to arrive at the destination to which they are booked, the carrier with whom the contract is made at one end is, in the absence of any contract limiting his liability to his own transport system, liable for the loss or destruction of the goods on portion beyond his own system or in consequence of acts on default of persons other than his own servants; (2) that in the absence of a contract to the contrary, the consignor cannot hold the company with whom he does not contract liable for damages when all that can be complained of is his nonfeasance though such company may be liable in tort for breach of duty arising from the mere fact that it has undertaken the liability of carrying goods or property belonging to another; (3) when there is an agreement between two companies the effect of which is to constitute one Company the agent of the other and the traffic is carried for the joint benefit of both the companies, either Company may be sued at the option of the consignor.

The term “carrier” in its general sense means a person or Company who undertakes to transport the goods of another person from one place to another for hire. (*Wallis, C. J. and Kumaraswami Sastri, J.*)  
**MYLAPPA CHETTIAR v. BRITISH STEAM NAVIGATION Co.**  
 34 M. L. J. 553=8 L. W. 46=  
 24 M. L. T. 176=45 I. C. 485.

———**Railway—Delivery of goods, when complete.**

Whether the goods are to be delivered to the consignee at his house or at the termination of the journey, depends on agreement and on the usual course of business. If the goods are delivered at the house to which they are addressed, the carrier has done all that he has contracted to do and the mere fact that he delivers to some other person than the consignee at that house is no proof of breach of duty on his part. But if he delivers at any other place to any person other than the consignee, he does so at his peril. But where the carrier is not bound to deliver at the house of the consignee, his liability as carrier ceases when he has brought the goods to the station of destination and has tendered or delivered them within

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a reasonable time to the consignee or has allowed the consignee reasonable time in which to remove the goods. (*Kaaji, J.*) **RAMACHANDRA JAGANATH v. G. I. P. RY.**

20 Bom. L. R. 591=44 I. C. 401.

——— *Railway—Liability to reweigh goods, and give certificate of shortage—Refusal to take delivery—Damage to goods after refusal—Liability for.*

A Railway Company is not bound to reweigh the goods and give a certificate of shortage on the demand of the consignee if the consignee refuses to take delivery on the Company declining to reweigh the goods and give a certificate of shortage the goods remain at his risk so that any deterioration or damage caused to the goods after the date of his refusal to take delivery falls on him. (*Fletcher and Huda, JJ.*) **JAGAN NATH MARWARRI v. EAST INDIAN RAILWAY COMPANY.**

22 C. W. N. 902=43 I. C. 933.

——— *Railway—Misdelivery—Delivery without getting back railway receipts—No proof of negligence—Fraud of third person—Non-liability. See RAILWAYS ACT, S. 77.*

35 M. L. J. 35.

——— *By sea—Liability of—Limitations on—Conditions in Bill of Lading that Company not liable for damage by sweatings, fermenting, heat, etc., or by the negligence of servants or for any damage capable of being covered by insurance—Validity of conditions. See BILL OF LADING.*

45 I. C. 168.

**CARRIERS ACT (III of 1865) S. 10**—Suit for damages, for short delivery—Notice of, to be expressly given—Provision in Bill of Lading for giving of notice. See (1917) D.G. COL. 127; **RIVER STEAM NAVIGATION CO., LTD. v. HAZARI MALL.**

27 C. L. J. 294=41 I. C. 919.

**CASTE DISABILITIES REMOVAL ACT (XXI OF 1850)**—Effect of—Hindu widow—Conversion to Islam—Re-marriage—No forfeiture of inheritance. See **HINDU WIDOWS RE-MARRIAGE ACT.**

23 M. L. T. 81.

**CATTLE TRESPASS ACT, (I OF 1871) S. 22**—Suit for damages for illegal seizure—Maintainability of.

In a suit for damages for illegal seizure of cattle the onus lies on the debt. to prove that the seizure was justifiable in law.

Such a suit is not barred by reason of Ch. V of the Cattle Tresspass Act. 15 W. R. 279; 16 Cal. 159, 8 I. C. 106 foll. (*Drake Brockman, J. C.*) **BALA v. VITHU.**

44 I. C. 237.

——— **S. 22**—Unjustifiable impounding of cattle by Municipal servant—Prosecution of—U. P. Municipalities Act, S. 326 (1).

**CAVEAT EMPTOR.**

S. 326 (1) of the Municipalities Act relates only to suits of a civil nature in a Civil Court and has nothing to do with prosecutions under the Cattle Tresspass Act.

Where a Magistrate found that cattle had done no damage to Municipal trees and that consequently the seizure of the cattle by the accused who were Municipal servants was without jurisdiction, held that the accused were rightly convicted under S. 22 of the Cattle Tresspass Act. (*Tudnal, J.*) **SATOLA v. EMPEROR.**

16 A. L. J. 143=44 I. C. 592

=19 Cr. L. J. 368.

——— **S. 24**—Conviction under—Essentials of. For a conviction under S. 24 of the Cattle Tresspass Act there must be a finding as to trespass or damage as contemplated by S. 10 of the Act. (*Jwala Prasad, J.*) **SURENANDAN RAI v. EMPEROR.**

43 I. C. 245=

19 Cr. L. J. 157.

——— **S. 24**—Conviction under—Legality of. in the absence of finding as to whether seizure was lawful.

In the absence of any finding that the cattle were seized while trespassing on or damaging the field of the owners, the conviction under S. 24 of the Cattle Tresspass Act is not sustainable. In order to sustain such a conviction it is not sufficient to prove that the accused removed the cattle from the pound but it must also be found that the cattle were liable to be seized under the Act, in other words that the cattle were seized while they were trespassing upon and doing damage to the field of the owner and were then put into the pound. (*Jwala Prasad, J.*) **BHOWNATH SINGH v. EMPEROR.**

4 Pat. L. W. 40=43 I. C.

618=19 Cr. L. J. 202.

**CAUSE OF ACTION**—Meaning of—Bundle of material facts necessary for plf. to allege and prove before he can succeed. See C. P. CODE, S. 20 (c).

35 M. L. J. 189.

——— *Meaning of—No relation to the defence set up by the debt in written statement.*

The cause of action has no relation whatever to the defence which may be set up by the debt. nor does it depend on the character of the relief prayed for by the plf. It refers entirely to the grounds set forth in the plaint as the cause of action or in other words to the *media* upon which the plf. asks the court to arrive at a conclusion in his favour. (*Drake Brockman, J. C.*) **MAHOMED ALI KHAN v. SHUJAT ALI KHAN.**

46 I. C. 913.

——— *Merger of, in judgment—Transit in rem judicatum—Remedy by execution—Fresh suit barred. See MALABAR LAW, LANDLORD AND TENANT.*

34 M. L. J. 167=44 I. C. 110.

**CAVEAT EMPTOR**—Doctrine of—Applicability to court sale. See C. P. C. O. 21, R. 71.

23 M. L. T. 9.

## C. P. COURTS ACT, S. 15.

**CENTRAL PROVINCES COURTS ACT. (11 OF 1894) S. 15**—"Value of suit," meaning of—*Appeal*—*Forum*—*Valuation of plaint, determining factor*.

Plff. originally sued for the recovery of Rs. 1,651-15-0, but subsequently gave up his claim to the extent of Rs. 651-2-5 leaving a balance of Rs. 1,000-3-0. Through mistake, however, he prayed a decree only for Rs. 988-3-7. The first Court dismissed the claim but on appeal to the District Judge the decree was set aside and the suit was remanded for a decision on merits, and a decree was passed in favour of the plff. for Rs. 988-3-7 claimed by him.

*Held*, that the value of the suit was Rs. 988-3-7 and that an appeal lay to the District Judge and not to the Court of the Divisional Judge.

Jurisdiction in the matter of appeals in the Central Provinces is governed by S. 15 of the Central Provinces Courts Act. The words "value of the suit" as used in that section invariably mean value of the relief originally claimed by the plff. in the plaint increased or reduced by voluntary amendment that is to say, value of such relief as is made the subject-matter of the Court's decision. 29 Bom. 675, 11 N. L. R. 13 dist.

Where a plff. voluntarily reduces an original claim, it is the reduced claim which represents the value of the suit for the purposes of appeal.

A Court cannot adjudicate itself out of the jurisdiction given to it by law over the suit as instituted. (*Stanyon, A.J.C.*) **DINDAYAL v. DEONATH.** 44 I. C. 237.

**CENTRAL PROVINCES LAND REVENUE ACT (XVIII OF 1881), Ss. 39, 42 and 83**—*Record of rights, whether complete before notification under S. 39—Suit for ejectment against recorded tenant—Onus.*

There is nothing in Land Revenue Act to justify the view that a Record of Rights prepared by a Settlement Officer under S. 82 of that Act cannot be considered complete until the Chief Commissioner has under S. 80 declared the settlement to be completed.

It, therefore, lies on a plff., who sues to eject a person who has been recorded as a tenant and in whose favour a settlement parcha has been issued to prove that the deft. is not a tenant. (*Batten, A.J.C.*) **TUKARAM v. DINAJI.** 45 I. C. 470.

—**Ss. 65 A, 132 and 162 (a)**—*Gaontia tenure—Succession to—Resignation of eldest heir, if must be immediately on succession to the whole of the estate—Estoppel—Election.*

The provisions of S. 65 A. of the Central Provinces Land Revenue Act, 1881, were enacted not for the benefit of the zemindar but to retain certain selected families in the *gaontiaships* of their villages and to protect them against the transfers and sub-divisions.

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The rights of the eldest male heir to resign or renounce his rights as *gaontia* with a view to giving up all claim to inherit the estate which was by statutory devolution descended upon him must be exercised at the time when the succession opens, viz., on the death of the last protected *gaontia*, and it is not open to him subsequently to transfer the estate by sale, gift in favour of a younger brother.

*Quere.*—Whether, if he did so, he would be estopped from contesting the transfer.

Per *Atkinson, J. (Imam, J., contra)* if two or more villages form the protected tenure of a *gaontia*, even though they may have been declared protected by separate certificates at different times, the eldest male heir must exercise his choice of resignation or adoption of all or none of such villages. There can be no splitting up of the estate or tenure into different parts having distinct entities.

Where the election is made by the person upon whom the tenure devolves by inheritance it is irrevocable in its operation, and automatically one heir is succeeded by another of equal degree.

In the absence of evidence to show that the eldest son of the last protected *gaontia* resigned his claim to the *gaontiaship*, a younger son is not entitled to surrender the estate to the *zemindar*.

Per *Atkinson, J.*—The onus of establishing resignation lies on the person who affirms it.

*Obiter dictum.* A *gaontia* is not entitled to surrender his estate in favour of his *zemindar*.

The provisions of S. 132 were intended to enable the Deputy Commissioner merely to determine claims to protection under S. 65 A, and to enforce the provisions of that section. It was never intended that the Deputy Commissioner should be empowered to deal with a suit for ejectment or for recovery of a *gaontiaship*.

A suit for the recovery of a *gaontiaship* is maintainable in the Civil Courts.

Where a younger son of the last protected *gaontia* was recorded in the Record of Rights, *held*, that as the presumption arising from such an entry is only in regard to possession, the eldest son was entitled to succeed in a suit for recovery of the *gaontiaship* on proof that he had a better title than the younger son. *Held*, further, that the fact that the eldest son had been treated by the *zemindar* and by the Government the sole successor to the *gaontiaship* on the death of his father, was sufficient to rebut the presumption arising from the entry in the Record of Rights.

Per *Atkinson, J.* The word "resign" in S. 65 A, really means "release." (*Chapman, Atkinson and Imam, JJ.*) **LAL NRIPARAJ SINGH RAI BAHADUR v. MOHEN GAONTIA.**

3 Pat. L. J. 229=4 Pat. L. W. 256=  
44 I. C. 817.

—**Ss. 137 to 140**—*Lambardar—Appointment to Gumastah by—Right to claim*

## C. P. LAWS ACT.

*contribution from other sharers for wages of Gumastah.*

A Gumastah appointed by a non-resident lambardar Mulkaddam to discharge the duties of a Mulkaddam is his agent alone and not that of the whole proprietary body. Consequently the lambardar cannot claim contribution from the other co-sharers for the wages paid by him to the Mulkaddam Gumastah. (*Drake Brockman, J. C.*) BALI RAM v. NARAIN RAO. 43 I. C. 967.

**CENTRAL PROVINCES LAWS ACT, (XX OF 1875)**—Mortgagee by conditional sale prior to—Redemption—Right of. See T. P. ACT. S. 61. 14 N. L. R. 195.

—S. 5—'Hindu' meaning of—Apostasy effect of—Conversion to Mahomedanism—Succession-law of—Gonds, if Hindus.

Apostates from the Hindu religion ceases to be Hindus and where such apostasy takes the form of conversion to religion which in itself regulates the devolution of property, e.g., the Mahomedan religion, then, except on proof of a well established custom to the contrary and that only in regard to inheritance and succession, the convert becomes subject to the law of his adopted religion.

The term 'Hindu' in S. 5 of the Central Provinces Laws Act, 1875—refers to persons who profess some form of the Hindu religion, whatever be the branch, school, sect, offshoot or denomination to which they belong, but it does not extend to persons who have never possessed any form of the Hindu religion or to those who have been converted from it to some entirely different religion. The word would apply to dissenters and non-conformists but not to apostates. Thus a Jain is a Hindu but a Brahmin converted to Buddhism or Islam is not.

The Gonds in the Central Provinces are not Hindus and they are not governed by the Hindu law except when it is adopted by any family, set or branch amongst them. (*Stan-jon, A. J. C.*) UJIYARA v. TRILCHAN GOND. 44 I. C. 435.

**CENTRAL PROVINCES MUNICIPAL ACT (XVI OF 1903)** Ss 52 and 53—Municipal Committee if owner of all land within Municipal Limits.

There is no presumption that all land within the limits of a Municipal town must, in the absence of evidence to the contrary, be taken to belong to the Municipal Committee. (*Drake Brockman, J. C.*) PRALHAD SING, v. ABDUL AZIZ KHAN. 47 I. C. 892.

—Ss. 67 (1), (2), 122 and 139—Old encroachment by predecessor in title—Punishment for, illegal—Remedy.

S. 122 of the C. P. Municipal Act punishes only the act of making an actual encroachment. The section cannot reasonably be

## C. P. TENANCY ACT S. 35.

construed as making punishable an existing encroachment not made by the accused person.

In the case of an encroachment not made by the accused S. 67 (2) of the Act provides full means of redress which can be enforced by the penal provisions of S. 139.

The word 'such' in sub-section (2) of S. 67 of the Act refers back to the words 'structure encroaching on any street' in sub-section (1) and not only to new encroachments as is clear from the proviso in which encroachments of old standing are referred to. (*Batter, A. J. C.*) MADAN GOPAL DEOKARAN v. THE SECRETARY MUNICIPAL COMMITTEE, NAGPUR. 47 I. C. 879=13 Cr. L. J. 979.

**CENTRAL PROVINCES TENANCY ACT (XI OF 1895)**—S. 35 (2)—Applicability—Case of obstruction by landlord.

S. 35 (4) of the Central Pro. Ten. Act has no application where the case is not one of voluntary inaction on the part of the tenant but one of obstruction on the part of the landlord. (*Drake Brockman, J. C.*) PANDU v. SITAL PRASAD. 14 N. L. R. 176=48 I. C. 188.

—S. 35 (4)—Implied surrender—Knowledge of landlord, necessary—Payment of rent to one of several persons entitled to a holding.

There can be no implied surrender under S. 35 (4) of the C. P. Tenancy Act without the knowledge and intervention of the landlord. Where the holding is in the name of an uncle and his minor nephews, there is presumption that the rent paid by the uncle is paid on his sole behalf and not on account of his nephews also especially where the nephews continue as the recorded tenants. (*Batter, A. J. C.*) SURTI v. MUNNI. 43 I. C. 180.

—S. 35 (4)—Surrender under—Effect on encumbrances created by tenant—Implied surrender—Plea of, to whom available. See LEASE. 14 N. L. R. 107.

—Ss 35 (4) and 91—Tenancy right—Will of—Ouster of true tenant by devise—Suit by tenant to recover possession—Limitation—Surrender, implied—Payment of rent on behalf of tenant.

S. a co-sharer, gave a lease of the ordinary tenant right of his *sir fields* to R, another co-sharer, for 140 years. A sum of Rs. 1,490 was paid in advance by way of rent for the period of the lease. R died leaving a will, by which he bequeathed all his property to his mother A, on whose death R's widow brought a suit for the possession of the holding alleging that her husband had no right to will away the holding and that she remained the ordinary tenant of the holding.

Held, that R had no right to will away the tenant right; and that S. 94 of the C. P. Tenancy Act was not applicable to the case as the ouster, if any, of the plff. from the holding was not at the instance of the landlord.

## C. P. TENANCY ACT S. 41.

There had been no material surrender under S. 35 of the C. P. Tenancy Act, inasmuch as the payment of rent in advance must be taken to have been on behalf of the true tenant

A mere non-cultivation of a holding by or on behalf of a tenant is not in itself sufficient to constitute an implied surrender. (*Mittara, A. J. C.*) SHAMRAO v. SATYA BHAMA BAI. 47 I. C. 28.

—S. 41—Occupancy holding—Mortgage of—Declaration of invalidity in a suit by malguzar—Subsequent sale of holding in execution of a decree for money—Rights of purchaser.

Where a malguzar obtains a declaration that a mortgage of the occupancy holding by the tenant is invalid as against him and subsequently obtains a decree against the tenant for money and not for rent and sells the holding in execution thereof, the purchaser at the sale is not entitled to impeach the mortgage (*Mittara, A. J. C.*) NARAIN RAO v. FATHE DAL. 43 I. C. 907.

—S. 41 (7)—Transfer of sub-lease by tenant—Consent of landlord unnecessary.

The provisions of the Central Provinces Tenancy Act require the consent of the landlord only in respect of a transfer by the tenant and not in respect of a transfer of a sub-lease which is valid and binding against the landlord. (*Kotwal, Offg. A. J. C.*; NARA YANDAS KHUSALIRAM MARWADI v. KRISHNA ROW. 43 I. C. 970.

—S. 45—Scope and applicability—Proprietary right—Transfer by decree in pursuance of award—Occupancy—Tenant right in sir land—Accrual of.

By two deeds dated 1881 and 1884, certain malguzari villages in the Bhandra District were mortgaged with all rights and appurtenances, including the right to occupy and cultivate the sir lands of the mortgaged estate. On 30-6-1899 the mortgagee obtained a decree nisi for foreclosure, which expressly included the cultivating rights in the mortgaged sir lands as liable thereunder.

In 1905, while proceedings for an order absolute on the above decree were pending, the parties referred the whole case for disposal by a Board of Conciliation acting as arbitrators. The Board made an award—Wherein the amount payable and mode of payment were set out, and it was declared that, in default of payment, the creditor should be entitled to enforce the whole of his rights under the deeds of 1881 and 1884, against certain of the mortgaged villages specified in the award, the rest of the mortgaged villages being released from liability. This award was filed in Court, and a decree nisi for foreclosure was made in accordance with its term on 18-10-1905. Default in payment having ensued, a final decree was made on 16-6-1910.

## C. P. TENANCY ACT, S. 46.

Upon the question as to the bearing of S. 45 of the Central Prov. Ten. Act, on this case:

*Held*, by the Court of the Judicial Commissioner, that the arbitration award of 20-2-1905 superseded and extinguished the foreclosure decree of the 30th January 1899 wherein the deeds of 1881 and 1884 had been registered that therefore, the foreclosure decree absolute of 16-6-1910, whereby the judgment-debtors lost their proprietary rights in the sir lands, was not based on a document duly registered before the date on which the Tenancy Act came into force; and hence, that sub-sec. (6) of S. 45 did not apply, and notwithstanding the contract award and decree to the contrary, the judgment-debtors had become occupancy tenants of the foreclosed sir lands. (*Lord Sumner.*) NARAIN GANESH GHATATE v. BALIRAM. (1918) M. W. N. 885=28 C. L. J. 447=14 N. L. R. 165=48 I. C. 141=45 I. A. 179 (P. C.)

—S. 46—Civil Court—Jurisdiction of, to entertain suit for possession of occupancy tenancy by heir—Occupancy tenancy—Testamentary disposition of, if valid.

Plff sued for possession of an occupancy holding in the Civil Court on the ground that it devolved on her as heir of her mother and the deft. resisted the claim on the ground that as the land was gifted to him by a registered deed by the plff's mother the Civil Court had no jurisdiction to entertain the suit.

*Held*, that as the suit was one for possession of an occupancy tenancy and not a suit to set aside an alienation made by the former tenant in contravention of the provisions of the Tenancy Act, the Civil Court had jurisdiction to entertain the suit.

Apart from the provisions of the C. P. Tenancy Act the deed of gift regarded as an attempt to alienate anything more than a life interest of a Hindu widow was invalid.

An occupancy tenant cannot leave any testamentary direction for the disposal of his right by his widow after his death. (*Stanyon, A. J. C.*) KALWA v. BHAWAR SINGH. 44 I. C. 1001.

—Ss. 46, 47 and 95—Transfer, meaning of—Surrender of tenancy by occupancy raiyats to some of the co-sharer landlords if a transfer—Remaining co-sharers put in possession of holding by revenue officer—Suit for possession by lambardar.

Some of the co-sharer landlords to whom the tenants surrendered their holding leased the land to other persons, but the lessees were ejected by the Revenue Court on an application by the remaining co-sharer landlords under S. 46 of the C. P. Ten. Act, 1898. *Held*, that the surrender was not a transfer within the meaning of Ss. 46 and 47 and that the order of the Revenue Court was *ultra vires* and that a suit in a civil court to set aside that order was not barred by S. 95.

## C. P. TENANCY ACT, S. 46.

A surrender is not a transfer within the meaning of S. 46 of the Central Provinces Tenancy Act, 1898.

The words "otherwise transfer" in S. 46 (3) are limited to transactions of a similar nature to those enunciated in the first part of the sub-section, namely, transfers by way of sale, gift, mortgage, or sub-lease.

The Act does not make any provision for the recovery of possession by a co-sharer landlord, of land which has been surrendered to the other co-sharers by a tenant. (*Mullick and Atkinson, JJ.*) **TRILOCHAN PANDA v. DINABHANDU PANDA.** 3 Pat L. J 88=44 I. C. 317.

—S. 46 (5)—Registration of document induced by false recitals—Fraud—Registration, invalid.

Where owing to false recitals in a document tendered for registration under S. 46 (5) of the C. P. Tenancy Act, the Registering Officer has been received into registering a document which under that sub-section he is not empowered to register, the document must be deemed to have been not registered and is not effective for the purpose for which it is created. If the recitals in a deed of gift which induce the Sub-Registrar to register it are false, the jurisdiction of the Civil Courts to declare the deed to be inoperative is not barred. 8 N. L. R. 23 expl. 1 N. L. R. 112 foll. (*Batten, A. J. C.*) **KHADAK SINGH v. DEEPCHAND.** 43 I. C. 16.

—S. 58—Bhumak—Position of—Refusal to do private work of Malguzar—Ejectment.

A *Bhumak* in the District of Chanda in the Central Provinces is not a village servant but is regarded as one rendering service to the *Malguzar* alone. His rights in the land held by him are not governed by the provisions of Chapter V of the Central Provinces Tenancy Act. If, therefore, he refuses to do the private work of the *malguzar*, he is liable to be ejected from the lands which he holds as a *bhumak*. (*Kotwal, A. J. C.*) **BALA v. BALLABHDAS.** 14 N. L. R. 152=46 I. C. 779.

—S. 81 (b)—Second appeal—Rent suit—Adjudication between rival claimants.

In order to have a right of second appeal in a suit for rent of less than Rs. 100 in value it is necessary that there should have been an adjudication between persons impleaded as parties to the suit and having conflicting interests. 14 C. P. L. R. 31 foll. (*Mitra, A. J. C.*) **DINDAYAL SHEODUTTA v. SUKHA.** 47 I. C. 540.

—S. 94—Scope of—Dispossession by non-lambardar mortgagee—Suit for possession—Limitation.

A co-sharer in a village mortgaged his share to the debt, who obtained a decree for sale and having himself purchased it in execution, ob-

## CHARGE.

tained possession thereof in 1909. The plff. who was the owner of the remaining share, had already sold it to B in 1907. The plff. filed the present suit in 1912 to recover possession of the land on the ground that by the transfer of his 2 annas 8 pies share he became an occupancy tenant of the village sir and ordinary tenant of the khudkhast.

Held, that as the debt took possession in 1909 *qua* mortgagee and not *qua* mortgagor, S. 94 of the C. P. Tenancy Act, which has reference only to relations between landlords and tenants, did not apply to the case (*Lindsay J. C.*) **BHIKANCHAND GOKULCHAND v. HARPRASAD.** 45 I. C. 184.

—S. 97—Policy—Suit against land impleading stranger as co-debt.

The policy of the C. P. Tenancy Act as declared by S. 97 of the Act is that all questions concerning the right as much of an agricultural holding which arises out of the relationship of tenant and landlord, should, except so far as appeals are concerned, be tried by a Judge who is also a Revenue Officer.

The mere fact that some one who is not a landlord is joined as a co-defendant in a suit between a landlord and tenant does not take away the operation of S. 97 of the C. P. Tenancy Act and such a suit is triable only by a Judge who is also a Revenue Officer. (*Drake Brokman, J. C.*) **KAMA v. BHARANLAL CHANTANLAL.** 45 I. C. 654.

—S. 97—Tenancy in respect of a fractional share of a field not defined by metes and bounds.

Under the Central Provinces Tenancy Act there can be no tenancy in respect of a fractional share of a field or fields not defined by metes and bounds. (*Batten A. J. C.*) **SUMERA v. PREMCHAND.** 14 N. L. R. 62=44 I. C. 845.

CHARGE—Amendment of bad charge—Validity when made after mischief is over. See 1917 DIG. COL 131. **JAI SINGH v. EMPEROR.**

44 P. R. (Cr.) 1917=43 I. C. 324=19 Gr L J. 100.

—Fund to come into existence on a future date—Validity of charge. See T. P. ACT, SS. 6 AND 58. 47 I. C. 563.

—Future property—Loans to be a charge on—Repudiation of contract before property comes into existence—Effect of.

Where loans advanced with the object of financing a litigation are charged on an amount which may be secured by a compromise in the suit to be effected in a particular manner, and the compromise is effected in a different manner, the lien will not attach itself to the substituted property, especially where the parties put an end to the contract of loan before the compromise. (*Ayling and Seshagiri*

## CHAUKIDARI CHAKRAN LAND.

*Aiyar, J.J.*) PUSAPATI VENKATAPATHIRAJU  
v. VENKATA SUBHADRAYYAMMA.

47 I C. 563

**CHAUKIDARI CHAKRAN LAND—Patni-lease**  
—*Clause reserving power to Zemindar to ap-*  
*point and dismiss chowkidars effect of.*

A clause in a patni-lease which reserves to or confers on the zemindar, the right to appoint and dismiss chowkidars has not the effect of reserving to the Zemindar and excluding from the patni the Chowkidari Chakran Land (*Tennon and Newbould, J.J.*) NAFAR CHANDRA v. BIJOY CHANDMAHTAP.

22 C. W. N. 487=44 I. C. 526.

—Resumption, of Lands comprised in patni—Rights of patnidar—Additional rent, payment of *See* (1917) DIG. COL. 133 KHOND KAR METI HOSSEIN v. UMESH CHANDRA.

45 Cal. 685=27 C. L. J. 494=41 I. C. 964.

—Resumption of—Patnidar and Zemindar—Respective rights of—Settlement with Zemindar, ineffective.

Chaukidari Chakran land included within a patni belong to the patnidar after they are resumed and Zemindar's settlement of those lands after their resumption with a third person is ineffective as against the patnidar. (*Fletcher and Huda, J.J.*) MURARI MAHAN DAS v. TOFEL SHA.

47 I. C. 164.

—Resumption of—Settlement made by Collector in contravention of order of Govt.—Person entitled to settlement, rights of—Limitation.

A settlement of Chaukidari Chakram lands made by a Collector with a person disregarding the order of the Government is wholly *ultra vires* and nugatory and does not entitle that person to get rid of the rights of the person who is entitled to the settlement under the Government order. In such a case limitation does not run against the person entitled to the settlement. (*Fletcher and Huda, J.J.*) AGHOBE NATH BANNERJEE v. KALYANE-SWARI DAS.

46 I. C. 883.

—Resumption of—Title patnidar—Liability of patnidar to pay rent.

Chowkidari Chakran lands situate within the ambit of a patni belong on their resumption, to the patnidar. Where the patnidar, has been enjoying the service of the chowkidar before the resumption, he is not liable to pay for those lands any rent or cesses in excess of what the zemindar has to pay to the chaukidari fund, unless by the terms of the patni-lease the zemindar is entitled to a profit in respect of such lands. (*Walmsley and Panton, J.J.*) MONOHAR MUKHERJEE v. KALI DAS NANDL.

47 I. C. 840.

—Resumption of—Transfer to Zemindar—Tenants' position of—Village Chaukidari Act, S. 51.

## CHAUKIDARI CHAKRAN ACT.

The Chowkidari Chakran lands included in a revenue paying estate forms part of the revenue paying estate and the zemindar has a qualified title therein. Consequently when the lands are resumed under the Village Chowkidari Act and are transferred to the zemindar in accordance with the provisions, the estate taken by the zemindar is in confirmation and by way of continuance of his existing estate. The zemindar incurs a liability to pay additional revenue to the Government in respect of the land. 25 C. L. J. 493 foll.

The object of S. 51 of the Village Chowkidari Act is to maintain the validity of the contracts made in respect of chowkidari chakran lands, and it is immaterial, whether such contracts do or do not include other lands which are in no way affected by resumption proceedings.

Where upon the chowkidar's vacating the lands, the zemindar took possession and allowed the chowkidar's tenancy to occupy the lands as his tenants.

Held, that on a transfer effected in favour of the zemindar under the provisions of the Village Chowkidari Act, a transferee of the zemindar could not treat the tenant as trespassers. (*Mookerjee and Walmsley, J.J.*) SIB CHANDRA BANERJEE v. SURENDRA CHANDRA MANDAL.

22 C. W. N. 997=27 C. L. J. 560=41 I. C. 759.

—Transfer to zemindar—Effect—Relation between zemindar and patnidar—Conditions of—Assessment of rent—Principle.

The effect of a transfer of a chaukidari land is to make the Zemindar hold the property subject to the rights previously created by him in favour of subordinate holders.

The rights of the Zemindar and the putnidar as between themselves are regulated by the conditions under which the patnidars are created. Where, definite information is not available as to the exact mode in which the patni rent was originally settled, the same basis of calculation in making assessment is adopted as between the State and the Zemindar and the patnidar on the other hand. The assessment is to be made on the basis of the annual value calculated according to the average rates of letting land similar in quality in the neighbourhood. (*Mookerjee and Beachcroft, J.J.*) RADHA CHARAN CHANDRA v. MAHARAJAH RANJIT SINGH.

27 C. L. J. 532=46 I. C. 187

—Zemindar's right to—Revenue sale of Zemindari—Auction-purchaser if entitled to Chaukidari Act. *See* (1917) DIG. COL. 138; BROJENDRA LAL DAS v. DEB. NARAIN TEWARI.

45 Cal. 765=27 C. L. J. 491=41 I. C. 894.

**CHAUKIDARI CHAKRAN ACT, (BENG. ACT XI OF 1870), S. 1—Services tenure-holder—Service, nature of.**

## CHOTA NAG. ENCUM. ESTATES ACT.

S. 1 of the Chaudidari Chakran Act does not govern cases in which there might be definite and conclusive evidence to satisfy the court as to what was the nature of the services required from the service tenure holder. (*Fletcher and Panton, JJ.*) SATISH CHANDRA BANDO. PADHYA v. NATABAR DOME.

28 C. L. J. 281=43 I. C. 362

**CHOTA NAGPUR ENCUMBERED ESTATES ACT, (VI OF 1876)**—*Applicability of to land outside chota Nagpur*—*Intention of Act*—*Bengal Patni Taluks Regulation (VIII of 1819)*—*Deposit not voluntary to prevent Patni Sale Suit to recover on the ground of intended sale being illegal, if maintainable*—*Proceedings before nature of.*

The Chota Nagpur Encumbered Estates Act (Act VI of 1876) has no application to immoveable property outside the limits of Chota Nagpur, 10 C. L. J. 527 approved.

In proceedings under S. 14 of the Bengal Patni Taluks Regulation, of 1819, (Bengal Regulation VIII of 1819) the Collector acts not in a judicial but in a ministerial capacity. Those who pay money under such proceedings are not in the same position as persons who pay a claim brought against them in an ordinary suit in which they had a full opportunity of resisting and who, not having availed themselves of such opportunity than, are debarred from doing so hereafter. Whether or not he contests the claim, a talukdar to stop a sale under S. 14 has to deposit the full amount claimed, and such deposit does not preclude him from thereafter raising the question of title in an ordinary suit. (*Viscount Haldane*) RAJA JYOTI PERSHAD SINGH v. KUMUD NATH CHATTERJI.

35 M. L. J. 347=24 M. L. T. 86=  
(1913) M. W. N. 441=8 L. W. 186=  
22 C. W. N. 1009=28 C. L. J. 165=  
20 Bom. L. R. 856=16 A. L. J. 569=  
5 Pat. L. W. 64=45 I. C. 827=  
45 I. A. 103 (P. C.)

—S. 3—*Applicability*—*Proprietor who is not holder of property if entitled to protection*—*"Debt" and "liability"*—*Meaning.*

The liability in respect of which protection is accorded under the Chota Nagpur Encumbered Estates Act is a liability to which the holder of the property or his heir is subject. If the proprietor is not the holder of the property then he does not come within the bar under S. 3 and under connected sections of the Act.

In order to be the holder of the property he must be either possessed of, or entitled in his own right to, the property. If he is not the holder of the property, clearly he is outside the scope of the Act and a decree holder is competent to proceed to execute his decree for possession against the proprietor who has been declared a trespasser, notwithstanding the bar

## CHOTA NAG. ENCUM. ESTATES ACT, S. 36.

contained in S. 3 of the Encumbered Estates Act.

*Obiter*—The words 'debt and liability' as used in S. 3 and connected sections of the Encumbered Estates Act mean pecuniary debt and pecuniary liability having regard to the scope and scheme of the Act. 20 Cal. 603 and 33 Cal. 1065 dist. (*Mullick and Atkinson, JJ.*) LAL MURTIUNJOY NATH SAHI DEO v. THAKUR PUNCKKAURI NATH SAHI DEO. (1918) Pat. 8=3 Pat. L. J. 156=

4 Pat. L. W. 116=43 I. C. 120.

—S. 3 CL. (C)—*Encumbered Estate*—*Debt incurred during disqualification*—*Fresh contract after removal of disqualification in respect of*—*Validity*—S. 12 A of the Act (*Amending Act III of 1909 B. C*)—*Effect.*

The Burway estate belonging to Raja Raghubar Sahai Deo was brought under the operation of the Chota Nagpur Encumbered Estates Act on the 29th September 1897 and was released on the 16th July 1909. Certain debts were incurred by the Raja between December 1907 and 1st October 1908 and the Raja executed a handnote on the 4th May 1911 for the principal and interest so borrowed.

*Held*, in a suit on the basis of the handnote after the death of the Raja against his son and grandsons, that the Raja was a disqualified proprietor under the protection of Act VI of 1876 of the Chota Nagpur Encumbered Estates Land Act and was therefore incompetent to enter into any contract involving him in any pecuniary liability under S. 3 cl. (c) of the Act and that although he ratified the said debts by execution of a handnote subsequent to his release the suit was barred under S. 12 A added to the Act by virtue of Amending Act III of 1909 (B. C.)

That as the Amending Act III of 1909 came into force on the 24th March 1909 prior to the release of the estate on 16th July 1909, the Raja had no vested right of ratification which can be said to have been taken away by the Amending Act.

The contention that S. 12 A bars the suit against only the person to whom the property is restored and does not apply to a suit against his son and grandsons does not hold good inasmuch as the latter's claim to be the heirs of the Raja and the estate has devolved upon them as such. When the estate was restored to the Raja in effect it was restored to the defendants who are the sons and the grandsons of the Raja and were fully represented by him and S. 12 A bars the suit against them also. (*Jwala Prasad and Inam, JJ.*) HANUMAN BUKSH v. ILKAIT GANESH NARAYAN. (1918) Pat. 318=

47 I. C. 705.

—Ss. 36 and 46—*Occupancy tenancy*—*Surrender of*—*Consideration for*—*Landlord's right to recover on the reinstatement of tenant's heir.*

## CHOTA NAG. ENCUM. ESTATES ACT, S. 71.

When an occupancy tenant surrenders his holding for consideration, and an heir is placed in possession under S. 36 (1) of the Tenancy Act, the landlord can recover in a Civil Court the consideration, less any sum to be paid by the heir. A surrender is not a transfer within the meaning of S. 46 (3). (*Batten, A. J. C.*)  
**JAIRAM v. GOPIKISHAN.** 14 N. L. R. 125=  
 47 I. C. 32.

—Ss. 71 and 217—High Court's power to interfere with order under S. 217—C. P. Code, S. 115—Govt. of India Act S. 107. See 1917) DIG. COL. 135 UDHAB CHANDRA SINGH v. LACHMI BIBI KUARANI. 3 Pat. L. J. 143=  
 3 Pat. L. W. 281=43 I. C. 933.

—S. 139 (5)—“*Proceeding*” if includes suit—Suit by plff. claiming occupancy right by reason of his having rendered the land cultivable for declaration of title and possession—Jurisdiction of Civil Court.

Where the plff., settled certain lands with the intention of converting them into his karkar and having remained in occupation rendered the same fit for cultivation but his possession was interfered with by a person claiming settlement from the landlord.

*Held*, that the plff.'s suit for declaration of his occupancy right and recovery of possession was maintainable in the Court of the Munsif and not in that of the Deputy Commissioner. S. 139 cl. (5) draws a distinction between suits and applications and the latter alone which are in the nature of a summary procedure are intended to be instituted in the Court of the Deputy Commissioner (*Dawson Miller, C. J. and Mullick, J.*) **NARAIN SINGH v. GABHRAIL URAON.** (1918) Pat. 131=4 Pat. L. W. 189=  
 44 I. C. 262

—S. 139 (6) and (3)—*Prodhan, Status of*—Suit to eject *prodhan* by landlord in Deputy Commissioner's Court, if maintainable.

A *prodhan* is neither an occupancy raiyat nor a non-occupancy raiyat. He occupies the position of a quasi service tenure holder.

The Chota Nagpur Tenancy Act gives express power to deal with the eviction of occupancy raiyats and non-occupancy raiyats. But there is no provision to justify a court, constituted to hear suits under that Act, to eject a tenure holder.

S. 139 (6) empowers the Deputy Commissioner's Court to hear suits between the *Prodhan* on the one hand and rival claimants on the other with regard to the right to hold the office coupled with the possession of the agricultural lands attached thereto. The Deputy Commissioner has no jurisdiction to try a suit to eject a *prodhan* by his landlord. (*Chapman and Atkinson, J.*) **THE TATA IRON AND STEEL CO. LTD. v. RAGHUNATH MAHIO.** (1918) Pat. 65=5 Pat. L. W. 199=45 I. C. 72.

## THE CHRISTIAN MARRIAGE ACT.

**CHRISTIAN MARRIAGE ACT (XV of 1872), S. 5**—Solemnised according to rules rites, etc.—Meaning. See **DIVORCE ACT, Ss. 41, 18 AND 19.** 11 Bar. L. T. 69.

—S. 68—Solemnisation of marriage according to caste rites between a Native Christian and a Bhangi girl—Person not authorised—Whether punishable.

M. R. belonging to the Bhangi (sweeper) caste was baptised when an infant and when he grew up he dressed like a Christian and used to attend a Christian school, but there was nothing which went to show that he acknowledged or formally recognised Christianity as an object of faith or belief. M. R. married a Bhangi girl and two Christian priests of the sweeper class, solemnised the marriages according to Bhangi rites. They were not persons authorised to solemnise marriages under S. 5 of Act V of 1872, and the Marriage Registrar of the District was not present. The two priests were convicted of an offence under S. 68 of the Christian Marriage Act, and so was M. R. under S. 68 read with S. 109 I. P. C.

*Held*, that the conviction was bad as M. R. was not a Christian at the time of the marriage and that to the two priests S. 68 of the Act did not apply, because it applies to Christian marriages only.

*Per Know, J.*—S. 3 of the Christian Marriage Act interprets the expression “Native Christian.” The meaning given to this latter expression is different from the meaning given by the Act to the expression “Christian.” It includes the Christian descendants of natives of India converted to Christianity as well as such converts. If the legislature contemplated applying S. 68 to Christians, i. e., persons professing the Christian religion and had wished to comprehend within it a Christian defendant of a native of India, it would have been easy to provide for this in S. 68. That no such provision was made confines S. 68 strictly to persons who at the time of marriage were persons professing the Christian religion.

Baptism of a person as an infant when he has no possibility of saying to the world what is the faith to which he belongs or the fact that when grown up he puts on Christian costume and attends a Christian school cannot make such a person, professing the Christian religion within the meaning of the Act.

*Per Walsh, J.*—Having regard to the history of the legislation on the subject, the Indian Christian Marriage Act must be held to apply to Christian marriages alone. The Act, however, does not prohibit even a professing Christian from marrying otherwise than under the Act if he wishes to do so. S. 68 refers to a class of persons, namely, those who solemnize or profess to solemnize a Christian marriage under this Act, not being authorised by S. 5 to do so. The Legislature could not have intended to sweep into the net of the

## CHURCH.

Criminal law, through an indirect piece of legislation by reference, not only every professing Christian who chooses not to be married as a Christian, but every non-Christian who took part in the solemnisation or celebration. This would be contrary to the ordinary mode of a statute. The question does not turn upon the words "solemnise" so much as upon the subject and scope of the Act (*Knox and Walsh, JJ.*)

*MAHA RAM v. EMPEROR*  
40 All. 393=16 A. L. J. 413=  
45 I. C. 519=19 Cr. L. J. 615.

**CHURCH**—Roman Catholic—Law Applicable to—Right to the Temporal possessions of the Church—Canon Law—Departure from proof, of. See ECCLESIASTICAL LAW. 3 L. W. 208.

**CHURS**—Forming in non-navigable rivers flowing through or by the side of permanently settled estates, if resumable and assessable with revenue. See BENG. REG. (X of 1825).

22 C. W. N. 872.

**C. P. CODE (XIV OF 1882) S. 2—Decree—Meaning of—Order dismissing appeal for default—Not a decree—Execution—Limitation—Starting point—Date of appellate decree.**

An order dismissing an appeal for default is not a decree within the meaning of the definition of that word contained in the C. P. Code of 1882.

Where an appeal was dismissed for default under the C. P. Code of 1882.

*Held*, that the only decree which could be executed was the decree of the original Court and that limitation for execution of the decree must be taken to have begun to run from the date of the original decree, and not from the date of the order dismissing the appeal from that decree for default. (*Lindsay, J. C.*) *RAM ADHIN v. RAM LOT.*

5 O. L. J. 252=47 I. C. 125.

**S. 248—Decree, Execution of—Order made without notice if valid—Notice to representative of judgment-debtor, of application for transmission of decree. See (1917) DIG. COL. 137; MAHARAJA BAHADUR SINGH v. INDER CHAND BOTHRA. 22 C. W. N. 390=26 C. L. J. 130=41 I. C. 883.**

**S. 257 A—Agreement to give time—What is—Sanction of Court not obtained for such agreement—Suit for damages for breach thereof—Maintainability.**

An agreement between a decree-holder and his judgment-debtor whereby the former consents to receive an amount less than the decree amount in several instalments covering a period of two years, the first instalment being payable on the date of the agreement, is an agreement to give time within the meaning of S. 257 A of the Code of Civil Procedure 1882 and is void unless sanctioned by the Court. Where no such sanction was obtained for such an agreement, *held* that a suit for damages for

C. P. CODE (1882), S. 335.

the breach of the agreement was unsustainable (*Abdur Rahim and Napier, JJ.*) *SISTU SEETHARAMAYYA v. TADEPALLEE SODEMA.*

7 L. W. 503=(1918) M. W. N. 292=  
24 M. L. T. 16=45 I. C. 16.

**S. 257 A—Payment to decree-holder for forbearance to execute decree if valid—Amount adjusted towards decree.**

Where a judgment-debtor paid a certain sum to the decree-holder for the forbearance shown by the latter in not proceeding with the execution of the decree on a former occasion and no sanction was obtained from the Court on any such payment, *held* that the sum paid was in contravention of the provisions of S. 257 A of the C. P. Code of 1882 and must therefore be applied to the satisfaction of the judgment-debtor. 26 M. 19 Ref. (*Sadasiva Iyer and Phillips, JJ.*) *ZAMINDAR OF KARVETNAGAR v. SUBBRAYA PILLAI*

(1918) M. W. N. 146=7 L. W. 36=  
43 I. C. 871.

**S. 310 A—Execution sale of holding—Deposit of decree amount by transferee of holding from tenant—Withdrawal by landlord without objection—Landlord estopped from pleading that transferee had no interest in the holding. See ESTOPPEL. 43 I. C. 742.**

**S. 325 A—Transfer in contravention of—Validity—Incompetent—Meaning.**

A transfer made in contravention of the provisions of S. 325 A of the C. P. Code is void and of no legal effect whatsoever. The word "incompetent" in the section is to be read in the exact and plain sense that the word implies. (*Lord Shaw*) *GAURI SHANKAR v. CHINNUMYA.*

35 M. L. J. 733=  
16 A. L. J. 993=14 N. L. R. 181=  
48 I. C. 312=45 I. A. 219 (P. C.)

**S. 335—Order disallowing obstruction not given effect to—Suit by auction-purchaser—Resistance by obstructor—Estoppel.**

Where the C. P. Code of 1882 was in force an auction-purchaser applied for possession of the properties sold, but was obstructed by the persons in possession. The Munsif passed an order for possession over riding the objection. No attempt was made by the auction-purchaser to obtain possession and the objectors remained in possession. In a subsequent suit by the auction-purchaser against the persons in possession brought after three years.

*Held*, that the debts were not estopped under S. 885 of the C. P. Code of 1882 from setting up their title to the property, even though, if possession had been given under the order of the District Munsif in the previous suit, they would have been bound by it, if they did not bring a fresh suit within one year. (*Seshagiri Iyer and Napier, JJ.*) *SANJEYUDU v. VENKADU.* 23 M. L. T. 223=45 I. C. 24.

## C. P. CODE (1882), S. 368.

—Ss. 368, 538 Cl. (18)—Order of abatement—Appeal. See C. P. CODE OF 1882, C. 588, Cl. (18). 129 P. L. R. 1917.

—S. 373—Order under—Construction—Principle—Application for permission to withdraw with liberty to bring a fresh suit—Order permitting withdrawal without expressly granting sanction—Fresh suit on same cause of action—Maintainable.

Where on a petition presented under S. 373 of the C. P. Code, 1882, for liberty to withdraw from the suit with permission to bring a fresh suit the Court passed the order "plff. is permitted to withdraw from the suit." Held, that the order must be read with the petition and construed as granting it *i. e.*, as granting permission to file a fresh suit, 35 Cal. 990 appr. (Wallis, C. J., Sadastva Iyer and Kumaraswami Sastri, JJ.) NARAYANA TANTRI v. NAGAPPA. 34 M. L. J. 515 =44 I. C. 889.

—S. 588 Cl. (18)—Order of abatement under S. 368—Appealability.

The appeal provided for by Cl. (18) of S. 588 of the Code of 1882 against an order of abatement under S. 368 has not been taken away by the new Code. (Johnstone, J.) H. H. BRIJ INDAR SINGH v. LALA KASHI RAM. 129 P. L. R. 1917.

**CIVIL PROCEDURE CODE (V of 1908)**  
Applicability of to proceedings in Revenue Courts under the Land Rev. Acts—Compromise in mutation proceedings on behalf of minor entered into without leave of court—Validity.

The provisions of the C. P. Code do not apply en bloc to proceedings in Courts constituted under the Land Revenue Act.

A minor was represented in certain mutation proceedings by his elder brother who bona fide entered into a compromise with the other party. The leave of the Court as required by O. 52, R. 7 of the C. P. Code was however not obtained for this settlement.

Held, that the compromise was not bad merely for want of such leave. (Lindsay, J. C.) HARPAL SINGH v. SUKHRANI. 21 O. C. 220=48 I. C. 119.

—Ss. 2 (2) and 152—Decree, amendment of—Order not a decree—No appeal.

No appeal lies from an order amending a decree inasmuch as such an order is not covered by S. 47 of the C. P. Code. (Shah Din, C. J.) AZIZ BAKSH v. SULTAN SINGH. 43 P. R. 1918.=46 I. C. 9.

—S. 2 (2)—Decree—C. P. Code O. 34, R. 6—Order under a decree—Appealable: See COURT FEES ACT, SCH. I ART. I.

16 A. L. J. 438.

## C. P. CODE (1908), S. 2.

—Ss. 2 (2) and 80—Decree, meaning—Decision that notice of suit is necessary under S. 80—Appeal. See (1917) DIG. COL. 141; NGA MIK v. NGA GYL. 11 Bur. L. T. 95=40 I. C. 677.

—Ss. 2 (2) 47 and 109 (a)—Decree—Determination of questions under S. 47 C. P. C.—Leave to appeal to the Privy Council—Right to. See C. P. CODE, S. 103 (A). (1918) Pat. 81.

—S. 2 (2) and O. 17, Rr. 2 and 3—'Decree'—Dismissal of suit for plff's failure to produce evidence—Decree or order—Appeal.

An application for adjournment on the part of the plff. Having been refused, the Court passed the following order: "As there is no evidence on the side of the plff., and some of the debts and though other debts are ready but adduce no evidence, let the suit be dismissed."

Held, that the order was a decree inasmuch as it was a final decision of the suit so far as the Court was concerned. It was nevertheless so because the suit was dismissed in consequence of the plff's failure to produce evidence. (Citty and Smither, JJ.) PRAMOTHA NATH SAHA v. SASHIMUKHI DEBI. 45 I. C. 200.

—S. 2 (2)—Decree—Order as to costs in an application for transfer under S. 24 C. P. Code—No appeal.

An order passed under S. 24 of the C. P. Code read with S. 15 of the Upper Burma Civil Court Regulation, is not a decree and is not appealable. No appeal therefore, lies from an order as to costs forming part of such order. (Saunders, J. C.) MA TU v. KUMAR GANGADHAR BAGLA 44 I. C. 690.

—S. 2 (2)—Decree—Order dismissing suit for default of prosecution—One of plaintiffs present and applying for adjournment but application rejected—Appeal against order—Maintainability.

Where on the date fixed for the hearing of the suit, one of the plffs. was present, and an application for an adjournment was made but was rejected, and on the same date the Munsif dismissed the suit with costs on the ground that no further step was taken, and on appeal, the Dt. Judge held that no appeal lay to him.

Held, that an appeal lay to the Dt. Judge, as the order of the Munsif was a decree under the C. P. Code. One of the plffs. beings present, it was not a case of dismissal for default. The Dt. Judge should have taken up the appeal and determined whether the application for adjournment was properly refused or not. (Chapman and Atkinson, JJ.) JUGESWAR RAI v. RAJLAL BAHADUR 4 Pat. L. W. 366. =45 I. C. 189.

—S. 2 (2)—Decree—Order refusing to admit appeal filed out of time.

## C. P. CODE (1908), S. 2.

*Quære*—Whether an order refusing to admit an appeal filed out of time is a decree within S. 2 (2) of the C. P. C. (*Fletcher and Huda, JJ.*) ISWAR CHANDRA KAPALI v. ARJAN.

43 I. C. 725

—S. 2 (2)—Decree—Partition suit—Supplementary final decree—Duty of Court to pass if portion of subject-matter not divided. See PARTITION, DECREE.

44 I. C. 671.

—Ss. 2 (2) 47, 96 and O 34, R. 5 (2)—Order dismissing application for a final decree for sale in a mortgage suit—*Appealability of—Limitation Act, S 19 and Art. 181—Applicability of to applications under O. 34. R. 5 of the C. P. Code—Acknowledgment of right—What constitutes.*

An order dismissing an application by the mortgagee for a final decree for sale under O 34, R. 5 (2) of the C. P. Code is not an order in execution of the preliminary decree but is not an order in the suit itself. Such an order falls within the definition of decree in S. 2 (2) of the C. P. Code and is appealable under S. 96 of the code.

Where after the passing of a preliminary decree for sale in a mortgage suit, the mortgagor deft put in a petition to the court applying for an adjournment in which he incidentally acknowledged the right of the (plff.) mortgagee to the decree amount and his right to realise the same by sale of the suit properties and the mortgagee plff. (applied) for a final decree under O. 34, R. 5 (2) of the code within three years of that petition held that the petition contained a sufficient acknowledgment of the mortgagee's rights to apply for sale and that his application was not barred by limitation.

Under S. 19 of the Lim. Act if the right itself is acknowledged the right to take legal steps to enforce that right need not be expressly acknowledged. (*Spencer and Krishnan, JJ.*) SUBBALAKSHMI AMMAL v. RAMANUJAM CHETTY.

35 M. L. J. 552=8 L. W. 526=  
24 M. L. T. 486=(1918) M. W. N.  
792=48 I. C. 298.

—Ss. 2 (11) and 50.—Legal representative—Intermeddler with estate—Duty to account for assets received—Execution against legal representative—Onus of Proof. See (1917) DIG. COL. 142. BABU SHIV SARANLAL v. MAHARAJAH KESO PRASAD SINGH. (1918) Pat. 86=3 Pat. L. W. 302=42 I. C. 122.

—S. 2 (11). Legal 'representative' meaning of—Members of a joint Hindu family whether can be brought within. See C. P. CODE, SS. 53 and 2 (11). 20 Bom. L. R. 660.

—S. 2 (12)—*Mesne profits*—Basis of calculation—Suit for possession by landlord against transferee of occupancy holding from tenant.

In a suit by a landlord for possession and mesne profits against the transferee of an occupancy holding from the tenant.

## C. P. CODE (1908), S. 9.

*Held*, that mesne profits ought to be assessed on the basis of the rents which the purchaser received during the period of his possession, and not on the basis of the rent which the landlord used to get from the tenant of the holding prior to its sale. (*N. R. Chatterjee and Newbould, JJ.*) PURNANANDA DUTTA v. ARINASH CHANDRA CHATTORAJ.

46 I. C. 623.

—S. 2 (12)—*Mesne profits*—Mode of calculation of.

Where the person dispossessed by a trespasser is himself, ordinarily a cultivator of the land in dispute, the profits to which he is entitled are those that the wrongful holder might have obtained by actual cultivation with due diligence. It is not open to a trespasser to dispossess an actual cultivator and then to sub-let the land trespassed upon to some third person, and then claim to compensate the rightful occupant only to the extent of what he may have obtained by the sub-letting. (*Stanyon, A. J. C.*) GOVIND MADHO v. DHASU.

43 I. C. 53.

—S. 9—Civil Court—Jurisdiction of, to try question as to the legality of a tax levied by Government under a special Act. See PUNJAB MUNICIPAL ACT, SS. 86 AND 242.

44 I. C. 910.

—S. 9—Decree—Grounded on mistake—Separate suit to rectify and to recover money paid under—Maintainability. See DECREE, SETTING ASIDE.

3 Pat L. J. 465.

—S. 9.—*Right to an office*—Jurisdiction of Civil Courts—*Suit, maintainability of—Matters to be proved characteristics of office, what are—Reciting prabhandams in temples and receiving therefrom end prasadam whether amounts to an office—Theerthakars whether office holders.*

A claim which refers merely to a religious honour which consists of receiving *theertham* and *prasadam* in a Hindu temple in a certain order is *prima facie* not one of a civil nature unless such honour is attached as an emolument to a religious office, a claim therefore will not be cognizable by a civil court.

In order to show the maintainability of such a claim in a Civil Court, the plff. must prove (1) the existence of the office to which the emoluments claimed are attached and (2) the connection between the office and the honour, dignities and pre-requisites claimed.

In order to constitute an office, the essential pre-requisite is the existence of a duty or duties attached thereto to perform and the non-performance of which may be vested by penalties such as suspension, dismissal, etc.

The rendering of any merely voluntary service cannot constitute an office.

Ordinarily temple offices have substantial emoluments attached to them in the shape of income from inam lands and money payment

## C. P. CODE (1908), S. 10.

and though the absence of such emoluments is not necessarily by itself evidence of the non-existence of the office, it makes it necessary to scrutinize carefully the evidence for its existence.

Where there were admittedly no emoluments of any value attached to what was alleged to be a theertham office and the duties thereof were alleged to be the recitation of the Prabhandams and Vedas on stated occasions and though the Theerthakars did recite the Prabandams and Vedas the evidence did not establish they were bound to do so but it appeared that among the Theerthakars, there were certain persons called Adyapakamdars whose special duty it was to recite these Prabandams and they were remunerated by Inam lands given to them and not only did the Theerthakars join in the recital but so did all Vishnavites present, and the only difference between the Theerthakars and the other Vishnavites was that the former had an 'arupad' or call of names to which they responded 'Nayinde' and the Theerthakars received the theertham and the prasadam from places specially allotted to them and before the outsiders got them and no penalties such as forfeiture of theertham or prasadam attached to the Theerthakars for failure to recite the Prabandams of Vedas.

Held, that all these showed only that the Theerthakars were a recognised and privileged class of worshippers and not that they held any office in the temple. (*Wallis C. J. and Krishnan, J.*) **VATHIAR VENKATACHARIAR v. PONNAPPA IYENGAR.** 7 L. W. 614= 45 I. C. 959.

—S. 10—Decree passed in contravention of provisions of, validity. See EXECUTING COURT. 42 P. L. R. 1918.

—S. 10—First suit—Withdrawal of, with liberty to sue afresh on payment of costs—Institution of fresh suit before payment of costs—Bar to trial so long as costs not paid See C. P. CODE, O. 23, R. 1 (3). 3 Pat. L. J. 63.

—S. 11—See also RES JUDICATA.

—S. 11—Finding on unnecessary issue. See RES JUDICATA. 141 P. L. R. 1917.

—Ss 11 and 47—Heard and decided—Execution proceedings—Mortgage, suit on a person in possession holding it as shield—Payments made towards prior mortgages—Decree subject to lien—Final decree without mention of lien—Sale and purchase of property by mortgagee—Dispossession of the person in possession—Suit by person dispossessed to recover moneys paid for prior mortgage—Maintainability.

One B held two mortgages, of February, 20 1895 and June, 27, 1895, over certain property

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belonging to K. There was a prior usufructuary mortgage over the same property for a sum of Rs. 290. In execution of a decree one M brought the equity of redemption. B brought suit upon the first mortgage for the sale of the property and he impleaded M. B. mentioned the prior usufructuary mortgage and offered to pay the amount due thereon. He obtained a decree and paid in the amount of the prior mortgage. The property, however, was not sold, M having come to terms with B. Between 1901 and 1904 M paid in sums of money till the whole amount which was Rs. 737 odd was paid off. B then sued on foot of his second mortgage and asked for sale of the property. M who was a deft. held up as a shield his rights by virtue of the payment of the two prior mortgages. The Court held that he could hold this up as a shield and made a decree for sale subject to mortgage. At the time of the drawing up of the final decree, however, no mention was made of the lien in favour of M. The property was sold and bought by B. B did not deposit any sum for payment to M and B obtained possession of the property, M objected that he could not be dispossessed till he was paid off but the Court refused to go into this question in execution proceedings and directed M to bring a separate suit. M thereupon brought the present suit claiming Rs. 737 with interest from B by sale of the property:—Held, that the suit was not maintainable, being barred by the principle of *res judicata* and provisions of S. 47 of the C. P. Code. (*Tudball and A. Raoof, JJ.*) **MOTI RAM v. BANKE LAL** 16 A. L. J. 685= 47 I. C. 954.

—S. 11 and O. 2 R. 2.—Heard and finally decided—Meaning of—Dismissal for non-joinder—No bar to subsequent suit.

To plead *res judicata* it is not sufficient to show that there was a former suit between the same parties, for the same matter upon the same cause of action. It is necessary also to show that there was a decision finally granting or withholding the relief sought. Where a suit is dismissed for mis-joinder or non-joinder or multifariousness or on any other purely technical point, a subsequent suit on the same cause of action is not barred. (*Mitra A. J. C.*) **DEODHAR SHEOSINGH v. NIHAL SINGH.** 47 I. C. 909.

—S. 11—Res-judicata—Applicability of rule—Question raised but not decided in prior suit—Effect.

A question though raised in the previous suit between the same parties does not become *res judicata* if it has not been adjudicated upon but on the other hand has been left open. (*Le Rossignol, J.*) **SHAMAR v. GURJO.** 6 P. W. R. 1918.

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—S. 11—*Res-judicata* between co-defendants—Conditions of applicability of doctrine—Decree in spite of a finding if and when *res judicata*—Unnecessary finding when *res judicata*—Evidence Act, S. 115—Estoppel—A unnecessarily made party to suit—A insisting on continuing on record and raising pleas as against co-defendant—Co-defendant praying to A's removal from record on ground of being unnecessary party—Court not removing him and deciding issues as between them after taking evidence—A not estopped from pleading incorrectness of decision in subsequent suit between himself and his co-deft. See (1917) DIG. COL. 145; SANKARAMAHALINGAM CHETTY v. MUTHU LAKSHMI.

33 M. L. J. 740=43 I. C. 860.

—S. 11—*Res judicata*—Civil Court—Decree establishing and declaring right to—Binding character on revenue court in suit for rent between same parties. See RES JUDICATA, CIVIL AND REVENUE COURTS.

23 M. L. T. 183.

—S. 11—*Res judicata*—Cross appeals—Two decrees—One decree becoming final—Effect on appeal from the other—*Res judicata*—Previous suit—Deciding question of title of nature cognizable by a Small Cause Court—No appeal from decision.

The plff. brought a suit in the Court of Munsif to recover possession over a half share in two groves numbered 123 and 2 respectively. The suit was dismissed in respect of No 2 and it was decreed in respect of No. 123. There were two appeals to the lower appellate court, the plff. assailing the decree in respect of No. 2 and the deft. in respect of No. 123. Both the appeals were tried together and disposed of by one judgment, but two decrees were passed whereby the plff's appeal was dismissed, and the deft's. appeal was allowed, the case being remanded. The plaintiff appealed against the second decree to the High Court. In regard to grove No. 123 the plaintiff sued the defendants for damages for cutting down the trees. The suit was of the nature cognizable by a Court of Small Causes, but it was instituted in the Court of the Munsif. In that suit the defendants denied the plff's. title, and the issue as to title was decided in the plff's. favour. In the present suit instituted in the same court the plff. again set up his title which the defts. denied. The Munsif held that the decisions in the former suit operated as *res judicata*. The lower appellate court reversed the finding. Held, (1) that the fact of the decree in regard to grove No 2 having become final did not operate to bar the plff's. appeal in respect of grove No. 123 on any principle of *res judicata*, (2) that the present suit was barred by the rule of *res judicata* by virtue of the decision on the question of title in the previous suit irrespective of the fact that the decree in that suit was not appealable to the High Court

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the suit being of a Small Cause nature. 16 A. L. J. 106 foll (Piggott and Walsh, JJ.) RAM FAQIR v. BINDESHRI SINGH.

16 A. L. J. 782=47 I. C. 837.

—S. 11—*Res judicata*—Decision unnecessary—Finding—Effect.

Where a suit was dismissed on a preliminary point that the suit as framed was not maintainable but a finding was recorded also on the merits, held that the decision would not operate as *res judicata* so far as the finding on the merits was concerned, because it was a decision on an unnecessary issue. (Leslie Jones, J.) RAMJI SHAH v. GHULAM.

22 P. W. R. 1918=44 I. C. 983.

—S. 11—*Res judicata*—Minor—Decree against, in suit represented by guardian *ad litem*, when binding on minor—Gross negligence of guardian what amounts to. See (1917) DIG. COL. 146; ISMAIL v. SULTAN BIBI. 103 P. R. 1917=155 P. W. R. 1917=6 P. L. R. 1918=43 I. C. 354.

—S. 11—*Res judicata*—Pro-note given for debt—Suit on note—Dismissal on merits—Fresh suit on original consideration—Maintainability. See RES JUDICATA, PROMISSORY NOTE.

87 P. W. R. 1918.

—S. 11—*Res judicata*—Widow—Life-estate—Litigation by widow in enjoyment of such a life-estate—When bar to reversioners—Adverse possession against a Hindu widow—Only life estate affected. See (1917) DIG. COL. 146; SUBBI GANPATHI BATTU v. RAM KRISHNA.

42 Bom. 69=

19 Bom. L. R. 919=43 I. C. 233.

—S. 11, Expl. 2—Finding on issue necessary for decision—*Res judicata* if, dependent on right of appeal.

Where a suit brought by a member of an undivided Hindu family to set aside an alienation by the mortgagor was dismissed on the ground that the alienation was a mortgage and the suit ought to have been one in redemption. Held, that the decision as to whether the alienation was by way of mortgage or sale operated as *res judicata* against the alienee in the subsequent suit brought for redemption.

Per Seshagiri Iyer, J.—If there has been an adverse finding to an issue necessary for the decision of the case but the final decree is in favour of the party against whom the issue is found, such finding not being incorporated in the decree, no appeal seems to lie from the decision, as Ss. 96 and 100 of the C. P. Code give a right of appeal only against decrees. 30 Mad. 447; 37 Mad. 25, 7 All. 606 ref. A finding if necessary for the decision of the suit is *res judicata* even though there is no right of appeal. There is nothing in the language of S. 11 of the C. P. Code to suggest such a

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test. The language of Explanation 2 implies that the competence of a court for purposes of *res judicata* is not affected by the fact that its decision is not appealable. The proper procedure in such cases seems to be for the party to ask the Court to embody the finding in the decree so that he may have a right of appeal against such decision. (*Seshagiri Iyer and Bakewell, JJ.*) MUTHAYA SHETTI v. KANTHAPPA SHETTI. 34 M. L. J. 331=

23 M. L. T. 291=7 L. W. 482=  
1918 M. W. N. 334=45 I. C. 975.

———S. 11, Expl. IV—*Res judicata*—Issue expressly excluded from decision if operates as — Tenant holding over — Damages — Assessment—Measure of.

Expl. 4 of S. 11 of the C. P. Code is not applicable to a case where the parties had in a previous suit, put forward all the grounds of attack and defence which were embodied in clear and distinct issues, but the Court not only did not decide them but expressed the exclusion of them from decision. (*Scott Smith and Shadi Lal, JJ.*) MADAN MOHAN LAL v. BOBOOAH & Co.,

70 P. R. 1918=11 P. L. R. 1918=  
71 P. W. R. 1918=44 I. C. 859.

———S. 11, Expl. V and O. 20, R. 12—Suit for possession and mesne profits—Decree silent regarding claim for future mesne profits—Fresh suit for such profits, not barred. See (1917) DIG. COL. 147; DURAISWAMI AIYAR v. SUBRAMANIA AIYAR. 41 Mad. 188=

33 M. L. J. 699=(1917) M. W. N. 847=  
6 L. W. 784=42 I. C. 929.

———S. 11 Expl. 6—Applicability—Scope and effect. See RES JUDICATA.

35 M. L. J. 625.

———S. 11, Expl. VI—Representative suit—Public pathway—Dismissal of suit by plff. for damages for obstruction on the ground that no special damages proved—Subsequent suit under S. 91, C. P. C.—Contention that highway is private, barred. See RES JUDICATA. (1918) M. W. N. 176.

———S. 13 (b)—Foreign judgment in favour of plff. on defts. omitting to answer interrogatories—Not a judgment on the merits—Not enforceable in India. See (1917) DIG. COL. 147; KEYMER v. VISVANATHAM REDDI.

40 Mad. 112=32 M. L. J. 35=  
21 M. L. T. 78=21 C. W. N. 358=  
15 A. L. J. 92=5 L. W. 342=  
19 Bom. L. R. 206=25 C. L. J. 233=  
10 Bur. L. T. 175=38 I. C. 683=  
44 I. A. 6. (P. C.)

———S. 13 (b) (d)—Natural justice—meaning of the term—Foreign Judgment—Wrong view as to legal liability of onus, whether opposed to natural justice and renders foreign

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judgment not given on the merits. See C.P. CODE, O. 21, R. 68.

41 Mad 205=34 M. L. J. 295.

———S. 12, Expl. 5—Mesne profits, future—Decree in prior suits silent as to—Fresh suit for such suits not barred. See RES JUDICATA, MESNE PROFITS. 16 A. L. J. 182.

———S. 14—Presumption — Foreign Judgment—Suit on Plea of want of jurisdiction—Onus.

Where a suit is brought on a foreign judgment every presumption is made in favour of such judgment, and therefore the onus is on the defendants to prove that they had not submitted to the jurisdiction of the Foreign Court. *Robertson v. Struth* 5 Q. B. D. 941 ref. (*Wallis C. J. and Spencer J.*) RAMANATHAN CHETTY v. LAKSHMANAN CHETTY.

24 M. L. T. 244.

———Ss. 16 and 20—Jurisdiction—Joshipan income, suit for recovery of, nature of—Immoveable property—Suit in respect of villages situated outside British India maintainability of.

A suit for the recovery of *joshipan* income is a suit relating to immoveable property.

Therefore, where a suit is brought for the recovery of *joshipan* income in respect of villages some of which are situated within, and the others outside, British India the plff. can get a decree only in respect of the income accruing from the villages situated within British India. (*Finlay O. A. J. C.*) BALWANT v. TULSIBAI. 46 I. C. 782.

———Ss. 20 and 21—Cause of action—Return of goods sent in excess—Damages—Jurisdiction—Forum.

Plffs. sent to defts some articles in excess of what defts had ordered and the latter returned them but the goods failed to reach the plffs. who brought this suit for the price of the same. Plffs. were residents of Kumbakonam and defts. of Mysore.

Held, that the suit relating to the excess goods was one for damages and the Kumbakonam Court had no jurisdiction to try the same.

S. 21 of the C P. Code does not confer jurisdiction and the fact that one portion of the claim is triable by that Court does not give jurisdiction for the other (*Oldfield and Sadasiva Iyer, JJ.*) MANJAPPA v. RAJAGOPALA CHARIAR. 24 M. L. T. 95=(1913) M. W. N. 378=45 I. C. 779.

———S. 20—Jurisdiction—Contract of loan—Subsequent promise by debtor to repay at different place—Binding nature—Contract Act S. 25—Effect—Suit in latter place—Maintainability.

A promise to pay what one is already under an obligation to pay is a promise without consideration, and cannot give rise to a cause of action.

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A promise to repay a loan at a certain place for the convenience of the creditor does not give the creditor right to sue at that place, unless there was some consideration for the promise (*Maung Kim, J*) *BA TU v. DAMAN KHAN*. 11 Bur. L. T. 67.

—S 20 (b) and (c)—*Jurisdiction—Cause of action—Money payable on death at Lahore—Death at another place—Effect of.*

A member of the Punjab Mutual Hindu family Relief Fund, Lahore, died at Lyallpur. The Fund's monies were payable on the death of the members, at Lahore. The Fund also carried on business at Lyallpur through an Agent. Plff. as representative of the deceased member brought a suit to recover the moneys from the Fund at Lyallpur.

*Held*, that the Lyallpur Court had jurisdiction to hear the suit against the Fund because the death of its member which was part of the cause of action occurred at Lyallpur and the deft. Fund carried on its business at Lyallpur through an agent (*Chevis, J.*) *THE PUNJAB MUTUAL HINDU FAMILY RELIEF FUND, LAHORE v SARDARI MAL*. 98 P. R. 1918=29 P. L. R. 1918=45 I. C. 900.

—S. 20 (c)—*Cause of action—Arising of, wholly or in part—Ambala Court—Jurisdiction, of to entertain a suit on a contract made at Jagadhri which was to be performed and was broken outside Ambala District.*

A suit in which plffs. claimed Rs. 14,000 from the deft. as due under a contract made and registered at Jagadhri is cognisable by the Court of the Senior Subordinate Judge of Ambala, although the contract was to be performed outside the jurisdiction of the Ambala Courts and the breach or breaches alleged in the plaint occurred also outside the Ambala District.

Although Expl. III to S. 17 of the Code of 1882 has not been re-enacted in the Code of 1908, the introduction of the words "wholly or in part" in S. 20 (c) of the latter Code left the law as it was before. (*Broadway, J.*) *SITA RAM v. RAM CHANDRA*. 26 P. R. 1918=51 P. W. R. 1918=44 I. C. 863.

—S. 20 (c)—*Cause of action—Forum—Suit on contract.*

In a suit on a contract though the place where the contract was made is not within the jurisdiction of the Court, the Court still has jurisdiction if the place where the contract was to be performed, or where in its performance the money to which the suit relates was expressly or impliedly payable, is within the jurisdiction of the Court. (*Saunders, J.C.*) *MEGHRAJ RAMNIRANJANDAS v. THAKUR DAS*. 44 I. C. 609.

—S. 20 (c)—*Cause of action meaning of—Jurisdiction—Claim for freight illegally collected—Claim for damages for short delivery*

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*or in the alternative for general average—Non-resident foreigner—Jurisdiction of British Court.*

Plff. chartered a vessel belonging to the 1st deft. to sail from Cutch to Basra and there to take on board 750 bundles of dates and to discharge the same at Calicut. This charterparty was entered into at Cutch, the 1st deft. being a resident of that place and a subject of the native state of Cutch. The ship sailed to Basra and took on board 651 bundles of date, but on her voyage to Calicut she met with rough weather and to save her and her cargo the master had to jettison 165 bundles of date. On her arrival in Calicut the master refused delivery of any of the Plff's goods till the freight for the whole consignment had been paid and the plff. paid the same and took delivery of the goods. In a suit by the plff. in the Calicut Court claiming (1) refund of freight, (2) the price of the bundles short delivered, or (3) the amount due to him on a general average' account, it was objected by the deft. that the Court had no jurisdiction to entertain the suit.

*Held*, overruling the objection (1) that the freight having been collected in Calicut, the cause of action for its refund arose in that place; (2) that the cause of action for the price of goods short delivered arose partly in Calicut as that was the place where the goods were to be delivered according to the terms of the Charter party; and (3) that the fact that voyage safely came to an end was part of the cause of action for general average and that having taken place at Calicut, the Calicut Court had jurisdiction to try the whole suit. The terms "cause of action" in S. 20 of the C. P. Code means the whole bundle of material facts which is necessary for a plff. to allege and prove to entitle him to succeed.

A Municipal Court is entitled to exercise jurisdiction over a non-resident foreigner where the cause of action arises within its jurisdiction. The question whether its decree could be enforced against him in the foreign Court is one for the consideration of the Courts of that State. (*Phillips and Krishnan, JJ.*) *MAISTRY RAJABAI NARAIN v. HAJI KARIM MAMOOD*. 35 M. L. J. 189= (1918) M. W. N. 521=24 M. L. T. 209=47 I. C. 708.

—Ss. 20 (c) and 21—*Cause of action—Suit to recover moneys due on policy of insurance—Death of assured—Part of the cause of action.*

Plff. sued the deft. company in the court at Feni upon two policies of life insurance issued by them to his deceased father. The assured sent proposal forms for the policies from some place in the Chittagong Dt to the head office of the company at Calcutta where the policies were made out and despatched to the assured who subsequently died within the local limits of the court of Feni in the Dt. of Noakhali.

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The trial Court and on appeal the Dt. Judge held that the death of the assured being apart of the plff's cause of action and it having taken place within its local limits, the court at Feni had jurisdiction.

*Held*, that in the absence of anything to show that there had been a failure of justice the trial cannot, in view of S. 21 of the C. P. Code, be set aside as without jurisdiction. (*Richardson and Beachcroft, JJ.*) THE BEN-GAL PROVINT AND INSURANCE CO. v. KAMINI KUMAR CHAUDHURY.

22 C. W. N. 517=44 I. C. 694.

—S. 21—Jurisdiction—Objection to place of suing not taken in first court, not to be taken on appeal.

An appellate court will not allow an objection to the place of suing unless it was taken before the settlement of issues and there has been a failure of justice. (*Phillips and Krishnan, JJ.*) CHOCKALINGAM CHETTIAR v. KURUNTHAPPAN CHETTEAR.

(1918) M. W. N. 661=47 I. C. 764.

—S. 22—Transfer application—objection by defts to jurisdiction of court—Maintainability—Grounds for transfer—Inconvenience of defendant's witnesses if sufficient—Plff's choice of forum—Interference.

A deft. in a suit who takes objection to the jurisdiction of the Court in which it has been instituted to try that suit cannot maintain an application for its transfer to another Court under S. 22 of the C. P. Code.

A plff's right to choose his own forum cannot be taken away from him except for very cogent reasons. 13 Bom. 178 ref.

*Held*, that the fact that a deft's witnesses would be very much inconvenienced if the suit continued in the court chosen by the plff as his forum is not a sufficient ground for taking action under S. 22 of the C.P. Code. (*Lindsay, J. C.*) ASKABAN BAID v. BHOLA NATH.

21 O. C. 217=48 I. C. 105.

—S. 24—Transfer of a suit of small cause nature from court having jurisdiction to try, to another court not competent to try as such—Jurisdiction to transfer. See (1917) DIG. COL 152; *BAIJOO v. TULSHA*.

20 O. C. 350=43 I. C. 314

—S. 24 (1) (b) and O. 47 R. 2—High Court Circular R. O. C. No. 3656 of 1916—Applicability.

Where a Sub Judge acting as a Small Cause Judge ordered notice of review in a Small Cause suit, and the High Court thereafter issued a Circular R. O. C. No. 3656 of 1916 that all small causes suits should be tried by special Small Cause Judge after 1.1.1916 and in pursuance thereof the District Judge transferred the revision petition to the new Court.

*Held*, it was not proper for the District Judge to transfer a case already once decided

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by the original Judge, as the circular applied only to cases instituted thereafter and the order is *ultra vires*. (*Seshagiri Iyer, J.*) VAITHILINGA CHETTY v. KALIAPERUMAL MUDALI. 24 M.L.T. 32=(1913) M.W.N. 291 =8 L. W. 259=45 I. C. 13.

—S. 24 (4)—Civil Suit—Transfer of —Small Cause Court—Court vested with small cause jurisdiction if a.

A court of Small Causes under S. 24 (4) of the Code of Civil Procedure includes courts vested with small cause Court Jurisdiction as well as the special Courts constituted under the Provincial Small Cause Courts Act. (*Teunon and Newbould, JJ.*) MADHUSUDAN GOPE v. BEHARI LAL GOPE. 27 C. L. J. 461=44 I. C. 881.

—S. 24 (4)—Small Cause suit—Transfer of, to the court of Munsif—Munsif not having small cause powers—Trial—No Appeal—Prov. Sm. C. C. Act, Ss. 28 and 35.

A suit for Rs. 273 was filed in the court of the sub-judge having small cause jurisdiction up to Rs. 500. The officer in question went on privilege leave and was succeeded by a Munsif as Subordinate Judge. As the Munsif had Small Cause Court powers only up to Rs. 250 the Dt. Judge transferred all suits above Rs. 250 in value pending in the Small Cause Court jurisdiction to another Munsif. The suit was tried and the Munsif decreed the suit for a very small amount. *Held* that the suit being of a value exceeding Rs. 250 remained pending on the Small Cause Court side, the presiding officer of the Court by reason of taking leave for a short time did not cease to be invested with the jurisdiction of a Small Cause Court Judge, and the suit was tried as Small Cause Court suit by the Munsif to whom it had been transferred and consequently no appeal lay (*Banerji and Tudball, JJ.*) CHATURI SINGH v. RAMIA. 40 All. 525=16 A. L. J. 548=46 I. C. 893.

—S. 34 (2)—Decree silent as to interest, construction—Subsequent suit for interest barred. See (1917) DIG. COL. 153; *YAGAPPA CHETTY v. MAHOMED*.

11 Bar. L. T. 132=40 I. C. 858.

—S. 35 cl (2)—Costs—Event—Case remanded to lower Court with direction that costs to abide and follow the result—Withdrawal of suit after remand—Whether an event—Lower court not dealing with costs—Revision.

At the hearing of an appeal, the case was remanded to the lower Court. The order further directed the costs of the appeal "to abide and follow the result." After remand the case was withdrawn.

*Held*, that "event" was nothing but the outcome or result of proceedings and that the withdrawal of the suit was an "event" within the meaning of that word in S. 35, cl. (2) of

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the C. P. Code and if the Court did not order costs it must assign reasons. Where it did not appear that the Court applied its mind as to the costs of the appeal it was a case for revision by the High Court. (*Oldfield, J.*)  
**LAKSHMI VENKAYAMMA RAO v. VENKATRAM APPA RAO**  
 24 M. T. 212=  
 (1918) M. W. N. 561=8 L. W. 219.  
 47 I. C. 862.

—Ss. 35 (3) and 144—Interest on costs—Refund by judgment debtor—Description—Interference with. See (1917) DIG. COL. 153;  
**INDRA BIKRAM SINGH v. CHANDRIA BAKSH SINGH.**  
 20 O. C. 327=4 O. L. J. 729=  
 43 I. C. 337.

—S. 39 and O. 21, Rr. 6 to 9—Mortgage—Decree for sale—Power to pass supplementary decree—Jurisdiction of executing Court and of Court which passed decree

The Court to which a decree for the sale of immoveable property is transmitted for execution has no power to pass a supplementary decree. The power of passing such a decree after judicial determination of the question of the liability of the mortgagor is in the Court in which the mortgage suit was originally instituted. (*Seshagiri Aiyar and Bakewell, J.J.*)  
**VELUSWAMI NAICKER v. EASTERN DEVELOPMENT CORPORATION** (1918) M. W. N. 4=  
 33 M. L. J. 382=22 M. L. T. 257=42 I. C. 953.

—S. 39 (1) (c)—Transfer of decree for execution—Jurisdiction of Court to execute when property is outside jurisdiction.

A Court whose decree has been sent, under S. 39 (1) (c) of the Code, for execution by the sale of immoveable property situate within its jurisdiction is competent to carry out the execution notwithstanding that the whole of the property covered by the decree is not situate within the local limits of its jurisdiction. 22 Cal. 871, 14 Cal. 661 Ref. (*Shah Din, C. J.*) **AZIZ BAKSH v. SULTAN SINGH.**  
 43 P. R. 1918=46 I. C. 9.

—Ss. 44 and 45 and O. 21 R. 11—Decree of British Court—Application for transfer to Court of a Native State subject to reciprocity—Step-in-aid of execution.

An application to a British Court to transfer its decree to the Court of a Native State between which and the English Courts reciprocity prevails, in an application to take a step-in-aid of execution. The reason why the C. P. Code is silent as to the execution of decrees of British Courts by the Courts of Native States is that the Indian Legislature has no power to legislate for foreign courts (*Beaman and Heaton, J.J.*) **JANARDAN v. NARAYAN.**  
 42 Bom. 420=  
 20 Bom. L. R. 421=46 I. C. 56.

—S. 47, O. 21, R. 90 and O. 43, R. 1 (j)  
 Appeal—Application to set aside sale, dismissal of—Second Appeal whether lies. See (1917)

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DIG. COL. 153; **MAUNG SHWE MYAT v. MAUNG SHWE BAN.**  
 11 Bur. L. T. 26=  
 (1916) 11 U. B. R. 132=39 I. C. 374.

—S. 47 and O. 41, R. 5.—Appeal—Order in execution—Order accepting security offered and directing delivery of possession to decree-holder

An order by which security offered by the decree-holder for getting delivery of possession of the property forming the subject-matter of the decree is accepted and the delivery of possession is directed to be made to the decree-holder is appealable, inasmuch as the order directing delivery of possession is a final order and not an interlocutory or intermediate one. (*Teunon and Newbould, J.J.*) **RUDRA NARAYAN JANA v. NABA KUMAR DAS.**  
 22 C. W. N. 657=44 I. C. 156.

—S. 47 and O. 21 Rr. 58 and 63—Appeal Attachment—Objection to—Dismissal of, on the ground that objection was a party to the suit—Suit by defeated claimant, maintainability of.

A person claiming to be not a party to the suit preferred an objection to the attachment of certain property in the capacity of a stranger to the suit. The objection was dismissed on the ground that he was a party to the suit. Held, that the remedy of the objector was to file a regular suit to establish his right to the property attached and not to proceed by appeal.

In such cases the test is whether the claim as laid by the objector is adverse to the claims of the real judgment-debtor, and an objector claiming under a paramount title is not deprived of his ordinary remedy of a regular suit merely because his objection is dismissed on the ground that he is held to be a party to the suit. (*Batten, A.J.C.*) **GANDELAL v. MANJEE SONAR.**  
 47 I. C. 904.

—S. 47 and O. 21, R. 66—Appeal—Execution proceedings—Sale proclamation—Order rejecting Judgment-debtor's valuation—Not appealable.

An order of the executing Court overruling the judgment-debtor's objection to the valuation put in by the decree-holder in the sale proclamation and refusing the judgment debtor's prayer for adjournment of the sale and issue of a fresh proclamation is not appealable. (*Fletcher and Huda, J.J.*) **BEJOY KRISHNA NANDY v. DHARENDRA KRISHNA DEB BAHADUR.**  
 47 I. C. 512.

—S. 47—Appeal—Parties are representatives—Interlocutory order determining representative of party—Not appealable.

Per *Couch, A. J. C.*—The question whether any particular person is or is not the representative of a party can be determined under S. 47 of the C. P. Code but only for a limited pur-

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pose. Under that section the Court does not purport to conclusively determine the controversy. Such an order, therefore, though within S. 47 is not a decree and is not appealable. (*Pratt, J. C., and Couch, A. J. C.*) KHAN MAHOMED v. CHELLARAM.

11 S. L. R. 74=43 I. C. 165.

—S. 47 and O. 21, R. 90—*Appeal—Parties—Benamidar—Execution sale—Setting aside on the ground that the auction purchaser was benamidar for judgment-debtor—Order not appealable—B. T. Act, S. 173.*

An order setting aside an execution sale under S. 173 of the B. T. Act, on the ground that the auction purchaser is a benamidar for one of the judgment debtors is not appealable by the benamidars even where the Court in arriving at the decision has considered some other matters such as O. 21, R. 90 of the C. P. Code and other grounds in support of the application.

Such a benamidar has also no right of appeal under the C. P. Code inasmuch as S. 47 of the Code does not apply to the case of a benamidar. (*Fletcher and Newbould, JJ.*) DHIRAMOYE DAS v. ANANTARAM CHAKRAVARTY. 46 I. C. 743.

—S. 47 and O. 21, R. 66—*Appeal—Sale proclamation—Order setting terms of—Not appealable.*

No appeal lies against an order settling the terms of a sale proclamation under O. 21, R. 66 of the C. P. Code. (*Thunon and Newbould, JJ.*) GIRIDHARI LAL SEROWGI v. ALTAF ALI CHOWDHURY. 46 I. C. 564.

—Ss. 47, 104 and O. 43, R. (1) (J)—*Appeal—Second appeal—Execution sale—Application to set aside—Refusal.*

Where a person having a permanent right and whose interest does not pass under the sale applies to have it set aside under S. 47 or O. 21, R. 99 of the C. P. Code and his application is dismissed, there is no second appeal from the order of the Appellate Court. (*Fletcher and Hudson, JJ.*) JAGADISH NARAIN PARAMANICK v. MAHAMUDDIN MOHAMED. 46 I. C. 529.

—S. 47—*Applicability—Execution sale—Purchase by decree-holder with leave of court—Suit by him for recovery of property purchased—Maintainability—Failure to seek remedy under O. 21, R. 95—Failure in proceedings under O. 21, R. 95—Effect—Nature of remedy under.*

S. 47 of the C. P. Code has no application to a suit brought by a decree-holder, who has with the permission of the executing Court purchased the property of the judgment-debtor sold in execution of his decree, for recovery of possession of that property on the strength of the sale to him; nor is such a suit barred because the pff. had failed to avail himself of the summary remedy provided by O. 21 R.

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95 of the C. P. Code or having sought that remedy has been unsuccessful, such summary remedy being concurrent with his remedy by separate suit. 31 All. 82 foll. (*Shah Din, C. J. and Le Rossignol, J.*) CHOTHA RAM v. MUSSUMMAT KARMON BAI. 8 P. R. 1918=44 I. C. 169.

—S. 47—*Applicability—Question in execution between parties to suit—Question between auction-purchaser and parties to suit—Suit in respect of—Maintainability. See MORTGAGE, DECREE FOR SALE.*

23 M. L. T. 198 (P.C.)

—S. 47—*Applicability—Suit for sale by prior mortgagee against mortgagor and puisne mortgagee—Decree in form, Appendix D, C. P. Code—Rights of puisne mortgagee to bring fresh suit for recovery of his mortgage amount. See MORTGAGE, PRIOR AND SUBSEQUENT.*

35 M. L. J. 639.

—S. 47, O. 21 Rr 2, 53 (b)—*Attachment of decree by creditor of decree-holder—Adjustment after—Effect of Notice to judgment debtor—Attaching creditor brought on record—Order on application—Appealability—“Either through court or otherwise” in O. 21 R. 53, meaning of.*

It is not competent to the holder of a decree which has been attached to apply to enter up satisfaction of the decree even though notice of the attachment was not given to the judgment debtor, under Sub-rule (6) of O. 21 R. 53.

Where the attaching creditors have been made parties to the decree-holder's application for entering up satisfaction the question that arises between them is one falling under S. 47 of the C. P. Code and an appeal lies from an order thereon.

*Quære.*—Whether the Court of its own motion can make the attaching creditors parties to the decree-holder's application.

*Abdur Rahim J.*—(Oldfield J. dubitante) The words “either through the Court or otherwise” in O. 21 R. 53 cl. (6) of C. P. Code refer to “payment or adjustment” and not to “notice”. (*Abdur Rahim and Oldfield JJ.*) SUBRAHMANIA AYYAR v. KUPPUSWAMI AYYAR.

24 M. L. T. 495=(1918) M. W. N. 874=43 I. C. 109.

—S. 47 and O. 21, R. 63—*Bar of Suit—Claim by stranger allowed—Subsequent suit by judgment debtor against claimant decreed—Sale to third person by judgment-debtor—Re attachment—Claim by vendee rejected—Fresh suit, if lies.*

A third person preferred a claim to property attached in execution of respondent's decree and it was allowed. The judgment-debtor sued to set aside the settlement which was the basis of the claim and obtained a decree for possession. He then sold the property to the

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appellant. The respondent having re-attached the property, appellant put in a claim and, having failed in it he filed a separate suit for possession.

*Held*, that the first attachment was not revived as the result of the judgment-debtor's suit and that the appellant's suit was not barred by S. 47 of the C. P. Code. (*Wallis, C. J. and Sadasiva Iyer, J.*) CHAMPATIL KOPPAN v. KOLASSERI KELAPPAN NAMBIYAR

44 I. C. 864.

———S. 47 — Bar of suit — Parties and representatives—Decree in representative capacity—Attachment of personal property—Claim—Suit incompetent.

If the property claimed by A in his personal capacity was sold, in execution of a decree passed in a suit in which he was sued in a representative character, as the property of B, it was open to A to apply under S. 47 of the C. P. Code to have the sale set aside. A separate suit was not maintainable. 17 Cal. 711 foll. (*Richardson and Walmsley, JJ.*) KHITISH CHANDRA BANERJEE v. THAKAMON DEBI.

27 C. L. J. 572=46 I. C. 458.

———S. 47—Bar of suit—Suit on mortgage against father and son—Son exempted in decree—Simple money decree against father—Execution against son disallowed—Subsequent bar—Form of decree.

A suit was instituted against a Hindu father and his son (who were members of a joint Hindu family governed by the Mitakshara Law) on the basis of a mortgage. The son contested his liability on the ground that there was no legal necessity. The result was that a simple money decree was granted against the father alone and in the decree it was stated that the son was "exempted" and costs were given to him against the plaintiff. On the decree being executed the sale of the father's share proved insufficient to pay off the decree. Thereupon it was sought to attach and sell the son's share, but upon objection being made by the son the objection was upheld. A suit was accordingly brought against the son for a declaration that the son's share was liable to be sold in execution on the ground of his pious liability. *Held*, that the suit was barred by the provisions of S. 47 of the C. P. Code. *Held*, also that the expression in the decree exempting a particular person was inaccurate and the operation of the decree was to dismiss the suit against the particular debt. (*Richards C. J. and Tudball, J.*) DATA DIN v. NANKU

16 A. L. J. 752=47 I. C. 864.

———S. 47—Bar of suit—Suit for recovery of possession by auction purchaser after confirmation of sale.

A suit by an auction purchaser for the recovery of possession of property which he has purchased at an auction sale which has been

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confirmed, is not a suit which is barred under S. 47 of the C. P. Code. (*Imam J.*) JAGESWAR SINGH MAHAPATRA v. SRIDHAR SARDAR.

47 I. C. 844.

———S. 47 and O. 21, R. 2—Decree for endorsement of promissory notes by defendant to plff.—Failure of defendant to comply with decree—Notes barred in consequence—Remedy of plff.—Fresh suit for damages—Maintainability. See C.P. CODE, O. 21, R. 32, S. 47. (1918) M. W. N. 333.

———S. 47 and O. 41, R. 1—Execution proceeding—Appeal against order within S. 47—Applicability of O. 41, R. 1 and O. 43 See (1917) DIG. COL. 160; QASIM ALI KHAN v. BHAGWANTA KUNWAR.

46 All. 12=

15 A. L. J. 801=42 I. C. 888.

———S. 47 and O. 21, R. 90—Execution sale—Application to set aside—Fraud—Application under O. 21, R. 90 and not under S. 47, C. P. Code—Old Code and New—Difference. See C. P. CODE, O. 21, R. 90 AND O. 43, R. 1 (J).

15 A. L. J. 920.

———S. 47, O. 21 Rr. 90 and 43 R. 1 (J)—Execution sale—Order setting aside on the ground of fraud—Fraud committed after publication of sale proclamation—Effect—Second appeal, not maintainable.

It is not open to a party to impeach a sale under S. 47 of the C. P. Code on the ground of fraud in conducting the sale. If a Court professing to act under S. 47, sets aside a sale on the objection of the judgment-debtor, the order setting aside the sale is not a decree. O. 43 R. 1 (j) provides for an appeal from an order setting aside a sale on the ground of irregularity or fraud in publishing or conducting a sale, but no second appeal lies from such an order.

O. 21 R. 90 covers a case of fraud committed after the publication of the sale proclamation.

Where the decree-holder agreed not to hold the sale if payment was made within a certain time, and he then fraudulently proceeded to sell the property in contravention of this arrangement, *held*, that this amounted to fraud in the matter of the conduct of a sale within O. 21 R. 90 C.P.C. (*Mullick and Thornhill JJ.*) SHEIKH MAULA BUL v. RAGHUBAR GANJHU

3 Pat L. J. 645.

———S. 47 and O. 21 R. 22—Execution sale—Validity—Omission to give notice required by O. 21 R. 22 C. P. C.—Fraudulent suppression of process for execution—Effect—Application to set aside sale—Limitation Act Art 181 and S 18—Applicability—Plea based upon applicant's knowledge of fraud—Onus of proof.

The omission to give a notice under O 21 R. 22 of the C. P. Code is by itself sufficient to render an execution sale void for want of jurisdiction, for the notice is the very foundation of the jurisdiction. 42 Cal 72 ref.

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Where every process prescribed by the legislature with a view to apprise the judgment-debtors or their representatives that execution was to proceed against them had been fraudulently suppressed *Held*, that such a case was governed by S 47 of C. P. Code, and the period of limitation was provided by Art. 181 of the first schedule to the Lim Act. To such case S 18 of the Lim Act applied.

The burden rests upon the person, who has committed a fraud, to prove conclusively that the person injured by his fraud has had clear and definite knowledge of those facts which constitute the fraud, at a time which is too remote to allow him to seek the assistance of the court. 17 Bom. 841 *ref* (*Mookerjee and Walmsley, JJ*) *RAM KINKAR TEWARI v. STHITI RAM PANJA*. 27 C. L. J. 528—46 I. C. 221.

—Ss. 47, 144 and 151—*Ex parte decree*—*Execution sale of a house*—*Decree subsequently set aside*—*Retrial ending in plaintiff's favour*—*Application to set aside previous sale*—*Limitation Act, Arts. 186 and 181*—*Time within which application to be made*—*Sale set aside on payment by debt of amount of second decree*.

The plaintiff obtained an *ex parte* decree for Rs. 86 against the defendant, in 1906, in execution of which the defendant's house was sold and purchased by the plaintiff in 1910. Subsequently, that defendant succeeded in getting the *ex parte* decree set aside and in having the case retried; but the result was that a decree for Rs. 87 was passed in plaintiff's favour in 1914. The defendant next applied to have the previous sale of the house in execution set aside:—

*Held*, (1) that the previous sale of the house in execution under the previous decree which had been set aside, should itself be set aside as having been no longer based on any solid foundation;

(2) that the order setting aside the sale could be passed under S. 47 or S. 144 or S. 151 of the C. P. Code of 1908;

(3) that the application was quite in time under the provisions of Art. 181 of the Lim. Act, the cause of action having accrued upon the setting aside of the *ex parte* decree in 1914;

(4) that, under the circumstances, the sale should be set aside subject to the condition that the defendant should pay up the amount due from her under the second decree within a specified time. (*Heaton and Hayward, JJ.*) *SHIVBAI v. YESU*. 20 Bom. L. R. 925—48 I. C. 130.

—Ss. 47 and 96—Order dismissing an application for a final decree for sale in a mortgage suit not order in execution—Appealable. See C. P. CODE, SS. 2 (2), 47, ETC.

35 M. L. J. 552.

—S. 47—Order granting delivery of possession—Review of—Appeal from order on

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review. See APPEAL, EXECUTION OF DECREE. 3 Pat. L. J. 571.

—S. 47 and O. 21, R. 7—Order refusing to execute decree, whether amounts to decree—Transfer of the decree for execution—Jurisdiction of Court passing decree, whether can be questioned by executing Court. See (1916) DIG. COL. 186; *MA ME v. MAUNG AUNG MIN*. 10 Bur. L. T. 159—(1916) 2 U. B. R. 19—36 I. C. 10.

—S. 47—Parties and representatives—Auction-purchaser not a representative of decree-holder. See C. P. CODE, SS. 144 AND 151 AND O. 21, R. 90. 41 Mad. 467.

—S. 47 and O. 21, R. 95—Parties and representatives—Decree-holder auction-purchaser—Suit for possession not maintainable—Remedy in execution.

When a decree-holder by his own action combines the position of decree-holder and auction-purchaser by purchasing at the auction sale with the permission of the Court, he does not lose his character of a party to the suit, and proceedings in execution are not terminated until he obtains possession of the property, inasmuch as O. XXI, R. 95 of the C. P. Code provides for delivery of possession being enforced in execution of the decree.

S. 47 of the C. P. Code is a bar to a suit for possession by decree-holder auction-purchaser (*Batten, A. J. C.*) *LACHUSA MOTILAL v. MAHERALAL RAHIMALI*. 44 I. C. 533.

—S. 47—Parties and representatives—Purchaser at execution sale.

A purchaser at a Court sale in execution of a decree by a Civil Court is not a representative of the judgment-debtor, within the meaning of S. 47 of the C. P. Code of 1908. (*Batchelor, C. J. and Kemp J.*) *NARSINBHAT v. BANDU* 42 Bom. 411—20 Bom. L. R. 495—46 I. C. 113.

—S. 47 and O. 21, R. 100—Parties and representatives—Purchaser of non-transferable holding from tenant—No right to apply to set aside sale in execution of decree for rent by landlord.

The purchaser of the whole or part of an occupancy holding not transferable by custom is not a representative of the judgment-debtor and so entitled to object to the sale under S. 47 of the C. P. Code or maintain proceedings under O. 21, R. 100, C. P. Code. (*Rao and Jwala Prasad, JJ.*) *PANCHRATAN KOERI v. RAM SAHAY*. 3 Pat. L. J. 579—4 Pat. L. W. 129—43 I. C. 969.

—S. 47—Parties and representatives—Question between decree-holder and his transferee—Not within the section.

S. 47 of the C. P. Code does not cover questions between a party and that party's repre-

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sentatives, e.g., a decree-holder and his transferee. In such cases the order passed, though made under S. 47, is only an interlocutory order and not a decree and is not appealable. (*Pratt, J. C. and Couch, A. J. C.*)  
 KHAN MAHOMED v. CHELARAM.

11 S. L. R. 73=43 I. C. 165.

—Ss. 47 and 144—Parties and representatives—Right of assignee pending appeal to apply for restitution. See C. P. CODE, S. 144.  
 (1918) Pat. 243.

—S. 47—Parties and representatives—Transferee from judgment-debtor and decree-holder purchaser—Bar of suit.

No suit will lie for recovery of possession of property at the instance of a transferee from the judgment-debtor during the pendency of the execution, against the decree-holder purchaser in Court-auction. The question is one relating to execution and arises between parties or their representatives and must be dealt with in execution. (*Batten, A. J. C.*) DEOBA v. LAXMAN.  
 44 I. C. 978.

—S. 47—Party to suit—Defendant exonerated by decree without adjudication but whose name is not formally struck off from record.

A deft whose name appears in the decree without having been struck off previously from the record is a party with respect to whom the prohibition of a separate suit enacted in S. 47 of the C. P. Code applied notwithstanding that he has been exonerated by the decree passed by the court without an adjudication on the controversial questions between him and the plff. 21 M. L. T. 121 not foll. 23 Mad. 361 foll. (*Sadasiva Iyer and Phillips, JJ.*)  
 VENKATASWAMY v. KUNCHALA CHIDAMBARAM.  
 23 M. L. T. 206=45 I. C. 671.

—S. 47—Party to suit—Meaning of—Mortgage—Suit for sale—Puisne mortgagees of one of many items made party deft.—Objection by him to sale of another item under title paramount—Order overruling objection—Appeal. See (1917) DIG. COL. 161; SHAM NARAIN SINGH v. CHANDRA SEKHAR PRASAD SINGH.  
 (1917) Pat. 346=

4 Pat. L. W. 86=36 I. C. 528.

—S. 47, O. 21, R. 2—Question relating to execution—Agreement that no decree should be obtained, if can be gone into in execution.

The question whether there was an agreement between the parties to a suit that no decree should be obtained therein, cannot be gone into in execution. 40 Mad. 883 dist. (*Sadasiva Aiyar and Napier, JJ.*)  
 DORAI SWAMI MOOPAN v. SUBBALAKSHMI PALAYEE AMMAL. (1918) M. W. N. 547=8 L. W. 268=

46 I. C. 880.

—S. 47—Question relating to execution—Cause of action merged in decree—Further

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remedy by execution. See C. P. CODE, SS 11 AND 47.  
 16 A. L. J. 685.

—S. 47—Question relating to execution, etc.—Cause of action—Merger of in judgment *Transit in rem judicatum*—Remedy by execution—Fresh suit barred. See MALABAR LAW, LANDLORD AND TENANT.

34 M. L. J. 167=44 I. C. 110.

—S. 47 and O. 21 R. 43—Question relating to execution—Default by depository of Cattle under O. 21 R. 43—Enquiry into—Enforcement of liability of—Remedy by suit.

The liability of a depository of property attached in execution of a decree who has made default, cannot be enquired into by the executing Court but must form the subject of a separate suit. (*Mitra, A. J. C.*) KHETSIDASS RADHAKISHEN MARWARI v. HARSA MARATHEE.  
 47 I. C. 956.

—S. 47 and O. 21, R. 96—Question relating to execution—Delivery of excess properties. Application for re-delivery—Order under O. 21, R. 96, C. P. C., judicial order.

Where, under an execution sale lands not included in the sale certificate whereby mistake delivered to the purchaser, the judgment-debtor cannot claim their re-delivery by a separate suit. The question whether the lands so delivered are correctly included in the sale certificate or not can only be determined by the executing Court on an application under S. 47 of the C. P. Code.

An order directing delivery of possession to a purchaser under O. 21, R. 96 of the C. P. Code is a judicial order. (*Abdur Rahim and Sreenivasa Iyengar, JJ.*) KATHIRAYASWAMI NAICKER RAMABHADRA NAIDU. 45 I. C. 608.

—S. 47—Question relating to execution—Execution Sale—Objection to, by purchaser of portion of the equity of redemption—Maintainability of—Paramount interest.

A purchaser of a portion of the mortgaged property joined as a deft. in a mortgage suit, cannot under S. 47 of the C. P. Code, object to the sale of the mortgaged property in execution of the final decree on the ground that he has acquired a new and independent interest in that portion of the property.

Any right that he has to an interest outside and independent of the mortgage must be enforced by proper proceedings outside the mortgage suit. (*Fletcher and Huda, JJ.*)  
 BINDHU BASINI DASSYA v. SRIMATI SIL.

47 I. C. 374.

—S. 47 (O. C. S. 244)—Question relating to execution—Mortgage decree for sale—Decree for sale—Decree not in accordance with provisions of Transfer of Property Act—Sale in execution—Validity—Fresh redemption suit against auction-purchaser on ground of invalid

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*duty of decree—Maintainability—C. P. C. of 1882, S. 244—Effect—Scope and applicability.*

In a mortgage suit for sale of the mortgaged property the decree passed did not comply with the provisions of the T. P. Act, S. 88, for no day was fixed by the High Court on which payment might be made within six months from the date of declaring in Court the amount due. In execution of the decree the mortgaged properties were attached, sold and purchased with the permission of the Court by the mortgagee decree-holder, and the sale was duly confirmed. The mortgagor subsequently brought the present suit to redeem the mortgage.

*Held*, that the decree was intended to be made in compliance with the Act, and, whether or not its provisions were complied with, the property and all right, title and interest of the debt were in fact sold in execution of a decree of a Court which had jurisdiction to entertain a suit in which the decree was made and that decree was not appealed, and that the mortgagor plaintiff was barred from a right to redeem.

*Held*, also, that the question now raised could not have been raised before the sale was confirmed and if so raised, would have been determined by the Court executing the decree, and that the present suit was barred by S. 244 of the C. P. Code of 1882 (*Sir John Edge*).  
GANAPATHY MUDALIAR v. KBISHNAMA CHARIAR. 41 Mad. 403—22 C. W. N. 553—34 M. L. J. 463—(1918) M. W. N. 310—8 L. W. 427—4 Pat. L. W. 310—20 Bom. L. R. 880—16 A. L. J. 353—23 M. L. T. 198—27 C. L. J. 367—44 I. C. 855—45 I. A. 54 (P. C.)

—S. 47—Question relating to execution—Parties and representatives—Decree against a person as representative of deceased and as being in possession of estate—Sale of portion of estate in execution—Suit to set aside, if lies.

Where a decree is passed against the representatives of a deceased person as such representative, and as being in possession of the estate of the deceased, and property forming part of the estate is sold in execution of the decree, the judgment-debtor cannot bring a suit to recover the property without getting the sale set aside. (*Chevis, J.*) PALA SINGH v. HABNAMA. 40 P. L. R. 1918—30 P. W. R. 1918—43 I. C. 712.

—Ss 47, 151 and O. 21, R. 2—Question relating to execution—Payment out of Court to decree-holders—Uncertified payment—Executing court a court hearing suit precluded from recognising payment—Plea of fraud not raised by judgment-debtor cannot be allowed to be raised by his assignee after many years—Inherent power of Court to re-open transactions on the ground of fraud—T. P. Act, S. 53—Transfer pendente lite.

The plaintiff held an unregistered mortgage for Rs. 90 executed by M. in 1884, on which

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he obtained a decree in 1899 and in execution purchased the mortgaged property himself at a Court-sale in 1901. He also obtained formal possession but not actual possession which was with debt. No. 1 who was subsequent mortgagee with possession. M. had mortgaged the property to debt. No. 1 by five registered mortgages in 1892, 1897, 1898, 1899 and 1900, and had placed him in possession of the property. In 1903 M. sold her right in the property to debt. No. 1. Debt. No. 2 was a purchaser from debt. No. 1. The plaintiff sued in 1912 to recover possession of the property, or, in the alternative to redeem the subsequent mortgages executed by M. The debts resisted the suit on the ground that the mortgage debt of 1884 having been satisfied in 1900 by M. the decree and the sale in the suit of 1901 were fraudulent. The plaintiff contended in reply that the question of fraud in the execution of the decree could not be investigated upon a vague plea of fraud in the written statement in a redemption suit and that the plea of satisfaction of the mortgage decree prior to the Court-sale could not be entertained, since the adjustment had not been certified, in view of the provisions of O. XXI, R. 2:—

*Held*, (1) that, under the provisions of S. 47 of the C. P. Code, a question relating to the satisfaction of a decree was a question arising in execution which must be tried by the executing Court under that section or at the discretion of that Court in suit, in either of which cases the Court would be a Court precluded from recognising the adjustment;

(2) that it was very undesirable that the debts should by the plea of fraud be permitted after the lapse of many years to call in question a title acquired at a Court-sale which was never challenged by the judgment-debtor though she was alive at the time of the trial of the suit;

(3) that, though the Court had inherent powers to allow, in a proper case, the investigation of a question of fraud in order to prevent injustice, there was no question of injustice here, for any investigation of title prior to debt. No. 1's purchase in 1903 would have disclosed the decree and Court-sale in the mortgage suit of 1899;

(4) that the mortgages of 1889 and 1900 effected during the prosecution of proceedings in the suit of 1899 were ineffectual as against the plaintiff.

(5) that the plaintiff was entitled to redeem the first three mortgages in favour of debt. No. 1 as the purchaser of the right, title and interest of M. who was entitled to redeem them at the date of the Court-sale. (*Scott, C. J. and Shah, J.*) MORU v. HASAN. 20 Bom. L. R. 929—43 I. C. 155.

—S. 47—Question relating to execution—Receiver appointment of in execution proceed-

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*ing—Subsequent order refusing to discharge appeal against, whether lies*

Where a Receiver is appointed in execution proceedings the question as to his discharge is a question relating to the satisfaction of the decree, and therefore, an order refusing to discharge the Receiver falls under S. 47 and is appealable. (*Mullick and Thornhill, JJ.*) MAHARAJAH SIR RAMESHWAR SINGH v. HITENDRA SINGH. 3 Pat. L. J. 513=46 I. C. 655

—S. 47 and O. 41 R. 5 (3)—Security ordered by Court under O. 41, R. 5 (3)—Immovable property given as security by the judgment-debtor—Realisation of security in execution—Propriety—Separate suit whether necessary—Matter arising in execution. See (1917) DIG. COL. 163; SUBRAMANIA CHETTIAR v. RAJA RAJESWARA SETUAPATHI. 41 Mad. 327=34 M. L. J. 84= (1917) M. W. N. 872=6 L. W. 762=43 I. C. 187.

—Ss. 47 and 11—Suit by prior mortgagee—Puisne mortgagee party—Decree and order absolute—Fresh suit by puisne mortgagee.

Where a puisne mortgagee was a party to the suit by prior mortgagee and a decree was passed under S. 88 of the T. P. Act which made no mention of the puisne mortgagee's right to redeem and the properties were sold privately after order absolute and puisne mortgagee brought the present suit for redemption

*Held* that the suit is not barred by S. 47 as the prior decree did not provide for the working out of the rights of the puisne mortgagee.

*Obiter*.—Even if the decree provided for redemption of the puisne mortgage S. 47 will not be a bar.

*Held* also that S. 11 will be no bar to the present suit. 40 Mad. 77 at 92 doubted (*Ayling and Krishnan, JJ.*) BRAHMANANDAN VENKATA LAKSHMI NARAYANA RAO v. ALLAMNENI VENKAYYA. (1918) M. W. N. 902

—Ss. 47 and 145—Surety—Decree-holder taking surety-bond outside court—Enforcement of surety-bond in execution not permissible. See C. P. CODE, S. 145.

8 L. W. 597.

—S. 47 Expl.—"Deft. against whom a suit has been dismissed," meaning of—Person properly impleaded, but against whom suit is dismissed as plff. abandoned part of his claim—Whether a party to suit within the meaning of S. 47—Madras Proprietary Estates Village Service Act, S. 17—Mortgage of village service inam lands after the grant of the title deed of enfranchisement but before the notification—Whether valid and operative. See (1917) DIG. COL. 164; SANNAMMA v. RADHABAI. 41 Mad. 418=34 M. L. J. 17=

(1918) M. W. N. 23=22 M. L. T. 532=7 L. W. 234=43 I. C. 935.

## C. P. CODE, (1908) S. 48.

—S. 47 (2)—Suit—Conversion of into execution application—Limitation, defence of.

A suit cannot be treated as an execution application where the effect of doing so would be to prejudice the deft. in his plea of limitation. (*Abdur Rahim and Napier, JJ.*) KATHI. AYASAMI NAICKER v. RAMABHADRA NAIDU. 45 I. C. 608.

—S. 48—Applicability of, to pending proceedings in execution.

The mere fact of the coming into force of the new C. P. Code pending a suit on a mortgage does not make the new section 48 applicable to proceedings in execution of the decree in that suit. (*Fletcher and Huda, JJ.*) SYAM CHAND MAITI v. BAIKUNTHA NATH MANDAL. 47 I. C. 143.

—S. 48—Execution—Revivor of former application for execution—Limitation Act, Art. 181 applicable.

S. 48 of the C. P. Code, 1908, has no application to the case of a revival of an antecedent application for execution which has been in suspense by reason of some bar or which has been stayed pending the determination of a subsequent litigation. The period of limitation in such cases is that provided by Art. 181 of the Lim. Act, 1908, namely, three years from the date of the removal of the bar. (*Mullick and Atkinson, JJ.*) SAKINA BIBI v. GANESH PRASAD BHAGAT. 3 Pat. L. J. 103=5 Pat. L. W. 21=44 I. C. 560.

—S. 48—Limitation—Starting point—Date of decree—Decree drawn up finally some time after the judgment—Effect of.

On the 17th November 1897, the Court to whom an award was presented, ordered it to be filed and a decree to be made in accordance with it. In 1899, when an application was made to execute the decree, the deft. objected that no executable decree had as yet been drawn up. The decree was on plff.'s application, amended on the 28th January 1898, so as to bring it into consonance with the award. The decree, which was passed for Rs. 56,575, ordered payment of Rs. 575 and Rs. 6,000 forthwith. Plff. after several applications in time filed the present application on the 2nd of December 1909, to execute the decree.

*Held*, that, as regards the amounts of Rs. 575 and 6,000, the correct starting point was 17.11.1897 and the application was barred by S. 48, C. P. C. (*Datchelor, A. C. J. and Kemp, J.*) NAASSINGRAO v. BANDU. 42 Bom. 309=20 Bom. L. R. 431=46 I. C. 107.

—S. 48 (O. C. S. 236)—Money-decree—Decree for sale of properties on default of payment of mortgage amount—Combined decree—Limitation.

A decree providing for payment of the mortgage money and for the sale of the properties

## C. P. CODE, (1908) S. 48.

of the mortgagor on default is a decree for payment of money within S. 230 of the C. P. Code of 1882 where an application for sale of the non-hypothecated properties is made more than 12 years from the date of the decree it is barred and cannot be taken to be one in continuation of a prior application for sale of the hypothecated properties. (*Abdur Rahim and Kumaraswami Sastri, JJ.*) **THIAGARAYAN v. KANNUSAMI PILLAI.** 43 I. C. 122.

—S. 48 and O. 34, R. 6—Mortgage decree—Combined decree—Application for execution against other properties of mortgagor—Limitation—Starting point. See (1917) DIG. COL. 166, *KHULNA LOAN CO. v. JNANENDRA NATH BOSE.* 22 C.W.N. 145=43 I.C. 436 (P.C.)

—S. 48—Subsequent order—Meaning of—Order giving time for payment by executing court—Limitation, Act, S. 15—Exclusion of time.

The expression "subsequent order" in S. 48 (b) of the C. P. Code means a subsequent order made by the Court which made the decree and acting as that Court and as a Court executing the decree. Where therefore a Court executing the decree, allows a judgment debtor two months' time to pay up the decree, the order allowing the time is not a subsequent order within the meaning of S. 48 and does not give a fresh period to the decree holder to execute the decree. The order giving time is not an order staying execution or an injunction and in computing time that period cannot be excluded. (*Richards, C. J.*) *JURAWAN v. MAHABIR DUBE.* 40 All. 198=16 A. L. J. 71=44 I. C. 24.

—Ss. 51, 72 and O. 21, R. 30. and Sch. III—Money decree—Execution—Temporary alienation of judgment-debtor's land to decree-holder—Application for—Order on—Jurisdiction of Asst. Collector and Collector sitting as Revenue Court. See (1917) DIG. COL. 167; *ARMAD KHAN v. PARMANAND.* 8 P. R. (Rev) 1917=7 P. W. R. (Rev) 1917=43 I. C. 356.

—Ss. 53, and 2 (11)—Decree for injunction against two adult members of joint family—Deaths of the adult members—Execution against other members not parties to the suit—Liability—Legal representative, meaning of.

A decree for injunction was obtained against two members of a joint Hindu family which consisted of other co-parceners. After the deaths of the debt members, the decree was sought to be executed against the surviving co-parceners who were not parties to the decree.

*Held*, that the decree could not be executed against the surviving co-parceners, for on no construction of the words "legal representative" could the members of a joint Hindu family be brought within the definition of the term contained in S. 2 (11) of the C. P. Code.

## C. P. CODE, (1908) S. 60.

*Per Beaman, J.*—S. 53 of the C. P. Code has been enacted especially to enforce one recognised rule of the Hindu law, namely, that members of the joint Hindu family may not escape the payment out of the joint family property of any debt incurred and decreed against their father before his death provided that such debt is not tainted by immorality. The object of the section is limitative, and is intended to give effect to a well-known rule of the Hindu law referable to a religious rather than legal sanction which might otherwise have been rendered nugatory by the definition of "legal representative" (*Beaman and Heaton, JJ.*) *CHUNILAL v. BAI MANI.* 42 Bom. 504=20 Bom. L.R. 660=46 I.C. 745.

—S. 54 and O. 21, R. 11 (2) IV—Administration suit—Execution of decree in, method of—Decree, amendment of. See (1916) DIG. COL. 195, *MAUNG PO-WIN v. MA TIN.* 10 Bur. L. T. 206=8 L. B. R. 338=36 I. C. 385.

—S. 54—Partition by Collector—Civil Court not competent to re-open.

When the Collector, acting under S. 54 of the C. P. Code once effects a partition, it is not competent to the Civil Court to entertain any application seeking to re-open the partition. 15 Bom 527 foll. (*Beaman and Heaton, JJ.*) *BHIMANGAUDA v. HANMANT.* 20 Bom L. R. 411=46 I. C. 10.

—S. 54—Partition—Revenue paying estate—Jurisdiction of Collector and Civil Court—Extent of Bengal Estates Partition Act (V of 1897), S. 12.

A Civil Court has jurisdiction to execute a decree for partition of a revenue paying estate provided that it does not assume jurisdiction to partition the liability for the land revenue, so that in the event of a party applying to the Collector for partition of the land revenue after partition has been effected by the Civil Court, it would be open to the Collector to reconsider the allotment of the shares granted in the Civil Court proceedings. (*Chapman and Atkinson, JJ.*) *DEBI SARAN SINGH v. RAJBANS NATA DUBEY.* (1918) Pat. 134=5 Pat. L. W. 9=45 I. C. 898.

—S. 55—Arrest of judgment debtor—Application for, not to be refused on the ground that he resides out of jurisdiction. See C. P. CODE, O. 21, R. 87. 3 Pat. L. J. 95.

—S. 60—Decree for mesne profits—Not to be sold under S. 60—Procedure under O. 21, R. 58, C. P. Code, See C. P. CODE O. 21, R. 58. (1918) Pat. 257.

—S. 60—Right to improvements of a Mulgeni Tenant, if can be attached and sold. See *ALIYASANTANA LAW, MULGENI TENANT.* (1918) M. W. N. 887.

C. P. CODE, (1908) S. 60.

—S. 60 (c) and O. 21, R 92.—*Execution of decree—Sale in execution—House of—Agriculturists—Exemption from liability to sale—Issue raised in a separate suit by the judgment-debtor that house was not saleable—Estoppel.*

In execution of a money decree passed against the debt. a house was sold and it was purchased by the plff. The debt raised no objection to the sale which was duly confirmed. The plff. having obtained formal possession brought a suit against the debt. for the recovery of actual possession. The suit was resisted on the ground that the debt. was an agriculturist and consequently the house was exempted from liability to sale under S. 60 (c) of the C. P. Code: *Held* that debt. having allowed the auction sale to take place without objection and that sale having been confirmed it became conclusive as between the parties, and the purchaser acquired a vested interest in the property sold and the debt. was precluded from questioning the validity of the sale and the title of the purchaser. (*Banerji and Ryves, JJ.*) LALA RAM v. THAKUR PRASAD.

16 A. L. J. 691=47 I. C. 947.

—S. 60 (c)—*House of agriculturists—Liability to sale in execution of mortgage decree.*

The house of an agriculturist is liable to sale in execution of a decree on foot of a mortgage made by him, when such house is not an appurtenance of his holding which he is forbidden by law to transfer. (*Tudball, J.*) NRBHAY LAL v. KALLAN.

45 I. C. 546.

—S. 60 (f)—*Birt jijimani—Liability of, for attachment.*

*Birt jijimani* is a right to personal service within S. 6 (f) of the C.P. Code and is therefore exempt from attachment and sale in execution of a decree, notwithstanding that in the eye of Hindu law such a right is immoveable property (*Tudball, J.*) DURGA PRASAD v. SHAMBHU.

43 I. C. 650

—S. 60 (g)—*Grant of jagir, whether of land or of revenue—Grant for maintenance—Political pension—Liability to attachment in the hands of the heirs of the donee.*

A Government sannad purported to grant the 'taluka' of a certain pargana, together with all lands cultivated or uncultivated, to one K for life as revenue free jagir by way of maintenance and went on to say that after the death of K the said 'ilaka' will continue to stand in the names of his children and grandchildren as a permanent zemindari assessed to a light amount of jama.

*Held*, that the grant to K was of land rather than of revenue charged on the land and was not a political pension within S. 60 (g) of the C. P. Code.

The word "jagir" primarily points to occupancy, though it may be occupancy of an office such as that of collector of revenue. Where however, a jagir held for life only is, as in this sannad, used in contra-distinction to an ilaka

C. P. CODE, (1908) S. 64.

held as a permanent zemindari, it is an almost necessary inference that the occupancy referred to is an occupancy of land.

Though the grant to K was expressed to be for this maintenance, it was not so in the case of his descendants who became absolute owners of the property.

That in the hands of the latter the subject-matter of the grant was liable to attachment in execution of a decree. (*Lord Parker of Waddington*) MUSAMMAT SAKINA BAI v. KANIZ FATIMA BEGAM. 22 C.W.N. 577= (1918) M. W. N. 384=47 I. C. 632 (P.C.)

—S. 60 (1)—*Pay of non-Commissioned Officer if liable to attachment—Army Act, Ss. 136 and 141. See (1917) DIG. COL. 169; SANTA v. BATTERSLEY.*

11 Bur. L. T. 130=42 I. C. 90.

—S. 64—*Attachment of property—Property falling to another by reason of an award, pending attachment—Whether takes effect, subject to attachment—Decree in terms of the award—Subsequent purchase by attaching creditor—Good only subject to the decree.*

Where during the pendency of an attachment on a property of the judgment debtor it is awarded to another person by arbitration the award is not a private transfer under S. 64 of the C. P. Code as it only recognises a pre-existing title, and the attachment and the consequent execution sale only take effect subject to the award

Where before the execution sale, a decree is passed in terms of the award, the title by the sale is subject to the decree. (*Spencer and Krishnan, JJ.*) KASI VISVANATHAN CHETTIAR v. RAMASWAMI NADAR.

35 M. L. J. 441=24 M. L. T. 477= 8 L. W. 582=48 I. C. 123.

—S. 64 and O. 21, R. 57—*Execution of decree—Rival applicants—Transferee from original decree-holder—Decree-holder attaching decree—Dismissal of execution application for default—Effect of on attachment—Rights of transferee.*

Where A and J obtained a decree against W in a contribution suit and B having obtained a decree against A sold it to G and G took out execution and got himself substituted in place of B and attached the decree obtained by A against W but G's execution case was dismissed for want of prosecution on 16th July 1917. Subsequently on the 26th August 1917 one Amirul Hasan purchased the decree against W. Then on the 9th September G filed an application for execution of the decree which he had attached already and on the 5th November Amirul Hasan also applied for substitution of his name and execution of the same decree:

*Held*, that the attachment which was made in order to enable G to take out execution

## C. P. CODE, (1908) S. 73.

money paid out of court—Remedy by suit alternative and not the only remedy.

The petitioner and respondent obtained two money decrees against certain judgment-debtors of whom some were common to the two decrees. On 19-9-16 in execution of petitioner's decree certain properties of the common judgment-debtors were sold and purchased by him. On an application made on 18-9-16 petitioner had been allowed to bid at the sale and was ordered to pay into Court one ninth of the amount of his bid in cash, the remainder being set off against the amount of his decree. Meanwhile on the 14th August respondent had applied for the execution of his decree, and on the 21st September before petitioner's bid was in fact accepted by the Court applied for rateable distribution of the sale-proceeds.

Held, that the application came under S. 73 of the C. P. Code and that respondent was entitled to rateable distribution of the proceeds of the sale, inasmuch as although the money remained in the hands of the purchasing decree holder the petitioner, it was, open to the Court to direct him to pay that sum into Court and it was therefore, in the power and at the disposal of the Court and was held by it within the meaning of S. 73; and that a refund of this kind might be enforced by process in execution. (*Teunon and Newbould, JJ.*) **BIJOY KUMAR ADDYA v. RAMA NATH BARMAN.** 43 I. C. 715.

—S. 73 (2)—Suit for refund of assets, not maintainable before assets are rateably distributed.

A suit by a plff. (a decree holder) for refund of assets before the actual distribution of them to the other decree-holders is premature and is liable to be dismissed. (*Tudball and A Raoof, JJ.*) **RAM CHANDRA NAIK KALIA v. RAGHUNATH SARAN SINGH DEO.**

16 A. L. J. 530=46 I. C. 101.

—S. 74—Penalty—Unconscionable bargain—Power of court to relieve against

A bargain is unconscionable when it is such as no man in his senses and not under delusion would make on the one hand and no honest and fair man would accept on the other. This definition is not satisfied by a case where long delay in payment brings about a position in which discharge of the debt is impossible, the debtor being a man of sufficient intelligence to foresee the result of his inaction.

Whether a particular gain is unconscionable or not and whether a particular stipulation constitutes a penalty or not are questions of fact rather than of law. (*Drake Brockman, J. C.*) **DEORAO v. AMBADAS.**

14 N. L. R. 21=43 I. C. 952.

—S. 80—Notice under—Time spent in—Suit against Secretary of State under S. 104-B, of the B. T. Act—No deduction of time. See B. T. ACT, S. 104 B.

46 I. C. 899.

## C. P. CODE, (1908) S. 91.

—S. 80—Public officer—Mala fide action in discharge of his duties—Notice under S. 80 whether essential before suit—Act purporting to be done in his official capacity—Meaning of

Where a public officer in the discharge of his duties acts *mala fide*, he is entitled to notice before action under S. 80 of the C. P. Code. 24 Cal. 584 appr. 7 Cal. 499; 26 All. 220 diss.

Per Chief Justice: The expression "act purporting to be done in his official capacity" in S. 80 of the C. P. Code means "an act intended to seem to be done by him in his official capacity."

Per Sadasiva Iyer, J.—An act done by a public officer would purport to be an act done in his official capacity not only if it was properly and rightly done by him in such capacity and within his powers, but also if it has such a reasonable resemblance (though a false or pretended resemblance) to a proper and right act that ordinary persons could reasonably conclude from the character of the acts and from the nature of his official powers and duties that it was done in his official capacity.

Per Spencer, J.—The word "purporting" covers a profession by acts or by words or by appearance of what is true as well as what is not true (*Wallis, C. J., Sadasiva Iyer and Spencer, JJ.*) **SAMANTHALA KOTI REDDI v. POTHURI SUBBIAH.** 41 Mad. 792=

34 M. L. J. 494=

23 M. L. T. 35=(1918) M. W. N. 414=

7 L. W. 586=45 I. C. 86.

—S. 80—Suit against public servant—Notice, necessity of, Bench Clerk of Sub-Judge. See (1917) DIG. COL. 174; **NGA. MEIK v. NGA GYI.** 11 Bur. L. T. 95=40 I. C. 677.

—S. 86—Suit against—Ruling Prince—Submission to jurisdiction in trial court—Waiver.

Where a Ruling Prince having Sovereign powers, submits to the jurisdiction of a British Court, no objection to the maintainability of the suit can be subsequently raised by him in the Appellate Court on the ground that the consent of the Governor-General in Council had not been obtained under S. 86 of the C. P. Code prior to the institution of the suit (*Fletcher and Smither, JJ.*) **MAHARAJA BIRENDRA KISHORE MANIKAYA BAHADUR v. HASEMAT ALI.** 46 I. C. 853.

—S. 91—Applicability of—Village pathway—Obstruction to—Public nuisance—Right of suit.

The public at large are not affected by the obstruction of a pathway which only the inhabitants of a particular village have the right to use. A suit for a declaration of the rights of the inhabitants of the village to the use of a pathway is not governed by S. 91 of the C. P. Code. (*Fletcher and Huda, JJ.*) **NAGENDRA NATH MAZUMDAR v. BANYARI LAL DAS.**

46 I. C. 970.

## C. P. CODE, (1908) S. 92.

—S. 92—Accounts—Trustee mixing up trust and private funds—Onus of, showing that particular acquisition is not trust property on trustee. See TRUSTEE.

(1918) M. W. N. 786.

—S. 92—Applicability—De fact. trustee—Suit for his removal, for appointment of trustee and for vesting trust property in him—Court fee—Death of one of plaintiffs obtaining sanction—Effect.

A suit brought for the removal of a person who is a *de facto* but not a *de jure* trustee, for the appointment of a trustee and for vesting trust property in him is a suit falling under S. 92 of the Code. It is not necessary to stamp the plaint in such a suit with a court-fee stamp calculated *ad valorem* on the value of the trust property.

*Semble*, that the death of one of the plffs. in a suit under S. 92 of the Code would not cause the abatement of the suit. Where, pending such a suit brought with the necessary sanction, one of the plaintiff die the suit does not abate. (Scott-Smith, J.) GOPI DAS v. LAL DAS.

97 P. R. 1918=47 I. C. 983

—S. 92—Breach of trust—Public Trust—Hereditary trustee—Removal—Grounds—Trustee spending money not required by terms of endowment—Right to re-imbursement—Trusts Act, S. 23 cl. (e)—Applicability to public.

A hereditary trustee is liable to be removed, if his continuation in office is likely to endanger the interests of the institution. 2 Mad. 197 *ref.*

The grounds which justify a Court in removing trustees are well expressed in Story's Equity Jurisprudence, S. 1289, adopted by the Privy Council in 9 Ap. Cases 371 and the principle enunciated there in the case of a private trust is applicable a fortiori to trustees of public trusts.

In cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust. It is not indeed that every mistake or neglect of duty or inaccuracy of conduct of trustees which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to show a want of honesty or a want of a proper capacity to execute the duties or a want of reasonable facility."

The court's duty is to look entirely to the interests of the trust, and where the circumstances show that it will not be for the benefit of the institution to allow it to remain under the management of a hereditary trustee, he ought to be removed.

Want of capacity to manage the trust properties is a sufficient ground for removal of a trustee. One of the most important duties of a trustee is to keep separate accounts and to keep the trust property separate from his own property; and if that is not done and difficulties in taking accounts thereby arise

## C. P. CODE, (1908) S. 92.

every presumption is to be made against the deft. and in favour of the trust.

A trustee of a public charity who chooses year after year to spend monies not required by the terms of the endowment out of his own pocket should not be allowed credit for such expenditure.

The duty of the trustee is to carry out the directions of the founder and not to encumber the trust property by systematically incurring expenditure beyond the limits of the income of the trust property.

S. 23, cl. (e) of the Trusts Act which makes a defaulting trustee liable to account for compound interest with half-yearly rests applies to private trusts; and to cases of public trusts, a rule of that nature can only be adopted with such modifications as the circumstances of such case require.

Where the Lower Court exercised its discretion properly the Appellate Court would not interfere. (*Abdur Rahim and Burn, JJ.*) RAJAH OF KALAHASTI v. GANAPATHI IYER.. (1918) M. W. N. 555.

—S. 92—Charity—Suit in respect of—Persons having interest—Meaning—Hindu Law—Son's liability to pay amounts collected by father as trustee and misappropriated by him—Avyavaharika debts—Meaning—Trustee—Suit for account—Period of accounting—Power of Court to fix limits.

Persons who are residents of the locality in which a choultry is situated and are members of the community for whose benefit the choultry was founded have a sufficient 'interest' therein within the meaning of S. 92 of the C. P. Code and are entitled to institute a suit under that section in respect of it.

Under the Hindu Law a person is liable to account for amounts collected by his father and grandfather in their capacity as trustees but subsequently misappropriated by them. The fact that the misappropriation would amount to a criminal offence does not affect his liability.

Meaning of "Avyavaharika" debts in the Hindu Law.

Courts have a discretion in fixing the period for which accounts should be rendered by a trustee of a charity.

In a suit against a Hindu for an account of monies collected by himself his father and grandfather in their capacity of successive trustees of a charity and not accounted for their Lordships held the defendant liable only for the collections made during 12 years prior to suit though the period of mismanagement related to a much longer period. (*Wallis, C. J. and Seshagiri Aiyar, J.*) GARUDA SANYA-SAYYA v. NERELLA MURTHENNA.

35 M. L. J. 661.

—S. 92—Mutwalli of wakf property—Application to be appointed—Rejection of by Di

## C. P. CODE, (1905) S. 92.

*Judge—Dt. Judge whether has powers of a kazi—Petitioners whether to be proceed by application or by suit.*

An application was made by a person to the District Judge to be appointed Mutwalli of a wakf property but the District Judge refused to deal with the matter on application on the ground that the petitioner's only course was to proceed by suit under S. 92 of the C. P. Code.

*Held*, that it may be conceded that the District Judge has the powers of a Kazi but it does not necessarily follow that the petitioner is entitled to proceed by application or that the District Judge has no power to relegate her to a suit. 20 C. W. N. 113 and 20 C. W. N. 118 ref. (*Richardson and Walmsley, JJ.*) JAMILA KHATUN v. ABDUL JALIL MEAH. 23 C. W. N. 138.

—S. 92—Public Trust—Breach of condition by mohunt—Dt. Judge ordering suspension on mere report—No suit filed—Jurisdiction—Interference in revision.

The C. P. Code gives no powers to the Dt. Judge to take any action in order to protect property forming the subject-matter a public endowment unless and until a regular suit is filed in his Court under S. 92, and when the Dt. Judge exercises any of the powers vested in him under that section he acts without jurisdiction. The High Court therefore interfered in this case in its revisional jurisdiction and set aside the order of the Dt. Judge suspending a Mohunt when there was no suit before him under S. 92. (*Tudball and A. Raoof, JJ.*) MOHUNT DARSHAF DAS v. THE COLLECTOR OF MEERUT. 16 A L. J. 742=47 I. C. 850.

—S. 92—Public trust—Dedication—Will—Appointment of vass to perform charities with properties of testator—Complete dedication. See. REL. ENDOWMENT. 47 I. C. 611.

—S. 92—Public trust—Deed of endowment silent as to—Extrinsic evidence of user etc., admissibility of, to prove character of trust.

Where a deed of endowment did not expressly state whether the temple built by the executant was intended for private or public worship, but it was found from extrinsic evidence that the executant was anxious to obtain religious benefit for her soul, that the temple had been from its very beginning open to the public for worship and that the customary religious festivals had been celebrated there in a public manner

*Held*, that under the above circumstances, the trust may be taken to be a public trust, erected for religious purposes. (*Stuart and Kamhaiya Lal, A. J. C.*) LAKSHMI KUNWAR v. MURARI KUNWAR. 5 O. L. J. 97=45 I. C. 231.

## C. P. CODE, (1908) S. 92.

—S. 92—Public trust—Suit by worshippers for removal of trustee—Sanction of Advocate-General or Collector—Necessity—Absence of—Effect.

A suit brought by persons claiming to be the worshippers of a shrine and beneficiaries in the property attached thereto for the removal of the trustee thereof falls under S. 92 of the Code and, if instituted without the consent in writing required by the section, the relief for the removal of the trustee cannot be adjudicated upon (*Shadi Lal and Chevis, JJ.*) MD. ABDUL KADIR v. HUSSAIN BIBI. 11 P. W. R. 1918=44 I. C. 379.

—S. 92 and O. 1 R. 8—Representative suit—Jurisdiction to frame scheme. See C. P. CODE. O. 1 R. 8. 24 M. L. T. 20=45 I. C. 423.

—S. 92—Right to sue—Worshippers of a public temple.

Persons having a right to perform worship in a temple intended for public worship are competent to institute a suit under S. 92 C. P. C. (*Stuart and Kamhaiya Lal, A. J. C.*) LAKSHMI KUNWAR v. MURARI KUNWAR. 5 O. L. J. 97=45 I. C. 213.

—S. 92. — Scheme — Alteration in—Remedy by way of application—Fresh suit unnecessary.

A Court which has sanctioned a scheme for the administration of a charitable trust is competent from time to time to vary the scheme if the exigencies of the case may require, without the necessity for a fresh scheme suit. *A. G. v. Bovill* (1840) 1 Phillips 762, *A. G. v. Bishop of Worcester* (1851) 9 Hare 328 (1876) 1 A. C. 1; 28 M. 319 and 80 M. 138 Ref. (*Mookerjee and Beachcroft, JJ.*) SADUPHADAYA OMESHANAND OJHA v. RAVANESWAR PRASAD SINGH. 43 I. C. 772.

—S. 92—Scheme—Cypres application of surplus funds—Power of Court—Limits of—Hindu Law—Recognition of the principle.

The principal consideration where the objects mentioned by the dedicatory do not exhaust the corpus of the fund, is to find out whether there was a general testamentary intention or purpose. Even though the object may be specified and the bequest otherwise definite if the law will not allow the application of the fund for the purpose, it may be that the Courts are not at liberty to infer a general testamentary intention in favour of charity in general and to direct the application of the property to other purposes of a charitable kind.

The primary rule is to ascertain whether the object aimed at by the testator is to be carried out without making a new Will for him. Although there may be vagueness in the selection of the places or in the allocation of the funds, so long as it is ascertainable that

C. P. CODE, (1908) S. 92.

the testator had a particular object in view and that he intended that the funds left by him should be appropriated to that object, Courts are bound to see that the persons appointed by the testator do not misappropriate.

If the Court can ascertain that there was a general charitable intention, the fact that the particular object for which the charity was intended did not exist or that the fund intended for that charity could not exhaust the whole income, will not be any reason for holding that the bequest failed in whole or in part. If it appears that the donor intended that, in any event, the fund should be devoted to charity and that the particular institution was named merely as the channel by which that intention was to be effected, the whole fund will be regarded as having been dedicated to charity and the Court will proceed to carry out the intention of the testator on the principle of the *cypres doctrine*.

When grants made to religious institutions are not ear-marked or, if ear-marked, are not intended to exhaust the recurring income, and whenever they are made as a general thanks offering, it is proper and legitimate to direct their application to the promotion of knowledge.

Indian Courts have ample powers to give directions towards application of the trust income, even though the trustee may not himself be competent similarly to apply it. The doctrine of *cypres* should receive as extended an application as possible so as to give effect to the true intent and aim of the donor. His lapses, his ignorance and failure to understand the situation should not fetter the Courts so long as the purposes specified by him are not violated.

Under S. 92 of the C. P. Code the Court can sanction a scheme on a *cypres* application of a charitable trust. (*Abdur Rahim and Sesha-giri Aiyar, JJ.*) MUTHUKRISHNA NAICKEN v. RAMCHANDRA NAICKEN. 47 I. C. 611.

—S. 92—Scheme—*Devaswom*—*Devaswom* belonging to villagers—Management of—Scheme framed by award made on submission by all villagers—Award made into decree—Alteration of scheme—Power of majority of villagers only to act.

Where a dispute regarding the management of a private temple was referred to arbitration, and the award in pursuance thereof was embodied as decree of Court, a majority of the villagers cannot, sometime later and without the aid of the Court, set aside the provisions of the award as regards management.

A consent decree cannot be set aside by the consent of parties without the aid of the Court.

The proper course to have the scheme modified in such a case is to bring a suit for the same.

The Court should not go into a question not raised in the pleadings.

C. P. CODE (1908) S. 92.

*Sadasiva Aiyar, J.*—Where a temple is alleged to belong to a fluctuating body of persons like a caste and not to the public, it should be strictly proved. (*Willis, C.J., Sadasiva Aiyar and Spencer, JJ.*) YEGNARAMA DIKSHITAR v. GOPALA PATTAR.

(1918) M. W. N. 595—S. L. W. 357—47 I. C. 548. (F. B.)

—S. 92—Scheme—Framing of, for better management—No breach of trust.

Even in cases where the trustee is not guilty of neglecting the trust or misappropriating its property, the court has nevertheless full discretion to frame a scheme for the better management of the trust if under the circumstances such a course is deemed to be in the interest of the trust. (*Stuart, and Kanhaiya Lal, A.J.C.*) LAKSHMI KUNWAR v. MURARI KUNWAR.

5 O. L. J. 97—45 I. C. 213.

—S. 92 and O. 1, R. 3—Scheme suit—Parties—Trespasser or alien—Suit against for recovery of possession of trust property—Alien as a proper party to a scheme suit.

Suits for recovery of possession of trust properties from third parties, from trespassers and from transferees, are not within the scope of S. 92 of the C. P. Code. 2 C. L. J. 431 and 24 Cal. 418 diss.

It is outside the power of a Judge to make use of O. 1, R. 3 of the C. P. Code for joining a purchaser of trust property as a party to the proceedings under S. 92 (*Sanderson, C. J. Woodroffe and Mookerjee, JJ.*) MUNSHI GHOLAM v. MOLLAH ALI HAFIZ.

28 C. L. J. 4—47 I. C. 111.

—S. 92—Scheme suit—Trustee *de son tort*—Long continued management by—No misconduct proved—No hostile removal at the instance of strangers.

Where the deft. and his ancestors though not the lawful trustees, yet had been in office for many years, Courts would be disinclined to disturb the defendant's possession and to depose him at the instance of strangers unconnected with the family of former trustees, except on proof of misconduct or for the clear benefit of the trust.

Where the association of strangers along with the existing trustee in the management is likely to lead to friction, the existing trustee will be allowed to manage the trust as the sole trustee, subject to an arrangement for exhibiting the accounts for the examination of the worshippers; and a scheme was framed on the lines adopted in 25 Mad. 219. (*Willis, C. J. and Spencer, J.*) SUBBARAYA CHETTY v. SIR S. SUBRAHMANIA AIYAR.

(1918) M. W. N. 786.

—S. 92—Scope of Suit by newly appointed trustee against old trustee to recover lands

## C. P. CODE, (1908) S. 92.

and moveable property mesne profits, accounts and damages—Old muktessars in possession also as trustee—Not strangers holding the land adversely to trust—Religious Endowments Act, S. 14—Court-jurisdiction.

The plff. who claimed to be a representative of the original donor and was a newly appointed muktessar of a temple, sued the defts. who were the trustees and the old muktessars of the temple, to recover possession of land belonging to the temple and the moveable property belonging to the deity and mesne profits and accounts. The trial Court held that the suit was neither wholly governed by S. 92 of the C. P. Code nor S. 14 of the Religious Endowments Act and decreed part of it on merits. The Dt. Court dismissed the suit on the preliminary grounds that the suit was barred by S. 92 of the C.P. Code. The plff. having appealed

*Held*, (1) that the suit fell within the scope of S. 92 of the C. P. Code, because it was a suit for the removal of the defts. from their position as trustees for the restoration of the trust property to the plff. as the muktessar for taking accounts, and for damages for their wrongful acts of trustees:

(2) that the defts. could not be regarded as strangers claiming to hold the lands adversely to the trust though they might not agree as to their obligations under the trust, since they were really trustees and as such they claimed to be entitled to hold the lands from generation to generation subject to the due fulfilment of the trust.

*Per Marten, J.*—There is much which is common between the two sections (S. 92 of the C. P. Code and S. 14 of the Religious Endowments Act) but S. 92 of the C. P. Code is substantially the wider and provides *inter alia* for settling a scheme which is a jurisdiction of a very wide and beneficial nature. A plff. may proceed for appropriate relief under either Act; and the opening words in S. 92 (2) only mean that if he elects to proceed under the Religious Endowments Act, he is not to be prevented from so doing by S. 92. (*Shah and Marten, JJ.*) HANSRAJ v. ANANT. 20 Bom. L. R. 954—48 I. C. 514.

—S. 92 Scope of suit under. See MAHOMEDAN LAW. 23 C. W. N. 115

—S. 92—Suit under—Compromise of, with the object of conferring benefit on private parties

A court should not sanction a compromise of a suit under S. 92 of the C. P. Code under which any portion of the trust properties is given to any of the parties. (*Abdur Rahim and Seshagiri Ayyar, JJ.*) MUTHUKRISHNA NAICKEN v. RAMACHANDRA NAICKEN. 47 I. C. 611.

—S. 96 (3)—Compromise decree—Application to set aside by person, not a party to the decree—Refusal to set aside—Order appealable. See C. P. CODE, O. 43, R. 1 (d). 22 C. W. N. 671.

## C. P. CODE. (1908) S. 97.

—S. 96 (3) and O. 23, R. 3—Consent decree, meaning of—Decree based on compromise set up by one party and denied by the other—Appealability of.

Every decree which has incorporated an agreement, compromise or satisfaction ordered to be recorded under O. 23, R. 3 of the C. P. Code is not *ipso facto* 'a decree passed by the Court with the consent of parties' within S. 96 (3) of the Code. It may deal only with a part of the subject-matter of the suit or it may be a contested agreement, compromise or satisfaction which has been the subject of an issue, trial and decision by the Court.

The right of appeal generally given against all decrees by S. 96 (1) and (2) of the C. P. Code is only withheld by sub-section (3) in the case of decrees passed with the consent of parties. Sub-section (3) is limited to cases where the parties invite the Court to pass a particular decree and the Courts act accordingly.

A decree based on a finding arrived at by the Court against the consent of one party, to the effect that the matter in dispute has been compromised, is not a decree passed with the consent of parties and S. 96 (3) has, therefore, no application to it.

Where an alleged compromise is pleaded in bar of a suit, and the Court holding that the plea is established dismisses the suit, the decree cannot properly be described as one made under O. 23, R. 3 of the C. P. Code. (*Stanyon, A. J. C.*) RENUKA v. ONKAR. 46 I. C. 775

—S. 97—Mortgage—Foreclosure—Preliminary decree—Personal liability for costs—Appeal

An appeal lies from a preliminary decree for foreclosure directing the recovery of the costs of the suit from the person of the mortgagor. (*Prideaux, A. J. C.*) SHRIRAM v. RAGHUBAM. 47 I. C. 542.

—S. 97—Preliminary decree—Appeal against, after final decree if maintainable.

In a suit for partition instituted on the 5th July 1913, the preliminary decree was made on the 14th August 1916, and the final decree on the 11th November 1916, but was not drawn up or signed till the 18th November 1916, and in the meantime on the 15th November the present appeal was preferred against the preliminary decree.

*Held*, that at the date when the appeal was preferred the only decree the deft. could appeal against was the preliminary decree, as clearly he was not able to appeal against the final decree of which he could not obtain a copy. The right of appeal given by S. 97, C. P. C., is not taken away by the mere fact that the Judge has passed the final decree. 42 C.L.J. 90 ref. (*Fletcher and Shamsul Huda, JJ.*) BHAGABAN CHANDRA KAIBARTA DAS v. ISEAN CHANDRA KABARTA DAS. 22 C. W. N. 831. —46 I. C. 802.

## C. P. CODE, (1908) S. 98.

—S. 97—Preliminary decree—Reversal of modification thereof in appeal—Final decree passed on the footing of the original preliminary decree whether ceases to be operative.

If a preliminary decree is reversed on appeal the final decree passed on the footing of that preliminary decree ceases to be operative 37 M. 29 and 37 Mad. 455 foll.

The same result will follow in cases of modification of the preliminary decree which imperil the original final decree. 18 C.L.J. 214; 18 C.L.J. 228 and 20 C.W.N. 1174 foll. (*Ayling and Seshagiri Aiyar, JJ.*) CUNNIAH MUDALI v. RANGASWAMI MUDALI.

35 M. L. J. 361.—48 I. C. 7.

—S. 98 (2)—Applicability of—Appeal under S. 54 of the Land Acquisition Act.—Difference of opinion between members of division Bench. See LAND ACQ. ACT, S. 54.

35 M. L. J. 110 (F. B.)

—S. 99 and O. 18, R. 2—Death of party before hearing of arguments—Legal representative not brought on record—Judgment, pronouncing of—Irregularity. See C. P. CODE, O. 22, R. 6.

43 I. C. 161.

—S. 99 and O. 20, R. 2—Judgment written and signed by judge who tried the cause—Judgment pronounced by colleague in open court—Mere irregularity. See C. P. CODE, O. 20, R. 2.

46 I. C. 618.

—S. 99—Misjoinder of parties and causes of action—Objection to be taken or allowed in second appeal when no prejudice to parties. (*Mitra, A. J. C.*) DHONIRAM MANGIRAM v. RAMGOPAL KANERAM.

43 I. C. 960

—S. 100. See also SECOND APPEAL.

—S. 100—Error of Law—Test of—Finding of fact—No jurisdiction to interfere.

Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law so also is the question of the admissibility of evidence and the question of whether any evidence has been offered on one side or the other; but the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact. The High Court has no jurisdiction in second appeal to set aside the decree of the Lower Appellate Court on the ground that it had applied the wrong standard of measurement to land of which the rent was in question. (*Lord Buckmaster,*) NAFAR CHANDRA PAL v. SHUKUR. 45 I. A. 183

—S. 100, Sub. S (1)—Second Appeal—Competency—Appellate decree passed without jurisdiction—"Contrary to law."

An appeal lies against an appellate decree passed without jurisdiction, as the decision is contrary to law within the meaning of S.

## C. P. CODE, (1908) S. 102.

100, sub section (1) of the C. P. Code (*Moikerjee and Bascheroft, JJ.*) BANDIRAM v. PURNA. 27 C. L. J. 115=43 I. C. 753.

—S. 100 (a)—Second Appeal—Grounds—"Usage having the force of law"—Effect—Question as to custom when a ground of second appeal and when not.

The words "usage having the force of law" in S. 100 (a) of the Code do not give the court any larger powers of interference with findings as to custom in so far as they are findings of fact than with any other findings.

While the reliability of evidence let in is for the lower Appellate Court, the value to be attached to the evidence (provided it is no mere "opinion" evidence) supposing it is accepted as true and the relevancy of evidence are questions to be considered by the High Court also. If notwithstanding uncontradicted instances ranging over a long period and recognised judicially in several cases, the lower Appellate Court find against the existence of a proper custom on the ground that in its opinion the instances are not sufficient in number, the High court is clearly entitled to hold that on the facts found by the lower Appellate Court, the custom is legally established. (*Wallis C. J. Sadasiva Aiyar and Kumaraswami Sasiri, JJ.*) KUMARAPPA REDDI v. MANAVALA GOVINDAN.

41 Mad 374=34 M. L. J. 104=23 M. L. T. 44=(1913) M. W. N. 350=7 L. W. 243=44 I. C. 699 (F. B.)

—Ss. 102 and 115—Second Appeal—Execution of Small Cause Court decree—Whether second appeal lies—High Court—Powers of interference in revision. See (1917) DIG. COL. 180; MANGER SINGH v. KHOBARI RAI. (1917) Pat. 80=3 Pat. L. W. 132=43 I. C. 15.

—S. 102—Second appeal—Execution proceedings—Suit of small cause nature—No second appeal.

No second appeal lies from an order passed in execution of a decree obtained in any suit of the nature cognizable by a Court of Small Causes where the amount or value of the subject matter of the original suit does not exceed Rs 500. (*Lindsay, J. C.*) GUDAR SINGH v. KANDHAI LAL.

5 O. L. J. 187=46 I. C. 82.

—S. 102—Second Appeal—Suit of nature cognisable by Court of Small Causes—What is—Suit of small cause nature at time of its institution but not one of small cause nature at the time of filing Second Appeal by reason of amendment of Small Cause Courts Act in the interval—Second Appeal in such suit not maintainable. (*Seshagiri Aiyer and Napier, JJ.*) SUBRAMANIYA IYAR v. NAMA-SIVAYA ASARI. 35 M. L. J. 37=23 M. L. T. 255=8 L. W. 374=(1918) M. W. N. 238=45 I. C. 11.

## C. P. CODE, (1908), S. 102.

— S. 102—Second Appeal—Suit of Small Cause nature—Suit for "rent" of less than Rs. 500—Suit by Mirasidar for thunduwaram—Thunduwaram—Claim to—Nature of—Provincial Small Cause Courts Act, Art. 13—"Dues."

Per *Sadasiva Aiyar and Napier, JJ.* Mirasi right is an interest in the village lands and the thunduwaram payable to the mirasidar is not of the nature of "rent" (like jodi) but comes under the general expression "dues" in Art. 13 of the Provincial Small Cause Courts Act. A second appeal therefore lies in a suit for the recovery of thunduwaram, though the amount sought to be recovered is less than Rs. 500. (*Wallis, C. J., Sadasiva Aiyar and Kumarasami Sastri, JJ.*) KUMARAPPA REDDI v. MANAVALA GOUNDAN.

41 Mad. 374=34 M. L. J. 104=23 M. L. T.  
44=(1918) M. W. N. 350=7 L. W. 243  
44 I. C. 699. (F. B.)

— S. 102—Small Cause suit—Transfer to original side under S. 23 of the Prov. Sm. C. C. Act—Appeal from decree—Competency of. See PROV. SM. C. C. ACT, SS. 23 AND 25.  
46 I. C. 645

— S. 102—Suit of small cause nature—Contribution—Maintenance decree against three persons—Liability of other two on default of the former—Suit to recover amount paid by the former—Cognizable by Small Cause Court.—No second appeal. See PROV. SM. C. C. ACT, CH. II ART. 41.  
16 A. L. J. 44.

— S. 103—Issue not decided by lower Court—Power of High Court—Presumption pre-emptor and Vendee co-sharers with vendor—Pre-emptor brother of vendor—Acquiescence question not decided.

Certain property was sold. The pre-emptor and the vendee were co-sharers with the vendor; and the pre-emptor was the brother of the vendor. In the suit for pre-emption the vendee pleaded, among other defences, that the pre-emptor had acquiesced in the sale being made to him. It was admitted by the pre-emptor that he was in debt, that he had no money and that at the time of the sale he was also selling the property. The Court of first instance held the custom proved; but that the facts did not give rise to an inference of acquiescence on the part of the plaintiff. The suit was decreed, the lower appellate court held that the custom was not proved but did not decide the issue of acquiescence. The suit was dismissed:—

*Held*, that the lower appellate court not having decided the issue of acquiescence, it was open to the High Court in second appeal to decide the question; *held* also that the facts proved that the plaintiff knew of and acquiesced in the sale. (*Richards, C. J. and Tudball, J.*) ANCHAL v. DALIP SINGH.  
16 A. L. J. 779=47 I. C. 400.

## C. P. CODE, (1908) S. 104.

— S. 104 and O. 21, R. 90—Application to set aside sale on the ground of fraud—Dismissal of—No second appeal. See C. P. CODE O. 21, R. 90 AND O. 43, R. 1 (j).  
15 A. L. J. 920.

— S. 104 (1) and O. 21 R. 95—Order for delivery of possession—Not appealable. See C. P. CODE, O. 21, R. 95  
16 A. L. J. 150.

— S. 104 (2) and O. 43 R. 1 (j)—Order refusing to set aside sale on the ground that purchaser had no saleable interest—No second appeal.

No second appeal lies against an order passed in appeal upon a petition by an auction-purchaser to set aside a sale on the ground that the judgment-debtor had no saleable interest in the property. (*Spencer and Kumarasami Sastri, JJ.*) SUNDARA SINGH v. PAZHAMALI PADAYACHI.  
45 I. C. 701.

— S. 104 (e)—Appeal against order granting stay of a suit—Application for stay before service of summons—Onus—Interference by Appellate Court—Arbitration Act, S. 19

Under S. 104 (e) of the C. P. Code an appeal lies from an order granting or refusing stay of a suit, where there is an agreement to refer to arbitration whether under the C. P. Code or under the Arbitration Act.

An appearance for the purpose of making a stay application may be treated as an appearance in the suit; for the expression "after appearance," in S. 19 of the Arbitration Act is merely directory as the section is intended to prevent a party from filing an application after he has attorned to the jurisdiction of the Court.

In an application for stay of a suit the onus is on the plff. to show why he should not be bound by his agreement to refer to arbitration.

Under the Arbitration Act the arbitrators are competent to decide questions of law and fact and the fact that a difficult question of law is involved is not ordinarily a good ground for refusing stay. (*Pratt, J. C. and Crouch, A. J. C.*) MESSRS. KODUMAL KALUMAL v. MESSRS. VOLKART BROS. 12 S. L. R. 34=  
48 I. C. 434.

— S. 104 (F)—Appeal—Arbitration Act Award filed in Court under—Application to set aside award—Jurisdiction under—Letters Patent 1235 Cl. 15.

Under S. 104 (f) of the C. P. Code—No appeal lies from an order refusing to set aside an award made and filed under the provision of the Arbitration Act.

S. 104 (f) of the C. P. Code does not apply to proceedings under clause (2) of S. 11 of the Arbitration Act.

The Court, however, has jurisdiction to hear the appeal under clause 15 of the Letters

## C. P. CODE, (1908) S. 104.

Patent. (*Sanderson, C. J. and Woodroffe, J.*)  
 CAMPBELL & CO., v. JESHBAS GIRIDHARI  
 LALL. 45 Cal. 502=46 I. C. 687.

—S. 104 (f) Sch. II. paras 1 and 15—  
*Private reference—Order refusing to file award*  
*—Nature of Appeal—Reference through court*  
*—Order setting aside award under para 15—*  
*Interlocutory order—No appeal or revision.*

Clause (f) of S. 104 of the C. P. Code refers to cases where a matter has been referred to arbitration without the intervention of the Court.

There is an inherent difference between orders refusing to file an award on a matter referred to arbitration without the intervention of the Court and those referred to under para. 1 of the Second Schedule of the C. P. Code. In the former case, if the Court refuses to file an award, its order amounts to a formal adjudication on the matter in controversy and conclusively determines the rights of the parties. In the case of orders setting aside an award under para. 15 of the Second Schedule, the order is only of an interlocutory nature and is in no way a conclusive adjudication of the matter in dispute. Consequently such an order is not open to revision on the ground of an error of law. (*Wilberforce, J.*)  
 BEHARI LAL v. KHAN CHAND.

154 P. W. R. 1918=47 I. C. 171.

—S. 105 (2)—*Appeal—Order of remand*  
*—Propriety of not to be questioned by lower Court—Jurisdiction—Omission to object to, Waiver.*

Under S. 105 (2) of the C. P. Code a lower court cannot treat order of remand of the appellate court as a nullity owing to the want of jurisdiction in the latter to pass it. A party who omits to raise the question of the jurisdiction of the appellate court at the hearing of an appeal and to appeal from the decision reached, cannot be allowed to object to that decision in the subordinate court to which the matter in dispute is remanded. (*Drake Brokman, J. C.*)  
 DHARAMCHAND v. GORELAL.

47 I. C. 886.

—Ss. 107, and 151—*Appellate court—Addition of party respondent—Powers in respect of—Addition of person as respondent who was not party to suit—Validity—Probate proceedings—Parties—Persons entitled to prove a will if proper parties.*

Both under S. 107 of the C. P. Code and under its inherent powers, an appellate court has power to add as parties to the suit persons who were not parties in the first court.

The mere possibility of an interest is sufficient to entitle a person to become a party to probate proceedings.

A person who is entitled to prove a will is entitled to intervene as a respondent in the appellate court to support the will.

## C. P. CODE, (1908) S. 109.

The head of an endowment entitled to a legacy under the will is so entitled. (*Mullick and Thornhill, J.J.*)  
 SRIMATI HEMANGINI DEBI v. HARIDAS BANERJI.

3 Pat. L. J. 409=5 Pat. L. W. 216=  
 (1918) Pat. 276=46 I. C. 398.

—Ss. 107 (1)(b) and 151 O. 41, Rr 23 and 25—*Remand by appellate court in cases not covered by rules—No appeal.*

An Appellate Court has, apart from rules 23 and 25 of O. 41 of the C. P. Code, inherent power under S. 151 of the Code to remand a case for re-trial. No appeal lies against such an order. This power of remand should, however, be exercised with the very greatest caution (*Roe and Jodab Prasad, J.J.*)  
 RAGHU, NANDAN SINGH v. JADUNANDAN SINGH.

3 Pat. L. J. 253=4 Pat. L. W. 449=  
 43 I. C. 959

—S. 109—*Final order—Appellate order holding that trial of suit was not barred by res judicata and remanding case for disposal on merits—Privy Council—Appeal to—Maintainability.*

Where the High Court set aside the decision of the lower Court on the ground that the trial of the suit was barred by the rule of *res judicata* and remanded the suit for re-trial on the merits.

Held, that it was an ordinary order of remand which does not decide any of the questions in dispute between the parties except that the suit is not barred by the rule of *res judicata* and no leave to appeal to His Majesty in Council could be granted. 17 All. 113 and 25 All. 629 foll. 15 Bom. 155 and 85 Cal. 618 dist. (*Chamier, C. J. and Sharfuddin, J.*)  
 HIRALAL MARWARI v. TAFAZAL HUSSAIN.  
 (1915) Pat. 1=4 Pat. L. W. 342=  
 45 I. C. 290.

—S. 109—*Final order—Remand of suit. Leave to appeal, if can be granted.*

Where the High Court on appeal remanded a case and directed that debts, who had been sued in their individual capacity should be sued as executors as well and that one of the debts should be sued as residuary legatee and heir, and on such amendment of the suit being made, the questions between the parties should be adjudicated upon.

Held per *Sanderson, C. J.*—That this was not a final order within the meaning of S. 109 of the C. P. Code. (*Sanderson, C. J. and Woodroffe, J.*)  
 KUMAR BIRENDRANATH ROY v. KUMAR NRIPENDRANATH ROY.

22 C. W. N. 640=46 I. C. 681.

—Ss. 109, 111 and 112—*Leave to appeal to Privy Council, in forma pauperis—No jurisdiction to grant. See C. P. CODE, O. 44, R. 1.*

3 Pat. L. J. 179.

C. P. CODE, S. (1908) S. 109.

—S. 109—Order of remand by High Court—Final judgment—when final claim as regards two sets of properties—Judgment, final as regards one only, if leave can be granted—Meaning of.

When the High Court reversed and remanded a suit to the Lower Court for further trial on the merits it would not amount to a final judgment within S. 109 cl. (a) to enable leave being granted to appeal to the Privy Council.

When every issue of fact has been found by the Appellate Court and the remand is directed solely with a view to give the consequential reliefs dependent upon the conclusions of the Appellate Court the judgment would be final but it need not be final though the remand is not on a preliminary point.

It is wrong to grant leave when the judgment is final only regarding one set of properties in dispute but not about the other. (*Ayling and Seshagiri Aiyar, JJ.*) MANGAYYA v. VENKATARAMANAMURTHY.

(1918) M. W. N. 844=48 I. C. 132.

—S. 109 (a)—Final order—Decree—Meaning of—Determination of a question under S. 47, C. P. Code—Order of remand, if and when a final order—Interlocutory order—Appeal from, when lies.

*Per Dawson Miller, C. J.*—Where the question is one relating to the execution, discharge or satisfaction of the decree, it is a matter in controversy in the suit and must be deemed to be included in the definition of decree, provided that the judgment sought to be appealed from conclusively determines the rights of the parties in the matter. 15 Bom. 155 and 23 All. 152 ref.

When the order of remand involves a cardinal point in the case, it is final and is appealable. 35 Cal. 618 ref.

When the orders do not purport to deal with the merits of the case nor even proceed so far as the point where it becomes necessary to determine the rights of the parties which go to the foundation of the suit, the orders are not final and appeals do not lie from them.

*Per Chapman, J.*—A mere determination that a plaintiff has a right to sue is not a determination of his right with regard to all or of any of the matters in controversy in the suit within the definition of the word "decree."

If a decree-holder institutes a suit instead of making an application and the opposite party objects that the suit is barred by the terms of S. 47 of the Code, an order overruling the objection is not appealable. In a converse case, where an application for execution has been made and the preliminary objection that the procedure should have been by suit has been overruled, the order cannot be held to be a decree. The order is an interlocutory order directing procedure and is not a final order. 23 All. 220 ref. (*Dawson Miller, C. J. and Chapman, J.*) RAI BAI NATH GOENKA BAHADUR

C. P. CODE, (1950) . 110.

v MAHARAJAH SIR RAMESHWAR BAHADUR SINGH. (1918) Pat 81=3 Pat L. J. 339  
=5 Pat L. W. 45=45 I. C. 192.

—S. 109 (a)—Final order—Order of remand—Not appealable.

An appeal does not lie to His Majesty in Council against an order of remand under O. 41, R. 23 of the C. P. Code as it is not a 'final order' within the meaning of S. 109 (a) of the Code. (*Prideaux and Kotwal, A. J. C.*) SULTAN BEG v. SUKDEO NANDRAM. 46 I. C. 922.

—S. 110—Leave to appeal—Cross appeals to High Court no substantial question of law.

In a suit the court of first instance decreed in part and dismissed it in part. There were cross appeals to the High Court on behalf of the plaintiffs and the defendants. The High Court decreed the defendants' appeal reversing the judgment and decree of the court below. In the plaintiffs' appeal the High Court affirmed the first court's decree. The plaintiff applied for leave to appeal against the judgment of the High Court reversing the first court's decree and the application was granted. On an application for leave to appeal against the portion of the judgment affirming the first court's decree, held that could not be granted inasmuch as there was no substantial question of law. (*Richards, C. J. and Tudball, J.*) CHIRANJILAL v. BEHARE LAL. 16 A. L. J. 864=48 I. C. 124.

—S. 110—Leave to appeal to Privy Council, *in forma pauperis*—No jurisdiction to grant. See C. P. CODE, O. 44, R. 1

3 Pat L. J. 179,

—S. 110—Privy Council Leave to appeal—Substantial question of law—Question as to merger or no merger. See (1917) DIG. COL. 186. LACHANBATI KOER v. BOCH NATH TEWARI. (1917) Pat. 337=

5 Pat. L. W. 309=43 I. C. 449.

—S. 110—Substantial question of law—Lim. Act, S. 10, applicability of, to suits by minor against administrator.

Having regard to the state of authorities in India on the question of the applicability of S. 10 of the Lim. Act to a suit by a minor against the administrator of his estate for accounts, the question is a substantial question of law within S. 110 of the C. P. Code. (*Miller, C. J. and Mullick, J.*) JANARDAN PRASAD THAKUR v. JANABHATI THAKURAIN. 45 I. C. 182.

—S. 110—Valuation of subject-matter—Mesne profits up to date of appellate decree taken into consideration—Net mesne profits.

In calculating the value of a decree for the purposes of S. 110 of the C. P. Code it is not the gross income of the property in dispute but the income after deducting the Government revenue and other outgoings, which should be taken into consideration.

C. P. CODE. (1903) S. 110.

The Patna High Court, following in this respect the practice of the Calcutta High Court, will permit an applicant for leave to appeal to His Majesty in Council to add to the actual value of the property in suit the amount of mesne profits accrued up to the date of the appellate court's decree. (*Miller, J. J. and Mullick, J.*) MAHABIR PRASAD SINGH v. ANUP NARAIN SINGH.

3 Pat. L. J. 377=  
3 Pat. L. W. 227=  
(1918) Pat. 248=  
46 I. C. 137.

—S. 110—*Valuation of the subject-matter—Suit for recovery of less than Rs. 10,000 on account of pension from assets of deceased—Defence that no pension was payable and that no property of deceased is in defendant's hands—Leave to appeal if can be granted.*

The plff. sued for recovery of Rs. 5,445 on account of pension at the rate of Rs. 503 per month under an agreement entered into by the late Maharani of Dumraon who held the estate as a tenant for life under the will of her husband. The defence of the deft. who came into possession after the Maharani's death amongst other matters was that the agreement was not binding upon him or on the estate and that in any case no assets of the Maharani came into his hands. The first Court dismissed the suit. On appeal the High Court reversed the judgment of the first Court and ordered that the decree should be executed only against the property of the late Maharani in the hands of the deft. which had not been duly administered. On an application for leave to appeal to the Privy Council.

*Held*, that the value of the subject-matter amounted to Rs. 10,000 within the meaning of the first paragraph of S. 110, C. P. Code.

The plff. not having sued for a declaration that he is entitled to future pension or to a charge on the property for such pension, the plaint did not involve directly a claim to or question respecting property of that amount or value within the meaning of the second paragraph of S. 110, C. P. Code.

The deft. having alleged that no property of the Maharani came into his hands, and the High Court decree having directed that the sum claimed could be realised from such property of the Maharani as remained in his hands unadministered, the decree did not involve any claim to the property of the value of Rs. 10,000.

Per *Mullick, J.* In determining the value of the subject-matter of the suit, pension which had accrued due since the decree of the first court could not be added to the sum claimed in the plaint, as the suit did not concern itself with any future arrears of pension.

The second para. of S. 110, C. P. C. did not apply so long as the plff. had not brought suits

C. P. CODE, (1903) S. 115.

for subsequent arrears and while such suits are in *gratia futuri* 39 M. 548 ref. (*Miller C. J. and Mullick, J.*) MAHARAJA KESHO SINGH v. SIVAPRASAD SARAN LAL.

3 Pat. L. J. 317=4 Pat. L. W. 240=  
44 I. C. 475.

—S. 110—*Value of subject-matter—Counter-claim value of more than Rs. 10,000—Appeal to Privy Council, competent.*

Where plff. and deft. each alleged breach of contract by the other party, making claims and counter-claims on that basis and plff.'s contention that deft.'s counter-claim was not admissible under the C. P. Code being overruled, a decree was passed in deft.'s favour, but plff. did not re-open the question in the appellate Court which reversed the first Court's decree and made a partial decree in favour of the plff. :—

*Held*, on deft.'s appeal to the Privy Council that the question of the admissibility of the counter-claim must be taken to have been decided between the parties in accordance with the contention of the deft. and the plff. could not be permitted to raise it for showing that deft.'s claim on appeal could not come up to Rs. 10,000 in value. (*Sir Walter Phillimore*) PIERCE LESLIE AND CO. v. GIRIAH CHETTIAR. 22 C. W. N. 282=46 I. C. 576. (P. C.)

—S. 110 and O. 45, R. 5—*Value of subject matter—Value determined once during trial for assessing pleader's fees—Not to be reopened during application for leave to appeal.*

In a suit to recover possession of certain property and to restrain the deft. from obstructing the plff. in his possession, the trial Court raised an issue as to the value of the claim for the purpose of assessing the pleader's fees, and found that the value was Rs. 4,000. The unsuccessful party appealed first to the District Court and then to the High Court, without raising any objection to the valuation. Finally when he applied for leave to appeal to the Privy Council, he wanted the High Court to remit the case for enquiry as to the amount or value of the subject matter.

*Held*, overruling the contention, that the applicant could not be heard to say that there was a dispute upon the point which would justify the order of remand. (*Batchelor J. C. J. and Beaton, J.*) ANANT v. RAMACHANDRA. 20 Bom. L. R. 418=36 I. C. 4.

—S. 111—*Leave to appeal to Privy Council, in forma pauperis—No jurisdiction to grant.* See C. P. CODE, O. 41, R. 1.

3 Pat. L. J. 179=  
See also 35 M. L. J. 253.

—S. 115 and O. 21, R. 2—*Attachment by decree-holder of a decree of judgment-debtor—Application by latter to record satisfaction*

## C. P. CODE, (1908) S. 115.

*of his decree—Objection by attaching decree-holder of collusion and fraud—Burden of proof—Whether court can allow application to record satisfaction to be withdrawn—Revisional Jurisdiction of High Court—Interference.*

Where a person obtains a decree against the decree-holder in another suit and attaches his decree and the latter subsequently applies to Court to record satisfaction of his decree and the attaching decree holder objects that the certificate of satisfaction is collusive and fraudulent, the burden of proving its collusive and fraudulent nature is on the attaching decree-holder : and it does not lie in the judgment debtor to prove the *bona fides* of the certificate.

When once a Court is seized of an application to enter up satisfaction, as above, it is bound to make an enquiry and see whether the decree has been satisfied ; and the Court will not be justified in allowing the application to be withdrawn.

Where, in such a case, a Court allows the application to be withdrawn there is a material irregularity in the exercise of the jurisdiction by the Court, which will warrant the interference of the High Court under S. 115 of the C. P. Code.

Wherever there is injustice done by a lower Court in the exercise of its jurisdiction, the High Court should interfere under S. 115. (*Seshagiri Iyer, J.*) SOMU PATHAR v. RANGASWAMI REDDIAR. 35 M. L. J. 253.

—S. 115 and Sch. II, para. 14—Award—Not based on evidence—Remission to arbitrators.

The High Court in the exercise of its powers under S. 115 of the C. P. Code made an order remitting the award for re-consideration by the same arbitrator on the ground that the award had left undetermined matters referred to arbitration (*Fletcher and Smither, JJ.*) GOPAL CHANDRA DAS v. KETRA MOHUN BHUIA. 22 C. W. N 933—46 I. C. 195.

—S. 115—Award—Decree on—Revision—Grounds—Irregularity in the proceedings of the lower Court, necessary—Irregularity in the proceedings of arbitrators, immaterial. See C. P. CODE, SCH. II, PARAS 17, 20 AND 21. 45 I. C. 647.

—S. 115—Case 'decided'—Revision—Maintainability—Order for leave to withdraw with liberty—Revision against. See C. P. CODE O. 23, R. 1. (1918) Pat. 220

—S. 115—Costs—Decision of Court as to, without considering the merits—Revision. See C. P. CODE, S. 35 (2). 8 L. W. 219

—S. 115—Cr. P. Code S. 195 (1) Sanction by Judicial officer exercising Small Cause power for offence under S. 182 I. P. C.—Civil matter—Revision.

## C. P. CODE, (1908) S. 115.

Where a contonment Magistrate exercising the powers of a Small Cause Court ordered the prosecution of a decree-holder for an offence under S. 182 I. P. C. said to have been committed during the course of the execution proceedings. Held, in revision, that the matter was of a civil nature and should not be brought up on the criminal suit, and treating it as a civil matter, it was impossible under S. 115 of the C. P. Code to interfere. (*Tudball, J.*) RAM PRASAD v. EMPEROR. 16 A. L. J. 921—48 I. C. 499.

—S. 115 and O. 32, R. 4 (2)—Defect in procedure—Appointment of guardian ad litem—Revision.

O. 32, R. 4 (2) of the C. P. Code requires that when a guardian has been appointed by a competent authority, that guardian is alone entitled to represent the minor unless the trial Court considers that the appointment of another guardian will be to the welfare of the minor.

The appointment of a guardian of a minor for purposes of suits is really a question of procedure and an error in matters of procedure is not generally revisable under S. 115 of the C. P. Code (*Mullick and Thornhill, JJ.*) MOHAMMED ABUS SALAM v. KAMALMUKHI. 5 Pat. L. W. 92—46 I. C. 316.

—S. 115—Difference of opinion between members of division bench—Opinion of senior Judge prevails. See LETTERS PATENT (CAL.) CL. 15. 27 C. L. J. 418.

—S. 115—Error of law—Decision based on—Revision.

Where the misunderstanding of the law by the lower Court has resulted in a totally erroneous decision, there is sufficient ground for interference in revision. (*Wilberforce, J.*) SUGHRU MAL HARCHARAN DAS v. SHAM LAL GOKAL CHAND. 146 P. W. R. 1918—46 I. C. 777.

—S. 115—Error of Law—No ground for revision—Maintainability of suit, without notice, decision on See (1917) DIG. COL. 158. RIVER STEAM NAVIGATION CO. v. HAZARI MAL. 27 C. L. J. 294—41 I. C. 919.

—S. 115—Error of law no ground for revision—Government of India Act, S. 107—C. P. Code, O. 21, R. 92 (2) proviso and 93—Persons obtaining orders for rateable distribution if persons "affected" within the meaning of proviso.

Error of law is no ground for interference under S. 115 of the C. P. Code or S. 107 of the Government of India Act.

Obiter.—Persons who had obtained orders for rateable distribution of the proceeds of an execution sale are persons affected by an application to set aside the sale within the meaning of proviso to O. 21, R. 92 (2) and an

C. P. CODE, (1908) S. 115.

order made behind their backs cannot bind them. (*Abdur Rahman, J.*) ROMANDUR KRISHNAMACHARLU v. DANOJI.

35 M. L. J. 864=24 M. L. T. 432=  
(1918) M. W. N. 716=3 L. W. 582=  
43 I. C. 38.

—S. 115—Error of law—No interference if Court below had jurisdiction.

Where a Court has jurisdiction to determine a particular matter, and in the exercise of its jurisdiction, it makes a mistake in law, this does not entitle the party against whom the decision is to apply to the High Court in revision.

In a suit on a promissory note for less than Rs. 500 the deft. pleaded minority at the date of execution. The Court of first instance dismissed the suit but on appeal the lower appellate court held that the deft. having knowingly misrepresented his age, he was estopped from pleading infancy and was bound in equity to refund the money and the suit was decreed. The deft. applied in revision to the High Court *Held*, that no revision lay the lower court having merely made a mistake of law in dealing with the case. (*Richards, C. J. and Banerji, J.*) DHARA SINGH v. GAYAN CHAND.

16 A. L. J. 441=45 I. C. 701.

—S. 115 and O. 21 Rr. 89 and 92—Error of law—No revision—Deposit of money under O. 21, R. 89 C. P. C., in treasury instead of in court during the vacation—Deposit, not a valid deposit—Refusal to set aside the sale—Matter within the jurisdiction of the court—No interference. See C. P. CODE, O 21, RB. 89 AND 92.

16 A. L. J. 433.

—S. 115—Error of law—Order returning plaint to be presented to proper court—No revision.

Where a Munsif returned a plaint for presentation to the proper court on the ground that the cause of action had not arisen within the jurisdiction and his decision was affirmed by the appellate court, *held* that the decision was not open to revision by the High Court it being only an erroneous decision of a question of law which the courts below had jurisdiction to determine. (*Banerji and Ryves, JJ.*) JYALA PRASAD v. EAST INDIAN RAILWAY CO.

16 A. L. J. 535=46 I. C. 99.

—S. 115—Error of law—Wrong decision on question of limitation—No revision.

An erroneous decision that a petition for restoration is not barred by limitation, when in fact it is so barred, is not an error in the exercise of jurisdiction under S. 115 of the C. P. Code. (*Roe and Imam, JJ.*) JHOTU LAL GHOSE v. GANOURI SAHU.

3 Pat. L. J. 376=46 I. C. 176.

—S. 115 and O. 21 R. 90, PROVISIO—Execution sale—Setting aside, without proof of substantial injury—Interference in revision.

C. P. CODE, (1908) S. 115.

Under the express terms of the proviso to R. 90 of O. XXI of the C. P. Code a Court is debarred from setting aside the sale on account of any error in the publication of the proclamation of sale, without going into the question of substantial injury. Where the Lower Court set aside the sale without such inquiry the High Court acting under S. 115 of the C. P. Code set aside the order of the Court below, and remanded the case for re-trial. (*Chapman and Roe, JJ.*) SRISH CHANDRA GHOSE v. SADEHU CHABAN ROUTRA.

(1918) Pat. 234=5 Pat.  
L. W. 15=46 I. C. 84.

—S. 115—High Court—Revision—Interference with order passed by Dt. Judge under S. 4 of Public Accountants Default Act (XII of 1850). See (1917) DIG. COL. 186; D. B. COOPER *In re*.

42 Bom. 119=19 Bom. L. R. 926=  
43 I. C. 465.

—Ss. 115 and O. 9, R. 4—Interference in cases where no appeal lies—Scope of.

A Court is not entitled indirectly to allow an appeal which is not given by the Code by treating the matter as one in revision. (*Richards, C. J. and Banerji, J.*) RAMJI DAS v. BHAGWAN DAS.

43 I. C. 180.

—S. 115 and O. 9, R. 13—Interlocutory Ex parte decree—Order setting aside conditional on payment of costs—Order refusing extension of time to pay costs—Interference. See (1917) DIG. COL. 191; CHANDRA GOUNDEN v. PALANIAPPA GOUNDAN.

23 M. L. T. 7=(1917) M. W. N. 870=  
42 I. C. 961.

—S. 115, O. 1, R. 10 (2) and O. 31 R. 1—Interlocutory order—Addition of parties—Interference by High Court—Government of India Act, S. 107

In a suit by a widow as the administratrix of her husband for the recovery of moneys due to him, another person claiming as adopted son of the husband applied to be made a co-plaintiff on the ground that the widow was guilty of laches and collusion. The widow admitted the fact of adoption but denied authority from her husband. The first Court refused the application.

*Held*, that the applicant ought to have been joined as co-plaintiff and the High Court could interfere under S. 115 of the C. P. Code or S. 107 of the Government of India Act. 14 C. W. N. 708 foll. (*Tennon and Newbould, JJ.*) JUGAL KRISHNA MULLA MULLICK v. PHUL KUMARI DASSI.

44 I. C. 554

—S. 115—Interlocutory order—Decision as to court-fee by subordinate court—Revision.

The High Court may interfere in Revision with an interlocutory order, where the record has been sent for and there appears on the

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record an obvious error so as to save the parties unnecessary expenses and undue delay.

The High Court set aside an order of a Subordinate Court requiring the piffs. to pay a certain amount of a Court fee. (*Chopra and Atkinson, JJ.*) **BANKEY SENARI v. Mr. RAM BAHADUR.** (1918) Pat. 223=4 Pat. L. W. 281=44 I. C. 391

———S. 115—*Interlocutory order—Remedy in appeal—No revision—Jurisdiction of Court—Illegality and material irregularity.*

A Court that has decided a suit over which it had jurisdiction cannot be said to have exercised its jurisdiction illegally or with material irregularity only on the ground that it has arrived at a wrong decision.

The Chief Court will not interfere with an interlocutory order made in a suit over which the trial Court had jurisdiction, when an appeal is allowed from the final decree or the applicant has another remedy open to him whereby he may obtain the relief sought by him. (*Shade Lal, J.*) **LOUIS DREFFUS & CO. v. KHILLU RAM** 46 I. C. 139.

———S. 115—*Interlocutory order—Revision of when.*

Interlocutory orders will not be interfered with in revision, unless for the most cogent reasons and in order to prevent otherwise irreparable injury. (*Parlett, J.*) **MAUNG FO HTAIK v. MAUNG SEIN BU.** 43 I. C. 684

———S. 115—*Interlocutory order—Revision of when competent.*

Where there has been no decision and the case is still pending, interlocutory orders passed during the course of the hearing cannot be made the subject of revision, unless those orders have the effect of determining the case, so far as the party applying for revision is concerned, or concluding the claim otherwise in a manner not open to appeal. (*Stuart and Kanhaiya Lal, J. J. C.*) **BRIJINDRA BAHADUR SINGH v. DEPUTY COMMISSIONER OF KHERI.**

5 O. L. J. 430=47 I. C. 676.

———Ss. 115 and 92—*Jurisdiction—Action in excess of—Order of Dt. Court suspending—Mahant of a public religious endowment, in the absence of suit under S. 92 C. P. C.—Revision. See C. P. CODE S. 92.*

16 A. L. J. 742.

———S. 115—*Jurisdiction—Limitation, not a question of jurisdiction. See DECREE, SETTING ASIDE.* 3 Pat. L. J. 478.

———S. 115—*Jurisdiction—Refusal to exercise—Receiver appointed to recover property—Suit by receiver—Postponement of trial—Refusal to exercise jurisdiction—Interference in revision.*

A Receiver who was appointed to take charge of certain jewels in a pending suit,

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applied to the court for an enquiry and for orders alleging that the jewels were in the possession of the respondent. The Court directed the Receiver to sue the respondent and on his suing postponed trial of suit pending disposal of the original suit.

*Held*, that there was a clear refusal to exercise jurisdiction and that the Court was bound to assist the Receiver in getting possession of the jewels. (*Oldfield and Bakewell, JJ.*) **RAMACHANDRA AYYAR v. VAITHINATHAN.**

8 L. W. 436=48 I. C. 139.

———S. 115—*Jurisdiction—Refusal to exercise—Suit on—Mortgage sub-mortgage amount due on sub-mortgage ordered to be paid out of sale proceeds—Decree directing sale of property both for mortgage money and amount of sub-mortgage—Wrong decree—Application for amendment—Order that amendment was uncalled for—Refusal to exercise jurisdiction—Revision.*

A suit was brought for sale on a mortgage. The mortgagee had created a sub-mortgage, and in the judgment that was passed the Court ordered that the property be sold, but that before the mortgagee was paid any money the sub-mortgagee should receive the money due under the sub-mortgage out of the sale proceeds. In the decree as drawn up the property was ordered to be sold for the mortgage money as well as for the money due under the sub-mortgage. Upon the application by the mortgagor for the amendment of the decree the Court refused to order the amendment as "uncalled for." *Held*, that the order was tantamount to a refusal to exercise jurisdiction and the High Court's interference in revision was justified. (*Richards, C. J. and Tudball, J.*) **PULE BISHUNATH RAO v. BRAHMANAND SWAMI.**

16 A. L. J. 749=47 I. C. 630.

———S. 115—*Leave to sue—Receiver—Refusal of—Revision—Interference—Interlocutory order—Case decided—Government of India Act, S. 107.*

The general principle applying to cases in which application is made to sue a Receiver in respect of properties in charge of the Court is that unless the Court is satisfied that there is no question at all to try or there is no legal foundation to the claim, leave should not as a matter of course be refused.

A court summarily dismissing an application for leave to sue a Receiver acts with material irregularity in the exercise of its jurisdiction.

An application for leave to sue a Receiver is a case within the meaning of S. 115 of the C. P. Code.

There is no statutory provision which requires a party to obtain the leave of the Court to sue a Receiver. The rule is based on public

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policy and the grant of leave is made not in the exercise of any power conferred by statute but in exercise of the inherent power, which every Court possesses to prevent acts which constitute or are akin to an abuse of its authority.

A High Court is entitled in the exercise of its powers of superintendence under S. 107 of the Government of India Act to correct and supervise Subordinate Courts whenever they appear to have wrongly exercised their inherent powers. (*Mullick and Thornhill, JJ.*) **BRAJA BUSAN v. SRIS CHANDRA TEWARI.** (1918) Pat. 337=47 I. C. 719

———S. 115 and O. 23, R. 1—Leave to withdraw—Grant of after trial and during arguments—Ill-advised grant of leave—Matter within jurisdiction of Court—No interference by High Court. See C. P. CODE, O. 23, R. 1. 15 A. L. J. 495.

———S. 115 and O. 23 R. 1—Leave to withdraw—Improper grant of—Revision, maintainable. See C. P. CODE, O. 23 R. 1. 35 M. L. J. 27.

———S. 115 and O. 23 R. 1—Leave to withdraw—Interference in a proper case.

It is the established practice of the High Court to interfere with orders passed by Subordinate Courts permitting a party to withdraw a suit with liberty to bring a fresh suit in fit cases. 41 Cal 632 diss (*Roe and Jwala Prasad, JJ.*) **BISHESHWAR AHIR v. BRIJRAJ MISSIR.** 3 Pat. L. J. 630=4 Pat. L. W. 235=44 I. C. 406.

———S. 115 and O. 23, R. 1—Leave to withdraw suit—Revision—Interference.

An order passed under O. 23, R. 1 of the C. P. Code giving the plaintiff permission to withdraw the suit with liberty to bring a fresh one, is open to interference by the High Court in revision. (*Scott Smith, J.*) **MUNNA LAL v. CHHABAL DAS.** 46 I. C. 181.

———S. 115—Limitation—Omission to consider point of—Interference. See (1917) DIG. COL. 192; **KALIYAPERUMA PADAYACHI v. CVAR CHETTY FIRM.** 11 Bur L. T. 73=39 I. C. 154.

———S. 115—Material irregularity—Ascertainment of mesne profits without notice to party—Revision.

Where an enquiry is ordered for later profits without specific notice to the opposite party it is competent to the High Court to interfere under S. 115 of the C. P. Code. (*Oldfield, J.*) **VENKAMIDI MAHALAKSHAMAMMA v. VENKAMMAIDI RAJAMMA.** 43 I. C. 458.

———S. 115 and O. 24, R. 9D—Material irregularity—Gross mistake of fact—Wrong de-

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cision thereon—Other remedy open—No interference—Government of India Act, S. 107 (2)—Powers under—Limits of.

Where an application to set aside a patni sale had been dismissed by the Court below and the judgment-debtor applied to set aside the order in revision. *Held* that a mistake of fact and a wrong decision based on it, does not constitute illegality or irregularity within the meaning of cl. (c) of S. 115 of the C. P. Code nor under cl. 15 of the Charter Act, 41 Cal. 423; 15 Cal 416; 11 Cal. 6 foil.

The High Court could not interfere under S. 115 of the C. P. Code, as the judgment-debtor had his remedy in review of judgment.

The word 'superintendence' in cl. 15 of the Charter Act should be construed very narrowly and should not be invoked in order to justify interference in a case so as to evade the bar of S. 115 C. P. C. (*Sanderson, C. J., Tennon and Walmesley, JJ.*) **KUMAR CHANDRA KISHORE ROY v. BASARAT ALI CROWDHURY.** 22 C. W. N. 627=27 C. L. J. 413=44 I. C. 763.

———S. 115 and O. 23, R. 1.—Material irregularity—Order granting leave to withdraw—Omission to specify formal defect—Effect of.

The omission to state the formal defects which justify an order for permission to withdraw a suit with liberty to bring a fresh suit, amounts to a material irregularity within the meaning of S. 115 of the C. P. Code. (*Stanton, A. J. C.*) **PUNDALIK v. CHANDRABHAN.** 43 I. C. 346.

———S. 115—Material irregularity in procedure—Scope of—Revision.

If a Judge arrives at a conclusion of law or fact without having considered the law or a material part of the evidence, or by misunderstanding or erroneously recording the statements of pleaders or witnesses, the method of arriving at such a conclusion is illegal and irregular and is a ground for revision, provided the irregularity is material and the petitioner has suffered an injustice thereby. (*Twomey, C. J. and Ormond, J.*) **GORIDUT BAGLA v. BOOKMAN.** 47 I. C. 761.

———Ss. 115, 151 and O. 41, R. 23—Order declining refund of Court-fee on remand—Revision—Court-fees Act, S. 13.

In remanding a case under O. 41 R. 23 of the C. P. Code the lower appellate court declined to order refund of court-fee paid on the memorandum of appeal, which it was bound to do under S. 13 of the Court Fees Act. The appellant having applied to the High Court

*Held*, that though the application did not fall within the scope of S. 151 of the C. P. Code yet as the lower appellate court had acted with illegality or with material irregularity, the application should be allowed under S. 115

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of the Code (*Beaman and Heaton, JJ.*)  
BHAUSING v. CHUGANIRAM. 42 Bom. 363=  
20 Bom. L. R. 343=45 I. C. 552.

—S. 115 and O. 21, Rr. 58 and 63—  
Other remedy open—Suit—Error of law—No  
revision.

Where an applicant in revision has other  
remedies by way of suit or otherwise and where  
the error of the executing Court, if any, is at  
the most an error of law, the intervention of  
the High Court under S. 115 of the C. P. Code,  
is not called for. (*Teunon and Cumming, JJ.*)  
RAJANI KANTA PAL v. KEDAR NATH  
BISWAS. 47 I. C. 190

—S. 115—Other remedy open—Suit—  
Interference to avoid multiplicity of proceed-  
ings.

Ordinarily the High Court does not interfere  
where another remedy is open to a party, but  
each case must be judged on its peculiar facts.  
Where, therefore, in a case there were no  
complicated questions of fact or law and the  
applicants were clearly entitled to possession  
by virtue of their purchase from the auction-  
purchaser, the High Court interfered in revision  
with the order dismissing the application  
for delivery of possession. (*Banerjee and  
Tudball, JJ.*) BUDDHU MISSIR v. BHAGI-  
RATAI KUAR. 40 All. 216=16 A. L. J. 150  
=42 I. C. 936.

—S. 115 and O. 21, Rr. 58 and 63—  
Other remedy open—Suit—Interference, if  
barred. See (1917) DIG. COL. 194; MAUNG SAN  
BA v. MAUNG LAN BYE.  
11 Bur. L. T. 123=42 I. C. 74.

—S. 115 and O. 1 R. 10—Parties—Addi-  
tion of—Improper refusal—Revision.

Where an application under O. 1, R. 10 of  
the C. P. Code asking that a certain person be  
added as a party deft. to the suit and praying  
for permission to amend the plaint according-  
ly is rejected, no appeal lies against the order  
rejecting the application. Where, however, it  
appears that the Court has exercised wrong  
discretion in rejecting the application, the  
High Court can interfere in revision under  
S. 107 of the Government of India Act. (*Mullick  
and Thornhill, JJ.*) ABDUL HAQUE v.  
MUHAMMAD YAHYA KHAN. 47 I. C. 725.

—S. 115—Question of Jurisdiction—  
High Court—Question of law or fact bearing  
on—Interference when question wrongly decided.

In execution of a decree a house belonging  
to a minor was advertised for sale. An applica-  
tion was put in for the adjournment of the  
sale. The vakalatnamah under which the  
application was filed had been executed by one  
Gaya Prasad, it did not appear on the face of  
the vakalatnamah that he was executing it as  
guardian of the minor. An affidavit was also  
filed in support of the application, and the two

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together made it clear that he was acting as  
guardian of the minor. An adjournment was  
granted for 6 days, and after the expiry of the  
period the property was sold for very much  
less than its proper value. An application was  
made under O. 21, R. 59 of the C. P. Code by  
the Vakil who had applied for the adjourn-  
ment. It purported to be tendered on behalf  
of the minor. The Court of first instance  
rejected the application on the ground that the  
minor had not been represented by a next  
friend. This order was affirmed by the lower  
appellate court.

Held, in revision, that when a question of  
jurisdiction was involved the High Court was  
competent to revise a finding of law or fact  
bearing on a question of jurisdiction. 40 Mad.  
793 expl. (*Ryves, J.*) BEHARI LAL v. BALDEO  
NARAIN. 16 A. L. J. 717=43 I. C. 14.

—S. 115—Revenue Court—Agra Tenan-  
cy Act (II of 1901)—Matters coming under—  
No revision.

In matters coming under the Agra Tenancy  
Act the power of revision has not been given  
to the Allahabad High Court. 2 I. C. 377 foll.  
(*Abdul Raouf, J.*) JUMNA PRASAD v. KARAN  
SINGH. 46 I. C. 338.

—S. 115—Revision—Delay in applica-  
tion—No interference.

Where a plaint was directed to be returned  
for re-presentation to the proper Court, and  
the plff. applied for revision of the trial  
Court's order long after the dismissal of his  
appeal by the lower Appellate Court, the High  
Court refused to interfere in revision on  
account of the plff.'s laches. (*Kanhaiya Lal,  
A. J. C.*) BIHARI LAL v. RAM NABINJAN  
DAS. 43 I. C. 470.

—S. 115—Revision—Interference in—  
Entertaining claim under O. 21 R. 58 C.P.C.:  
in cases not coming under that rule. See C.  
P. C. 21, R. 58. 23 P. W. R. 1918.

—S. 115—Revision—Interference—  
Jurisdiction—Interlocutory order. See PUN-  
JAB COURTS ACT, S. 44. 58 P. L. R. 1918.

—S. 115—Revision—Jurisdiction—  
Court-fees paid by Plff. as on a suit for ac-  
counts—Whether Courts can fix valuation. See  
(1917) DIG. COL. 195; ASHIQ ALI v. IMTIAZ  
BEGAM. 39 All. 723=15 A. L. J. 794=  
42 I. C. 891.

—S. 115—Revision—Power of High  
Court—Ejectment suit under S. 58 Agra Ten-  
ancy Act—Denial of relationship of landlord  
and tenant—Appeal to Dist. Judge dismissed on  
the ground that no appeal lay.

A suit for ejectment was filed in the Revenue  
Court. The deft. pleaded that no relation-  
ship of landlord and tenant existed between  
him and the plff. The suit was decreed by

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that court. An appeal to the Dt. Judge was dismissed on the ground that no appeal lay to him, *held* in revision that no revision lay to the High Court. (*Abdul Racef, J.*) JAMNA PRASAD v. KARAN SINGH.

16 A. L. J. 859.

—S. 115—Sanction—Order granting or refusing to grant by Civil Court—Interference by High Court. See C. P. CODE, S. 115 (6).

45 I. C. 934.

—S. 115—Subordinate Court—Proceedings under S. 160 (3) of the Bom. Dt. Municipal Act—Revision by Judicial Commissioner's Court—Competency of. See BOM. DT. MUNICIPAL ACT, S. 160 (3).

44 I. C. 363.

—S. 115 and O. 1 R. 8 (2) and O. 22 R. 9—Suit by presumptive reversioner to set aside alienation by widow—Death of piff. pending suit—Order of abatement and dismissal of suit—Applicability by next reversioner to vacate order and to continue the suit—Competence—Limitation—Lim. Act Art. 181.

The nearest reversioner to the estate of a deceased Hindu sued to set aside certain alienations by a widow as void beyond her life-time and died pending the hearing. Before the expiry of six months and without hearing any other among the surviving body of reversioners the Subordinate Court passed an order declaring that the suit abated. Within two years of the said order the appellant the next reversioner applied to be brought on record as the legal representatives of the deceased piff. after setting aside the abatement and to be allowed to continue the suit. The trial court dismissed the petition and on revision the order was confirmed.

*Held, per curiam* A suit by the next reversioner is one really brought on behalf of the entire body of reversioners; if the reversioner conducting the suit dies the next reversioner can come in and continue the conduct of the suit as he is already a party thereto.

An application to continue the suit is governed by art. 181 of the Lim. Act; if the suit had been treated as having abated it must be made within three years of the order so declaring.

In the absence of any statutory provision whether substantive or processual a party is not bound by any order passed behind his back. Such an order may be treated as a nullity and need not be set aside.

The High Court should not under S. 115 of the C. P. Code revise the lower Court's discretion in regard to excusing the delay in applying under O. 22 R. 9 or for a review. The present application is properly one under O. 1 Rr. 1 and S. cl. 2.

*Sadasiva Aiyar J.*—The next reversioner entitled to continue the suit does not fall within the definition of legal representative in S. 2 sub-sec 11 of the C. P. Code.

## C. P. CODE, (1908) S. 144.

A representative suit is one brought by a person on behalf of himself and others having the same interest and must be distinguished from a suit brought in a representative capacity as executor, administrator, guardian or trustee for some other person having the legal or beneficial interest.

*Spencer J. (contra)* A suit brought by a reversioner is not only a representative suit but is also one brought in a representative capacity. 7 Bom. 467 ref (*Sadasiva Aiyar and Spencer, JJ.*) KRISHNASWAMI AIVAR v. SEETHALAKSHMI AMMAL.

(1918) M. W. N. 888.

—Ss. 115, 148, 151 and 152—Time fixed by decree for performance of an act—Provision for dismissal of suit on default—Default—Extension of time—No power to grant. See C. P. CODE, SS. 148, 151 AND 152.

16 A. L. J. 825.

—Ss. 132 and 133—Purdanashin lady—Appearance in public—Right to be examined on commission—Costs of the commission. See (1917) DIG. COL. 197: ELIAS JOSEPH SOLOMON v. JYOTSA GHOSH LAL. 45 Cal. 492=

22 C. W. N. 147=44 I. C. 157.

—S. 141, O. 9, R. 9 and O. 21, R. 100—Application by stranger for releasing property from attachment or execution—Dismissal for default—Power to restore. See C. P. CODE, O. 9 R. 9 AND O. 21, R. 100. 4 Pat. L. W. 102.

—S. 141 and O. 9—Execution proceedings—O. 9 C. P. C. not applicable. See C. P. CODE O. 9

(1918) Pat. 265.

—S. 141—Proceedings under Lunacy Act—Provisions of C. P. Code if applicable

Under S. 141 of the C. P. Code the provisions of the Code are applicable to proceedings under the Lunacy Act, and consequently, a Dt. Judge is competent to take proceedings on the basis of an application under S. 62 of the Lunacy Act, if such application is duly verified as provided for in the C. P. Code. (*Mockerjee and Beachcroft, JJ.*) MONI LAL SEAL v. NEPAL CHANDRA PAL. 22 C. W. N. 547=27 C. L. J. 205=43 I. C. 511.

—S. 144—Application for restitution—Limitation—Starting point. See LIM. ACT, ART. 181. 43 I. C. 775.

—S. 144—Ex parte decree—Sale in execution—Decree subsequently set aside—Retrial ending in piff's favour—Application to set aside. See C. P. CODE, SS. 47, 144 AND 151.

20 Bom. L. R. 925.

—S. 144—Parties—Assignee if can apply for restitution.

Where an assignment has taken place even after the appellants decree, which is the basis of the claim for restitution, the assignee is

## C. P. CODE, (1908) S. 144.

entitled to the benefits of S. 144 of the C. P. Code.

Parties in S. 144 does not mean only persons who were impleaded as parties at the time of the decree of the trial Court but include also their representatives whether by assignment or devolution. (*Mullick and Thornhill, JJ*) SHAIKH KAMARUDDIN MANDAL v. RAJA THAKUR BARHAM (1918) Pat. 243=5 Pat. L. W. 141=46 I. C. 465.

—S. 144—Restitution—Application for Limitation Act, Art. 182 applicable. See LIM. ACT, ART. 182 44 I. C. 301.

—Ss. 144 and 151 and O. 21, R. 90—Restitution—Execution sale—Order of first Court refusing to set aside sale, reversed on appeal—Auction-purchaser not a party—Application by judgment-debtor for restitution against auction purchaser, if maintainable—Auction-purchaser not a representative of decree-holder.

An order under O. 21, R. 90, C. P. Code refusing to set aside a sale held in execution of a decree, was reversed on appeal but the auction-purchaser was not made a party to the proceedings for setting aside the sale or to the appeal therefrom. The judgment-debtor subsequently applied for restitution against the auction-purchaser.

Held, that S. 144 of the C. P. Code did not in terms apply, as no decree was varied or reversed but only an order under O. 21, R. 90 was reversed on appeal; and that assuming, that S. 151, allowed an order for restitution in appropriate cases not falling under S. 144 such an order could not be made when the auction purchaser was not a party before the Appellate Court which set aside the sale.

A Court auction-purchaser was not a representative of the decree holder 31, Mad. 507 and 34 Mad 417 ref. (*Sadasiva Ayyar and Bakewell, JJ.*) SUBBAMMA v. CHENNAYYA. 41 Mad. 467=47 I. C. 628.

—S. 144—Restitution—Partition decree—Appeal from preliminary decree—Passing of final decree and delivery of property pending appeal—Dismissal of suit by appellate court—Restitution.

When a preliminary decree for partition is set aside on appeal, the final decree which may have been passed pending the appeal from the preliminary decree becomes ineffective. Consequently, a party from whom any money has been levied under the final decree so rendered inoperative, is entitled to restitution of the amount from the party who levied it on the basis of the final decree. (*Mockerjee and Beacheroff, JJ*) ATUL CHANDRA SINGH v. KUNJA BEHARI SINGHA. 27 C. L. J. 451=43 I. C. 778.

## C. P. CODE, (1908) S. 145.

—S. 145—Restitution—Principle of—Property, sale of, not covered by proclamation—Sale certificate, cancellation of in appeal—Application for restitution—Auction-purchaser, rights of See (1917) DIG. COL 199; KEDAR NATH MARWARI v. JAI BERRHMA. 5 Pat. L. W. 238=37 I. C. 963.

—S. 144—Restitution—Proceeding for—Nature of—Applicability of O. 2, R. 2 of C. P. C.—Decree for possession—Reversal on appeal—Application for restitution—Subsequent application by successful appellant for mesne profits for period of adversary's possession—Maintainability—Limitation—Limitation Act of 1908—Art. 181—Effect period for which mesne profits may be allowed.

A proceeding for restitution under S. 144 of the Code is neither a suit nor a proceeding in execution. It is a miscellaneous proceeding to which the rules applicable to execution proceedings do in substance apply. The provisions of O. 2, R. 2 of the Code are not applicable to such a proceeding.

Where on the reversal of a decree for possession, the successful appellant first applied for restitution of the property and then, within 8 years of the date of the appellate decree, put in another application for the mesne profits of the property for the period during which the opponent was in possession under the original decree held (1) that the second application was not barred under O. 2, R. 2 of the Code by reason of the claim for mesne profits not being included in the original application (2) that under art. 181 of the Limitation Act it was not barred by limitation and the applicant was entitled to mesne profits for the full period of his opponents possession though it was more than 3 years. (*Mullick and Atkinson, JJ.*) KRUPASINDHU ROY v. MAHANTA BALBHADRA DAS 3 Pat. L. J. 367=47 I. C. 47.

—S. 144—Restitution—Revenue officers—Jurisdiction of. See UPPER EURMA LAND AND REVENUE REGULATION, S. 12 (1). 11 Bur. L. T. 3.

—S. 145 and O. 41, R. 5 (3) (c)—Decree—Execution—Decree holder not confined to properties given as security in application for stay of execution pending appeal.

Where pending the disposal of an appeal execution of the decree was stayed on the judgment-debtor giving a security bond and the appeal was eventually dismissed, held that the furnishing of the security in no way detracted from the right of the decree-holder to enforce his decree as against his judgment-debtor in any way he thought fit in accordance with the law. The fact that the security is given does not take away any legal right which a decree-holder otherwise has. (*Mullick, and Atkinson, JJ.*) RAJ BANS SAHAI v. SURJU LALL. 3 Pat. L. J. 176=4 Pat. L. W. 216=43 I. C. 454.

## C. P. CODE, (1908) S 145.

—S. 145—*Surety—Liability for decree amount in case dispute not settled—Decree based on compromise, if can be executed against surety.*

In an application for execution of a decree against the sureties of the judgment-debtor, it appeared that the sureties had made themselves liable to pay the decretal amount only in case the debts did not settle the dispute and judgment was passed against them, and that the plff. had entered into a compromise with the debts according to which the latter had made themselves liable to pay the total amount of money claimed by the plff by certain instalments set forth in the deed of compromise.

*Held*, that as the decree was passed on the basis of the compromise without any mention being made of the sureties, it could not be executed against them under the terms of the surety bond. (*Shah Din, J.*) KAPUR v. SHANKAR DASS. 99 P. W. R. 1918=45 I. C. 992.

—S. 145...*Surety bond taken outside court—Enforcement of in execution.*

S. 145 of the C. P. Code does not apply to proceedings for the enforcement of surety bonds taken by the decree holder outside the Court. (*Sadasiva Aiyar and Napier, JJ.*) SUBBARAYA PILLAI v. SATHANATHA PANDARAM. 24 M. L. T. 416=8 L. W. 507=(1918) M. W. N. 764.

—S. 145—*Surety in execution proceedings—Dismissal of execution case—Effect of, on liability of surety.*

Where certain crops attached as the property of the judgment-debtor, were allowed to be removed on execution of a surety bond that if the claim was not allowed the sureties would pay the decree-holder a certain sum, the mere fact that the execution case against the judgment-debtor was dismissed after the claim was disallowed does not affect the liability of the sureties under the bond. 14 Cal. 757 dist. (*Chitty and Smither, JJ.*) AJITULLA SARKAR v. NANDOOR MAHAMMED. 22 C. W. N. 919=43 I. C. 464.

—S. 145 and O. 32 R. 6—*Surety for guardian of minor—Attachment of property of surety for money due to minor's estate—Validity of.* See (1917) DIG. COL. 201; KURUGODAPPA v. SOOGAMMA.

41 Mad. 40=22 M. L. T. 320=(1917) M. W. N. 450=39 I. C. 928.

—S. 146 and O. 22, R. 10—*Assignee of interest if can appeal—Assignment pending suit—Suit disposed of against assignor—No appeal preferred—Application by assignee to be made a party—Devolution in the course of the suit.*

The proceedings contemplated by S. 146 C. P. Code includes an appeal and the expres-

## C. P. CODE, (1908) S 146.

sion 'claiming under' is wide enough to cover the case of devolution of interest.

A person obtained an assignment of the suit property pending a suit and the suit being decided against his assignor and no appeal having been preferred by the assignor the appellant, the assignee of the suit property pending suit, filed an application in the Dt. Court under O. 22, R. 10 for an order allowing him to prefer an appeal, and also preferred an appeal against the decree. The Dt. Judge dismissed both the petition and the appeal as incompetent. The appellant preferred to the High Court a Civil Miscellaneous Appeal and a second appeal against the decisions respectively.

*Held*, that O. 22 R. 10 only governs applications made to continue a suit and that an application presented after the termination of the suit was not within the rule.

*Held*, also that under S. 146 of the C. P. Code it was competent to the mortgagee to prefer an appeal to the Dt. Court against the decree of the subordinate Judge, and that the Dt. Judge was bound to dispose of the appeal on the merits notwithstanding the dismissal of the petition under O. 22, R. 10.

*Obiter*:—Where a plaint is returned for presentation to the proper Court any devolution of interest during the pendency of the proceedings is a devolution in the course of the suit in the second Court. 36 Mad. 492 dist. (*Seshagiri Iyer and Napier, JJ.*) SITARAMASWAMI v. LAKSHMI NARASIMHA.

41 Mad. 510=8 L. W. 21

—Ss. 143 and 144—*Restitution—Doctrine of, applicable to representatives of parties to suits.* See C. P. CODE. Ss. 144, AND 146.

27 C. L. J. 436.

—S. 146 and O. 21, R. 95—*Right of transferee from auction purchaser to apply.*

Having regard to S. 146 of the C. P. Code a transferee from an auction-purchaser is entitled to delivery of possession under O. 21 R. 95 of the Code (*Banerjee and Tudball, JJ.*) BUDDU MISIR v. BHIGIBATHI KUAR.

40 All. 216=16 A. L. J. 150=42 I. C. 936.

—Ss. 148 and 151—*Decree ex parte—Order setting aside conditional on payment of costs within prescribed period—Power to extend time.* See (1917) DIG. COL. 232; CHANDRA GOUNDAN v. PALANIAPPA GOUNDAN. 23 M. L. T. 7=(1917) M. W. N. 870=42 I. C. 961.

—S. 148—*Pre-emption decree—Expiry of time fixed for payment of purchase money—No power to extend time.* See PRE-EMPTION, DECREE. 16 A. L. J. 392.

—Ss. 148, 151 and 152—*Time fixed by decree—Suit to be dismissed on default of payment within time—No power to extend.*

## C. P. CODE, (1908) S. 149.

Where a decree embodies certain conditions and provides that a suit shall stand dismissed if those conditions are not complied with, e.g., where the date is fixed in the decree for paying in money and in the event of non compliance it is provided that the suit shall be dismissed, the Court has no jurisdiction to interfere with the decree by altering any of the conditions namely, by extending the time.

There is no distinction in this respect between a decree for pre-emption and any other decree. The only exception is that of a mortgage-decree in which time may be extended by virtue of the provisions of O. 34 of the C. P. Code. (*Richards C. J. and Banerji, J.*) *SAJJADI BEGAM v. DILWAR HUSSAIN.*

40 All. 579=16 A. L. J. 625=47 I. C. 4.

—S. 149—*Deficient Court-fee—Discretion of court to allow time for paying up—Wilful neglect.*

The court will not in its discretion under S. 149 of the C. P. Code allow the deficiency of Court fee be made up on the day of the hearing unless it is satisfied that some grounds exist for the exercise of its discretion. Of these grounds the principal one is that a *bona fide* mistake was made. (*Fletcher and Huda, JJ.*) *SAIDUNNESSA v. TEJENDRA CHANDRA DHAR.*

44 I. C. 398.

—S. 149—*Scope of—Deliberate omission to pay Court-fee—Court not bound to receive appeal and allow time. See (1917) DIG. COL. 202; RAMSAHAY RAM PANDE v. KUMAR LACHEMI NARAIN SINGH.* 3 Pat. L. J. 74=5 Pat. L. W. 18=42 I. C. 675.

—S. 151 and O. 45, R. 4—*Consolidation—Inherent power of High Court—Power not limited by O. 45 R. 4.*

It was not intended by O. 45 R. 4 to limit the powers of the High Court to consolidate cases to the purposes mentioned in that rule alone.

The power of consolidation is an inherent power of the High Court, which can be exercised in consolidating appeals to the Privy Council for the purpose of security for costs and to save expenses. (*Miller, C. J. and Imam J.*) *HAR PRASHAD RAI v. BRIJ KISHEN DAS.* 45 I. C. 581.

—S. 151—*Costs—Security for—Direction to furnish—Inherent power. See IN SOLVENCY* 22 C. W. N. 1018.

—S. 151—*Court Fee—Payment of excess fee—Refund of—Certificate to enable getting of refund—Direction to Taxing Officer to issue—Inherent power of High Court—C. P. C., S. 151.*

In the exercise of its inherent powers the High Court has power to make an order directing the Taxing Officer to issue the

## C. P. CODE, (1908) S. 151.

necessary certificates to enable an appellant to apply to the Revenue authorities to obtain a refund of an excess court-fee paid on a memorandum of appeal. (*Miller, C. J. and Imam, J.*) *CHANDBADHARI SINGA v. TIPPAN PRASAD SINGH.* 3 Pat. L. J. 452= (1918) Pat. 273=46 I. C. 271.

—S. 151—*Execution Sale—Setting aside of—Ex parte decree, in execution of which property sold, set aside on appeal—Inherent power to set aside sale. See C. P. CODE SS. 47, 144 AND 151.*

20 Bom. L. R. 925.

—S. 151—*Inherent power—Appellate Court—Power of, to consolidate appeals in Land Acquisition cases—See PRACTICE, CONSOLIDATION.* 34 M. L. J. 279.

—S. 151—*Inherent powers of court to re-open transaction on ground of fraud. See C. P. CODE, SS. 47, 151, ETC.*

20. Bom. L. R. 929.

—S. 151—*Inherent power—Expunging from record—Judgment of inferior court—Power of High Court. See GOVT. OF INDIA ACT S. 107.* 35 M. L. J. 368.

—S. 151—*Inherent Power—Injunction—Not to be granted against person, not a party to the proceeding.—See C. P. CODE O. 29 R.1.* 3 Pat. L. J. 456.

—S. 151—*Inherent power—No Power to interfere with decrees and orders of lower Court.*

S. 151 of the C. P. Code is intended to empower courts to deal with their own decrees and orders and was not intended to give authority to superior courts by way of conferring supplemental jurisdiction to that conferred by S. 115. (*Beaman and Heaton, JJ.*) *BARAUSING BAGHO v. CHAGANIRAM HARCHAND.* 42 Bom. 363=20 Bom. L. R. 348=45 I. C. 552.

—S. 151—*Inherent power—Refund of money drawn out from Court by a person ultimately held not entitled to it—Power of Court to order refund.*

An auction sale was set aside and the auction-purchaser was allowed to take out the purchase money which he had deposited in Court.

Held, that the auction-purchaser was bound to refund the purchase money which he had taken out from the Court.

It is not in accordance with justice, equity and good conscience that in a summary miscellaneous proceeding for refund of money taken out by an auction-purchaser, the Court should enter into an adjudication between the auction-purchaser and a person who is strictly no party at all to the proceedings but is alleged to be the real auction-purchase

C. P. CODE. (1908) S. 151.

(Mullick and Thornhill, JJ.) DALIP NARAIN SINGH v. BAIJNATH GOENKA.

5 Pat. L. W. 132=46 I. C. 275.

———S. 151—Inherent power—Re-hearing of case decided without hearing a party.

On an appeal preferred by some of the defendants without impleading their co-defts. as respondents the appellate court set aside the decree of the lower Court as against the appellants and made a new decree against a co-deft. who was not a respondent to the appeal. Thereupon the latter applied for the restoration and hearing of the appeal in his presence.

*Held*, that although no provision of the C. P. Code dealt with such a case yet the appellate court should restore the appeal and re-hear it in the presence of the co-deft. after adding him as a party. (Jhity and Walmsley, JJ.) DURGA CHARAN BOSE v. LAEHI NARAIN BERA. 47 I. C. 917.

———S. 151—Inherent power—Remand—Appellate Court—Power of. See C. P. CODE O. 41 Rr. 28 and 27. 27 C. L. J. 596.

———S. 151—Inherent power. Remand—No appeal. See C. P. CODE, SS. 107 (1) (b) AND 151, ETC. 43 I. C. 959.

———S. 151—Inherent power—Review. See (1917) DIG. COL. 205; KANAILAL GHOSH v. JATINDRA NATH CHANDRA. 45 Cal. 519=26 C. L. J. 325=42 I. C. 711.

———S. 151—Inherent power—Review of order made ex-parte.

On an ex-parte application made to the District Judge asking him under the provisions of S. 5 of the Lim. Act to extend the time for filing an appeal and to give the appellant time for the purpose of paying the Court-fees, the Judge made an order that time would be extended. But subsequently and before the memo. of appeal had in fact been admitted, he reconsidered his order and revoked it.

*Held*, that the Judge had ample authority under the law to revoke or alter his previous order at any time before the appeal was admitted. (Fletcher and Huda, JJ.) ISHWAR CHANDRA KAPALI v. ARJAN. 45 I. C. 725.

———S. 151—Inherent power—Revival of suit.

During the pendency of a pre-emption suit plff. lost his title to the property which qualified him for the exercise of the right of pre-emption, by virtue of a decree passed against him in another suit and he filed an appeal against that decree. The Court trying the pre-emption suit thereupon dismissed it as not maintainable, but remarked in its judgment that if the plff's appeal in the other suit was accepted he might apply for revival of the pre-emption suit. The plff. won his appeal and within 3 years applied under S. 151 of the C.

C. P. CODE. (1908) S. 152.

P. Code to the Court which had decided the pre-emption suit, for its revival.

*Held*, that the Court had inherent power under S. 151 of the C. P. Code to revive the suit though the original order was improper and the proper course would have been to stay the suit. (Lindsay J. C.) RAMESHWAR DAYAL v. GUR SAHAI.

5 O. L. J. 259=47 I. C. 127.

———S. 151—Inherent power—Scope of—Ends of justice.

The provisions of S. 151 of the C. P. Code can only be utilised to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. (Stuart and Kanhaiya Lal, JJ.) NARENDRA BAHADUR SINGH v. THE OUDH COMMERCIAL BANK. 5 O. L. J. 153=46 I. C. 63.

———S. 151—Inherent power—Stay of Sale in execution of decree of lower Court. See C. P. CODE O. 41 RR. 5 AND 6 (2). 34 M. L. J. 470.

———S. 151—Inherent power—Time fixed by decree for performance within specified time—Provision for dismissal on default—Default—No power to extend time for performance. See C. P. CODE SS. 145, 151 AND 152. 16 A. L. J. 625.

———S. 151—Inherent power—Wrong execution of decree—Interference by High Court.

When it is brought to the notice of the High Court that its decree is being executed in a manner manifestly at variance with the purport and intention of that decree then the High Court, under its inherent powers of supervision which are expressly saved by S. 151 of the C. P. Code may take such action for the ends of justice as may be necessary to enforce the proper execution of the decree.

Where the decree which was being executed was a decree of the Calcutta High Court in a suit which arose within the present jurisdiction of the Patna High Court, *held*, that it was the latter Court which had power to supervise the execution of the decree. (Miller, C. J. and Chapman, J.) KULADA PRASAD TEWARI v. SADHU CHARAN TEWARI.

3 Pat. L. J. 435=48 I. C. 107.

———S. 151—Restitution—Inherent power of Court in cases not covered by S. 144 C. P. Code—Inherent power not to be exercised to the prejudices of a person not a party to the original proceedings. See C. P. CODE SS. 144 AND 151, ETC. 41 Mad. 467.

———S. 152—Amendment of decree—Correction of clerical mistakes and accidental slips in decree—jurisdiction of court which passed decree—Pendency of appeal against decree—Effect.

## C. P. CODE, (1908) S. 152.

A Court as jurisdiction to correct any clerical error or accidental slip occurring in its own order notwithstanding the pendency of an appeal therefrom in a superior court.

The proper Court to correct clerical errors in a decree or order is the Court in which the errors were made and not the Court wherein at the time of the prayer for amendment, an appeal from the decree or order is pending. (*Spencer, J.*) MUTHU BHATTAR v. MRITHUN, JAYA BHATTAR. 7 L. W. 8=44 I. C. 243.

—S. 152—Decree, amendment of—Affirmation of decrees of lower Court on appeal—Decree can be amended, only if there is a variation between the decree and the judgment—appeal.

In a suit for sale on a mortgage the Munsif granted a decree for the claim as "proved." The debt appealed and the decree of the Munsif was affirmed. A decree absolute followed.

The debt then made an application to the appellate court for the amendment of the decree, and it was granted. *Held*, that the court was wrong in granting the application inasmuch as the debt should have shown that the judgment of the appellate court was at variance with its decree and not that the judgment of the Munsif was at variance with his decree. (*Richards C. J. and Banerji, J.*) BALGOBIND RAI v. SHEORAJ RAI.

13 A. L. J. 451=46 I. C. 373.

—S. 152—Decree—Amendment of, pending appeal—Copy of amended decree to be attached to memo. of appeal. See C. P. CODE, O 41 R. 1 (1). 43 I. C. 772.

—S. 152—Decree—Amendment—Appellate Court—Dismissal of appeal for default—Application to amend—Forum.

Where an appeal is dismissed for default, the dismissal does not amount to a confirmation of the decree appealed from and that decree continues to be the final decree in the case, so that an application for amendment of the decree in such a case must be made to the Court which passed the decree appealed from, and not to the Court which dismissed the appeal. (*Mitra, A.J.C.*) DAULAT v. RAJ RAM. 43 I. C. 360.

—S. 152—Decree—Error in—Amendment of, in execution—No prejudice. See DECREE. 16 A. L. J. 262.

—O. 1 R. 1—Parties—Co-trustees—All to join in institution of suit. See TRUSTEE. 27 C. L. J. 605.

—O. 1, R. 1—Parties—Suit for specific performance—Person in possession claiming under anterior agreement for sale—Necessary and proper party. See SPEC. PERFORMANCE. 44 I. C. 361.

—O. 1 R. 3—Addition of parties—Scheme suit—Trespasser or alienee from trustees—Joinder of, improper. See C. P. CODE, S. 92 AND O. 1 R. 2. 28 C. L. J. 4.

## C. P. CODE (1908) O. 1, R. 3.

—O. 1 R. 3—Multifariousness—Dismissal of suit—C. P. Code, O. 23 R. 1—Withdrawal of suit in second appeal. See (1917) DIG. COL. 207. AFZAL SHAH v. LACHMI NARAIN. 30 All 7=15 A. L. J. 809

=42 I. C. 856.

—O. 1, R. 3—Parties, joinder of—Suit for possession by heir against several alienees from last owner—No misjoinder.

A suit for possession on the ground of inheritance can proceed against a number of different alienees. The question is purely one of convenience. 11 P. L. R. 1911; 33 B. 293 29 C. 871 foll. (*Leslie Jones J.*) LAL CHAND v. MANOHRI. 64 P. W. R. 1918=

44 I. C. 549.

—O. 1, Rr. 4. and 3—Applicability—Misjoinder of parties and causes of action—Tests to determine—Suit for recovery of goods or their value from several debtors—Suit based on fraud of one of them in obtaining goods and transferring them to the others—Maintainability. See (1917) DIG. COL. 203; ROMENDRANATH ROY v. BROJENDRANATH DAS. 45 Cal 111=21 C. W. N. 794=27 C. L. J. 158

=41 I. C. 944.

—O. 1 R. 8—Leave to sue in a representative capacity—Claim for damages coupled with other reliefs—Leave to represent persons not consenting to institution of the suit—Scheme of management of a trust—Decree for.

Leave to file a representative suit under O. 1 R. 8 of the C. P. Code may be granted on behalf of a community or body of persons even though some persons object to it. The order need not be restricted to the grant of leave on behalf of the persons not opposing.

Though leave cannot be granted to file a representative suit for damages, the prayer may be allowed in combination with other reliefs sought. The plffs. may be allowed to claim damages not in their representative capacity but on account of the acts by which they were individually aggrieved.

A scheme of management for trust property may be prayed for in a representative suit, subject to the objections when the scheme is actually framed."

Leave was given to the plff, a leading Mirasdar to file a suit on behalf of 200 comirasdars as trustee of a forest land for a declaration that the property belonged in common to them on trust, for an injunction restraining the deft. from trespassing on it, for damages, and, if necessary, for a scheme of management. (*Oldfield and Sadasivalyer JJs.*) KATHA PILLAI v. KANAKASUNDARAM. 24 M. L. T. 20=8 L. W. 160=

(1918) M. W. N. 794=45 I. C. 423.

—O. 1 R. 8—Representative suit by daily worahipper of mosques to set aside alienation by mutwalli if lies. See MAHOMEDAN LAW. 23 C. W. N. 115.

## C. P. CODE, (1908) O. 1, R. 9.

—O. 1, R. 9—Misjoinder of parties and causes of action—Heir—Suit for possession against alienees from different alienors. See PRACTICE. 59 P. R. 1913.

—O. 1, R. 10—Administration suit—Jurisdiction of Court to make deft party plff.—Original plff. if found not competent to maintain suit—Deft. entitled to share Bona fide mistake—Proof of, if necessary.

The Court has jurisdiction in an administration suit (if it be found that the original plff. has no right of suit) to make one of the defts. entitled to share, as party plff. It is not necessary to find *bona fide* mistake for the Court to act under O. 1, R. 10 of the C. P. Code. (*Krishnan, J.*) BHIMANGOWD v. ESWARAGOWD. 9 L. W. 79=(1918) M. W. N. 929

—O. 1, R. 16—Parties—Addition of—Improper refusal—No appeal from order—Revision. See C. P. CODE, S. 115 AND O. 1, R. 10. 47 I. C. 725.

—O. 1 R 16—Suit against dead person—Institution bad—Rule not applicable. See LIM. ACT. S. 22. 47 I. C. 894.

—O. 1, R. 10 (2)—Addition of parties—Improper refusal—Interference by High Court in revision. See C.P. CODE S. 115 AND O. 1 R. 10 (2) ETC. 44 I. C. 564.

—O. 1, R. 10 (2)—Parties, addition of—Suit for rent against one of the heirs of a tenant—Other heirs if can be added as parties.

In a suit for recovery of arrears of rent instituted against one of the heirs of the original tenant whose name was recorded in the landlord's *sherist a*, the remaining heirs of the tenant were on their application added as parties to the suit.

Held, that although the added defts. were not strictly necessary parties to the adjudication of the question arising between the plff. and the original deft., yet they were not improperly added parties to the suit. 12 C. L. J. 267 foll. (*Teunon and Newbould, JJ.*) GURU PROSANNA LAHIRI v. SAMIRUDDIN SARKAR. 44 I. C. 465.

—O. 2 R. 2—Abandonment of claim—Bar to subsequent suit—Knowledge of right, essential.

In order to make O. 2, R. 2 of the C. P. Code applicable to a subsequent suit, it is necessary to show that the plff. held at the date of the institution of the previous suit actual and not merely constructive knowledge of the right which he is seeking to enforce in the subsequent suit. 15 Cal. 800 foll. (*Mittra, A. J. C.*) BINYA BAI v. GANPAT. 47 I. C. 881.

—O. 2, R. 2—Applicability—Mortgage and lease forming part of same transaction—Suit for rent instituted after mortgage debt becomes due—Subsequent suit for principal amount under mortgage-deed—Maintainability.

## C. P. CODE, (1908) O. 2, R. 2.

Where a mortgage-deed and a contemporaneous lease form in reality one transaction (the latter merely providing a mode for realising interest) a suit for rent instituted after the principle mortgage debt had become due, bars a subsequent suit for recovery of the principal and interest due on the mortgage. (*Shah Din and Wilberforce, JJ.*) NATHA SINGH v. CHUNI LAL. 69 P. R. 1913=47 I. C. 364.

—O. 2, R. 2—Applicability of—Omission to sue for relief—Suit not terminated in a decree—No bar.

O. 2, R. 2 of the C. P. Code refers to a case where there has been a suit in which there has been an omission to sue in respect of a portion of claim and a decree has been made in that suit. In that case a second suit in respect of the portion so omitted is barred. 11 M. I. A. 551 ref. (*Sandersen, C. J. and Woodroffe, J.*) UPENDRA NARAIN ROY v. RAJ JANAKI NATH ROY. 45 Cal. 305=

22 C. W. N. 611=47 I. C. 129.

—O. 2, R. 2—Applicability of—Restitution proceedings.

A proceeding in which relief by way of restitution is claimed is neither a suit nor an execution proceeding, but a miscellaneous proceeding to which the rules applicable to execution proceedings in substance apply. The provisions of O. 2, R. 2 do not apply to such a proceeding. 40 M. 780 Ref. (*Mullick and Atkinson JJ.*) KRUPASINDU ROY v. BALBHADRADAS. 3 Pat. L. J. 367=47 I. C. 47.

—O. 2, R. 2—Cause of action meaning of—Dismissal of suit for declaration—No bar to suit for possession See (1917) DIG. COL. 212; MAUNG BA THAUNG v. MA SHIN MIN. 10 Bur. L. T. 189=37 I. C. 15.

—O. 2, R. 2—Continuing wrong—Prior suit, no bar. See (1917) DIG. COL. 213; RAGHUNATH SINGH v. ACHUTANAND. 3 Pat. L. W. 283=43 I. C. 374.

—O. 2 R. 2—Mesne profits—First suit for ejectment—Subsequent suit of mesne profits.

Where a usufructuary mortgagee first brought a suit in ejectment against the mortgagor and subsequently sued him for mesne profits, Held, that the previous suit being a suit for ejectment and not a suit for redemption, the present suit for mesne profits was not barred. (*Mittra A.J.C.*) PARAMSUKH v. YADOJI. 46 I. C. 743.

—O. 2, R. 2—Mortgage—Suit for interest after principal becomes due—Subsequent suit for principal and interest—Maintainability—Res judicata.

O. 2, R. 2 of the C. P. Code bars a suit for principal and interest due on a mortgage where the plff. mortgagee has previously sued and obtained a decree for interest only, when

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he could have sued for the principal as well. (*Chevis and Broadway J.J.*) **KISHEN NARAIN v. PALA MAL.** 33 P. R. 1918=167 P. W. R. 1913=47 I. C. 937.

———**O. 2, R. 2—Mortgage—Suit against some co-owners—mortgage in contravention of O. 34, R. 1—Subsequent suit against others, maintainability.**

Where a person brought a suit on his mortgage against some of the co-owners of the mortgaged property and obtained a decree, a subsequent suit on the mortgage against the other co-owners is barred under O. 2, R. 2 of the C. P. Code. (*Bakewell and Phillips, J.J.*) **KIZHAKKE MANNAMBARATH v. KANNA KURUP.** 3 L. W. 152=47 I. C. 595.

———**O. 2 Rr. 2 and 4—Partition—Suit for recovery of moveables and immoveables—One cause of action—No misjoinder.**

In a suit for partition, the plff. has to include the whole of his claim, that is to say, the whole of the properties which are alleged by him to be properties of the joint family, immoveable properties moveable properties and funds which according to him have resulted from joint business carried on by members of the joint family on behalf of all, and such a suit cannot be treated as one for the recovery of possession of both immoveable and moveable property requiring for their joinder Courts leave under O. 11, R. 4 of the C. P. Code.

An order passed in such a suit requiring the plff. to elect to proceed either with the claim for the recovery of immoveable properties or with that for recovery of the moveables and funds is erroneous. (*Tennon and Chaudhuri J.J.*) **BENI MADHALE v. GOVIND CHANDER SIKKAR.** 22 C. W. N. 669=46 I. C. 165.

———**O. 2, R. 2—Scope of—Prior suit not maintainable as laid — Subsequent suit on proper case of action—No bar.**

One K. executed a mortgage in favour of R. in 1892. In 1898 K. granted a power of attorney to R. to facilitate the collection of rents. Under the power of attorney, R. was to pay K. a certain sum and appropriate the balance towards the mortgage. The mortgagor brought a suit for cancellation of the power of attorney and for accounts. The suit was dismissed on the ground that the remedy was by a suit for redemption. K. now brought the present suit for redemption. It was contended that the suit was barred by O. 2, R. 2 of the C. P. Code.

*Held*, that O. 2, R. 2 of the C. P. Code did not bar the present suit for redemption.

O. 2, R. 2 of the C. P. Code bars a present suit only when the cause of action in the subsequent suit is the same as in the previous suit. It does not apply where the cause of action in the subsequent suit could also have been made the subject of litigation in the

**C. P. CODE, (1908) O. 5, R. 10.**

former suit. In such a case, the second suit is not barred under O. 2, R. 2.

Where a former suit is brought either on a non-existent cause of action or upon a false cause of action, that will not bar the institution of a suit on the true cause of action. (*Ayling and Seshagiri Iyer, J.J.*) **DASABATHY NAIDU v. PADALA KUMARANULL RAJA.**

24 M. L. T. 311=(1918) M. W. N. 427  
=7 L. W. 557=45 I. C. 969.

———**O. 2 R. 2—Scope of—Suit against one debtor if a bar to suit against another debtor.**

O. 2 R. 2 of the C. P. Code applies only where the debt in the subsequent suit was also the defendant in the previous suit. The rule does not apply where the subsequent suit is brought against a different debt. (*Mitra A J.C.*) **KASHI BAI v. SHEORAM KHUPCHAND.**

47 I. C. 896.

———**O. 2, R. 3—Cause of action arising subsequent to suit—Relief on the strength of, can be granted in exceptional cases. See PLEADINGS.** (1918) M. W. N. 199.

———**O. 3 R. 1 and O. 9, R. 9—Dismissal of suit in the presence of pleader, if a dismissal for default—Application to set aside.**

The personal appearance of a plff. who has instructed a Pleader to appear in his behalf for the purpose of conducting the suit is not necessary, and if the suit is dismissed in the presence of the Pleader, the decree of dismissal would not be subject to the procedure for setting it aside laid down in O. 9, R. 9 of the C. P. Code. (*Mullick and Thornhill J.J.*) **MOWAR RAGHBAR SINGH v. GOURI CHARAN SINGH.** 46 I. C. 492.

———**O. 5, Rr. 10 and 17—Service of summons—Delivery to defendant—Non-compliance with other formalities—Factum valet doctrine of, if applicable.**

O. 5, R. 10 of the C. P. Code lays down the main rule that service shall be made by delivering or tendering copy of the summons signed and sealed as prescribed. Whenever such delivery or tender has been made to the debt. personally, the service is complete, and no subsequent irregularity by the process server or other ministerial officer of the Court such as the omission of the process server to obtain the signature of the debt. can undo it. Such a case is particularly of a kind to which the maxim *quod fieri non debet factum valet* seems applicable.

But where the service is not personal, there is necessity for a strict compliance with the rules of procedure laid down in the C. P. Code. 26 Cal. 131, 13 I. C. 560. app; 16, Bom. 117 diss. (*Sanyal, A. J. C.*) **GOPALDAS v. ISLU.** 46 I. C. 277.

C. P. CODE. (1908) O. 5, R. 10.

—O. 5, Rr. 10 and 19—Summons—Service, modes of—Summons delivered to deft. but not received by him and acknowledgment not signed by him and summons not affixed to his house—Service not proper (*Broadway, J.*)  
DIWAN CHAND v. MUSSAMMAT PARBATTI.

99 P. R. 1918=43 I. C. 28.

—O. 5, R. 15 and O. 30, R. 3—Munim if a member of the family—Service on party's munim if sufficient.

A munim is not a member of the family of his employer within the meaning of O. 5, R. 15 of the C. P. Code.

In a suit for recovery of money the Court directed the notice to be issued to the parties and their pleaders that they should attend on a certain date. It appeared that no notice was served on the plff's pleader, but one was served upon the munim of the plff's firm.

Held, that service on the munim even if he was the person having the control or management of the plff's business, was not sufficient and that the Court had no power to dismiss the suit for default. (*Scott Smith, J.*) FIRM, RAM GOPAL KANHIA LAL v. NARAIN DAS.

105 P. W. R. 1918=45 I. C. 932.

—O. 5, R. 17 and O. 9, R. 13—Refusal to accept service—*Ex parte* proceedings—Application to set aside—Return of process server—Denial of, necessary.

It appeared from the affidavit of the serving officer that the deft. refused to accept service of the summons which was, therefore, affixed to the outer door of his dwelling. The deft. having failed to appear on the date fixed, the Court granted an *ex parte* preliminary decree to the plff. for dissolution of partnership and accounts and directed the deft. to file a true and full account of the partnership. The deft. applied for setting aside the *ex parte* decree.

Held, that inasmuch as the deft. refused to accept service of the notice although it was read out to him and he was repeatedly asked to receive it and as he did not categorically deny the facts stated by the process server in his affidavit the Court was justified in proceeding *ex parte* against the deft. *Rattigan C. J.* and *Shah Din, J.*) RADHA KISSEN v. TIRATH RAM.

41 P. L. R. 1918=31 P. W. R. 1918=43 I. C. 718

—O. 5, Rr. 17 and 19—Service of summons—Affixure of summons to outer door—Declaration of service by Court, essential.

Where a summons is fixed to the outer door of a deft. under O. 5, R. 17 of the C. P. Code he cannot be said to be "duly served" until an order under R. 19 is made by the Court declaring that the summons had been duly served, and such order ought to be obtained as soon as possible after the return is made by the serving officer. (*Richards, C. J.* and *Banerji, J.*) CHAMPAT SINGH v. MAHABIR PRASAD.

43 I. C. 632.

C. P. CODE, (1908) O. 6, R. 17.

—O. 5, R. 19—Service of summons—Affixure to outer door of house—Declaration under R. 19 essential. See C. P. CODE O. 15, Rr. 17 AND 19. 43 I. C. 632.

—O. 6 R. 4—Undue influence—Plea of—Particulars not given—Court not to entertain the plea. See PLEADINGS. 47 I. C. 11

—O. 6, R. 14—Signature of plaintiff by person authorised by a man in jail—Validity of signature—Jail Regulations, breach of—Effect of—Practice—Professional misconduct—Mixing up of questions of—Decision of case.

Jail regulations and Manuals have the force of law but they cannot override or alter the general law. A plaintiff signed or a suit authorised by a man in jail is just as good as any other plaintiff or suit, however many jail regulations are broken. The breach of Jail regulations by the prisoner, his pleader or friends cannot destroy a cause of action or invalidate a plaintiff and the Court should not enter into the question whether permission of Jail authorities had been given or not.

A person in jail who is unable to sign a plaintiff may authorise some other person under O. 6, R. 14, to sign it for him and the plaintiff so signed will be a valid plaintiff. 23 All. 55 ref.

The object of Courts is to decide the right of parties and not to punish them for mistakes which they make in the conduct of their case by deciding otherwise than in accordance with their rights.

If a Court thinks that there has been any breach of professional etiquette, or any matter calling for the exercise of disciplinary powers, in the conduct of the pleader or advocate in the case, it should decide the merits and reserve such question for further consideration after the disposal of the suit. (*Walsh, J.*) BISHESHAR NATH v. EMPEROR 40 All 147 =16 A. L. J. 64=44 I. C. 28.

—O. 6, R. 17 and O. 7, R. 6—Amendment of pleadings—Exemption from limitation—Grounds for, not specifically stated—Duty of court to allow amendment.

The provisions of O. 7, R. 6 of the C. P. Code should be construed in a liberal and reasonable spirit, and save under very exceptional circumstances, the Court of first instance should allow the plff. to amend his plaintiff so as to state the ground of exemption from the law of limitation as required by that rule. 31 I. C. 195 dist. (*Shah Din, J.*) RAM SUKH DAS v. GHULA MUHAMMAD. 102 P. R. 1918=43 I. C. 495.

—O. 6, R. 17—Amendment—Pleadings—Suit for declaration of title and confirmation of possession if can be converted into one for recovery of possession—Limitation.

Where a plaintiff in a suit for declaration of title and confirmation of possession alleges facts which show that he was out of possession, his

## C. P. CODE, (1908) O. 6, R. 17.

suit, even though framed for confirmation of possession, may be treated as one for recovery of possession if his title to recover possession has not been barred by limitation but where the plff. in such a suit makes a case that he is in possession, but fails to prove his possession, the Court will not give him possession, even though he proves his title and the suit has been instituted within the limitation prescribed for suits for recovery of possession. 16 W. R. 27; 14 C. W. N. 866 expl. (*Richardson and Beachcroft, JJ.*) MAHAMAD JALIS v. THE SECRETARY OF STATE FOR INDIA.

44 I. C. 996

— O. 6, R. 17—Amendment—Power to grant — Inconsistent case — Contradictory evidence—Amendment—Refusal of, by Appellate Court.

Though under R. 17 of O. 6 of the C. P. Code, very wide powers of amendment are vested in the court, an application for amendment in the second appellate Court was disallowed on the ground that the plff. would start afresh on allegations wholly inconsistent with those made in the original plaint, and to support the new allegations, he would have to bring forward evidence directly contradictory to the evidence already placed by him on the record. (*Mookerjee and Beachcroft, JJ.*) PADMA LOCHAN PATTAR v. GIRISH CHANDRA KIL.

27 C. L. J. 392—45 I. C. 241.

— O. 6 R. 17—Amendment—Principles, regulating grant of—Mortgage suit, non inclusion of previous mortgage through bona fide mistake—Order for amendment—Postponement of amendment—Application to be disposed of at the trial, if proper

The plff. respts. filed a suit on a mortgage, of the year 1915 executed by the 1st deft. appellant in favour of the plffs. There was a previous mortgage and a further charge of the year 1914, not included in the suit which were also executed by the 1st deft. in favour of the plff. which comprised properties outside the jurisdiction. There was a provision in the mortgage of 1915 by which properties within jurisdiction were included and charged for the payment of moneys due on the said previous mortgage and further charge (and thus conferring jurisdiction on the High Court in respect of them.) The first defendant subsequently filed a suit in the Patna Court for a declaration that the said previous mortgage and further charge were not enforceable inasmuch as they were not included in plff's suit and as no leave was taken under O. 2, R. 2 of C. P. Code. Upon that plffs. applied for the amendment of their plaint by the inclusion of the said previous mortgage and the further charge alleging that they were not originally included in the suit under a bona fide and erroneous impression that the Court had no jurisdiction in respect of them (as the properties charged were situated outside Calcutta)

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and that they overlooked the above provision in the mortgage of 1915.

The trial Judge without deciding anything allowed the amendment subject to any contentions which the deft. might raise in answer to the claim as amended. The deft. appealed.

Held, that the plffs. should be given liberty to amend their plaint.

It would have been better and more regular had the question of the right to amendment been determined before the order was made. If this would have involved a lengthy enquiry covering the same ground as the evidence in the suit the hearing of the application to amend should have been adjourned to the hearing of the suit and determined on the evidence then taken.

The Court being desirous of getting at the true facts will allow an amendment subject to the three chief general conditions: *Bona fides* on the part of the applicant, possibility of amendment without such prejudice to the other party as cannot be compensated by costs (such as prejudice to rights accrued) and subject to this that the amendment is not such as to turn a suit of one character into a suit of another character 1 C. 571; 18 B. 144; 16 W. R. 123, 9 B. H. C. R. 1, 5. Bom. L.R. 329, 9 C. 695, B. 416, 21 W. R. 208, 5 B. 612. (*Sanderson, C. J. and Woodroffe, J.*) UPENDRA NARAIN ROY v. RAI JAKODI NATH ROY.

45 Cal. 305—22 C. W. N. 611.  
47 I. C. 129.

— O. 6 R. 17—Plaint—Amendment—Order allowing—Validity—Application made at beginning of trial—Order made at later stage after hearing evidence—Effect.

Where in a suit for damages for injuries sustained by plff. by reason of deft's. negligence, the trial judge allowed an amendment of the plaint by increasing the amount of damages claimed on an application made at the beginning of the trial when the learned judge reserved his decision until he had heard more of the evidence and granted the amendment at a later stage, held that the order allowing the amendment was not illegal and would not be interfered with in appeal (*Wallis C. J. and Sadasiva Iyer, J.*) VINAYAGA MUDALIAR v. PARTHASARTHY. 23 M. L. T. 312—7 L. W. 415—45 I. C. 556.

— O. 6 R. 17—Pleadings—Amendment altering nature of suit—Amendment orally asked for during argument—Refusal.

An amendment which would have the effect of altering the nature of the suit, cannot be allowed upon a verbal suggestion made in a final reply. (*Hayward A. J. C.*) LOUIS DREYFUS & CO. v. THE SECRETARY OF STATE FOR INDIA.

45 I. C. 173.

C. P. CODE, (1908) O. 6, R. 17.

—O. 6 R. 17—*Pleadings—Amendment of—Application made at a late stage in second appeal—Refusal.*

An application for amendment of the pleadings will not be granted at a late stage of the case on second appeal. (*Mitra, A.J.C.*)  
BALIRAM v. GANPAT. 37 I. C. 906.

—O. 6, R. 17—*Pleadings, amendment of—Case closed for judgment—Amendment at that stage, impropriety.*

Plff. brought a suit for the possession of a site and the case was closed and posted for judgment. The plff. then applied to the Court praying that a right of way six cubits broad should be given to him. The Court held that the plff. was not the owner of the site but it directed the deft. to remove his hut so as to allow a right of way as claimed by the plff.

Held, that the plff. should not have been allowed to amend the plaint after the case had closed for judgment. (*Prideaux, A.J.C.*)  
CHAINU v. MANBOOK. 45 I. C. 894.

—O. 6, R. 17—*Pleadings, amendment—Application at a late stage—Refusal—No interference in second appeal.*

The Chief Court will not interfere in second appeal and allow an amendment of the plaint which had been disallowed by the court below. (*Shah Din, J.*) NANU v. MOTI. 46 I. C. 471.

—O. 6 R. 17—*Pleadings—Amendment of—Discretion of Court—Principles governing.*

Amendments of pleadings should be allowed when asked for by a party, provided the opposite party is not taken by surprise or precluded from adducing evidence or raising the necessary issues. Where, however, a party is agitating only a technical claim and the character of the suit is likely to be altered or where there is inordinate delay in asking for amendment, the Court would be justified in refusing to grant an amendment. The main considerations to be borne in mind are that multiplicity of suits should be avoided and the interests of substantial justice should be advanced. (*Seshagiri Iyer and Napier, JJ.*) RAMASWAMI REDDI v. GENGGA REDDI. 45 I. C. 649.

—O. 7 R. 7—*Claim for larger relief—Plff. entitled to decree for smaller relief to which he was found entitled—Decree for joint possession in suit for ejectment can be passed.* (*Batten, A.J.C.*) GHOOPI v. SITEU. 44 I. C. 557.

—O. 7, R. 7—*Plaint—Reliefs not claimed, not to be granted.*

An usufructuary mortgagee who sues the purchasers of the equity of redemption and prays (1) for a decree on the mortgage; (2) for possession; or (3) for a money decree, is not entitled to a decree for the usufruct of the property accumulated in the hands of the De-

C. P. CODE, (1908) O. 8, R. 2.

Magistrate while the property was under attachment in proceedings under S. 145 of the Cr. P. Code (*Sharfuddin and Roe, JJ.*)  
KHEBHANI OJHA v. GULAB OJHA.

2 Pat. L. J. 698=43 I. C. 463

—O. 7, R. 10—*Suit not cognizable by Court—Duty of court to return plaint to proper court—Trial on the merits, bad* See (1917) DIG COL 221; PADE MAHOMED v. CHEETRA NATH CHOWDHURY

27 C. L. J. 390=41 I. C. 203.

—O. 7, Rr. 14 and 18—*Rejection of document undoubtedly in existence at the date of suit but not produced within time fixed—Improper exercise of discretion.*

In a suit for enhancement of rent on the basis of a kabuliyat which was not filed with the plaint as required by O. 7 R. 14 of the C.P. Code, but was filed in Court after the time within which parties were directed by the Court to file their documents the Court rejected the document.

Held, that as there was no doubt that the document was in existence at the date of the institution of the suit, and also having regard to the proceedings which had taken place in the suit, the rejection of the document by the Courts below was not a proper or judicial exercise of the discretion conferred by O. 7, R. 18. 13 C. W. N 797 and 8 Bom 377 foll. (*Richardson and Beachcroft, JJ.*) JOGENDRA KUMAR GHOSE v. ANANDA CHANDRA MAZUMDAR 44 I. C. 21.

—O. 8, R. 2—*Pleadings—Special period of limitation—Plea not raised in written statement nor considered by first Court—Appellate Court if can dismiss suit on the plea.*

In a suit in ejectment on the ground that plffs. were permanent tenants, the defts. pleaded in their written statements that neither the plffs. nor their predecessors-in-interest ever had any sort of rights or possession over the land in suit within twelve years and that their claim was barred by limitation. No issue was settled as to whether the special rule of limitation in Art. 3 of Sch. III to the B. T. Act applied to the case. The first court decreed the suit but on appeal the suit was dismissed on the ground that it was barred by limitation under Art. 3 of the B. T. Act.

Held, that the special case of limitation under the provisions of Art. 3, Sch. III to the B. T. Act not having been specially pleaded and the facts in support of such a case not being apparent on the face of the record, the Judge of the Appellate Court has no jurisdiction to go into the matter and to enquire whether on certain facts that he had found the suit was barred by limitation. (*Fletcher and Huda, JJ.*) KEDAR NATH MONDAL v. MOHESH CHANDRA KHAN.

28 C. L. J. 216=46 I. C. 787

## C. P. CODE, (1908) O. 8, R. 5.

——— O. 8 R. 5—Power of court to acquire proof of a fact notwithstanding admission by debt in pleadings. See T. P. ACT, S. 59.

(1918) M. W. N. 853.

——— O. 8, R. 5—Scope of—Suit on a mortgage against a minor defendant—Allegation of proper execution of mortgage in plaint not denied in written statement—Issue as to execution of mortgage not raised at the trial nor evidence adduced on point—Decree on mortgage propriety of—Omission to raise issues on question of fact—Effect of.

The scope of O. 8, R. 5 of the C. P. Code is only this, that the omission to deny an allegation of fact in the plaint is not to be taken as an admission in the case of minor defendants and the rule has nothing to do with the conduct of the suit afterwards. In a suit on a mortgage against certain minor debts, their guardian did not deny in his written statement the allegations in the plaint as to the proper execution of the mortgage and their pleader neither asked for an issue nor let in evidence on the question but the whole trial proceeded only on the issues as to limitation and *res judicata*. The Court decreed the suit in favour of the plffs.

Held, that the omission of the debts, to raise an issue as to the execution of the mortgage implied an abandonment of that question at the trial and that it was not incumbent on the court to require proof of execution of the mortgage from the plff., under such circumstances. 26 Bom. 380 dist. 7 M. L. T. 106 ref. (*Abdur Rahim and Bakewell, JJ.*) NAGAPPA v. SIDDALINGAPPA.

35 M. L. J. 372=47 I. C. 589.

——— O. 8, R. 5—Specific denial, absence—Not an admission of plff's claim—Right to call for proof.

In this country a very high standard of pleadings cannot be expected.

The debt, in a suit for possession did not specifically deny the allegation made by the plff that the property sued for formed a portion of a certain taluk. The Munsif, held that there was a constructive admission by debt, of the plff's, title as alleged in the plaint and decreed the suit without considering the evidence adduced on both sides on the question of the title. On appeal the Judge reversed the decision of the Munsif on the ground that there was no such admission on the part of the debt, as would warrant a decision in favour of the plff's, title, especially as the trial Court had required proof of the plff's title in spite of the so-called admission by the debt.

Held, that the decision of the appellate court was correct. (*Fletcher and Huda, JJ.*) NAJA MIA v. ABDUL KADAL.

46 I. C. 878.

——— O. 8, R. 5—Set off—Barred claim if can be pleaded.

## C. P. CODE, (1908) O. 9, R. 3.

A claim which has become barred by limitation at the time of filing of the written statement in a suit is not a debt legally recoverable by the debt, from plff. and cannot therefore, be allowed to be set off. (*Chitty and Walmsley, JJ.*) KANAILAL KUNDU v. NITY SARAN MUKHERJEE.

47 I. C. 938.

——— O. 8, R. 6—Set off—Court fee payable—Advalorem.

A written statement pleading a set off must bear an *advalorem* court fee stamp on the amount of the set-off claimed. (*For, C. J. and Twomey, J.*) M. E. PILLAY v. MAISTRY.

10 Bur. L. T. 242=36 I. C. 957.

——— O. 8, R. 9—Inconsistent case—Not to be allowed to be set up at a late stage—Application to file new written statement on the day before hearing setting up totally inconsistent case—Refusal—Proper exercise of discretion. (*Roe and Coutts, JJ.*) BABU BISHENDAYAL SINGH v. MT. JAISRI KURE.

(1918) Pat. 323.

——— O. 9—Applicability of, to applications under, O. 21 Rr 58 and 100—Claim by strangers—Dismissal for default—Power to restore. See C. P. CODE, O. 9, R. 9 AND O. 21, R. 100

4 Pat. L. W. 102.

——— O. 9—Applicability to.

O. 9 C. P. Code does not apply to execution proceedings 41 Cal. foll. (*Mullick and Thornhill, JJ.*) BABU RITU KOER v. BABU ALAKDEO NARAIN.

1918 Pat. 265.

=5 Pat. L. W. 208=47 I. C. 154.

——— O. 9, Rr. 3 and 4—Dismissal of suit for default of both parties—Refusal to restore—Prior suit—Dismissal of, if a ground.

The mere fact that a case had been previously dismissed for default is no reason for refusing to restore it after a second dismissal. (*Richards, C. J. and Banerjee, J.*) RAMJI DAS v. BHAGWAN DAS.

43 I. C. 180.

——— O. 9, R. 3—Mortgage suit—Dismissal of application for final decree for default of appearance of both parties—Fresh application—Maintainability of.

Where an application for a final decree in a mortgage suit is dismissed for default of appearance of both parties, a fresh application can be made. (*Richards, C. J. and Banerjee, J.*) ARMED KHAN v. GAURA.

40 All 235=

16 A. L. J. 143=43 I. C. 518.

——— O. 9, Rr. 3, 6 and 9—Presence of one suit of six plaintiffs—Appearing plff. general attorney for others—Dismissal of suit for want of prosecution—Dismissal on merits—Second suit on the same cause of action Bar.

On the date fixed for the hearing of a suit the debts, and their pleader did not appear. The plff's pleader also did not appear but one

G. P. CODE, (1908) O. 9, R. 4.

of the plff's was present. He was also the general attorney of the other plffs. The court dismissed the suit for "want of prosecution." The plffs. thereupon applied to have the dismissal set aside but the application was refused on the ground that their remedy was by means of a separate suit. They consequently brought a second suit claiming the same relief they claimed in the former suit. *Held*, that inasmuch as all the plffs. appeared and must be deemed to have been present through the plff. who had appeared and was general attorney for the non-appearing plffs. the suit must be regarded as having been dismissed on the merits not under O. 9, R. 3 of the C. P. Code and a second suit on the same cause of action was therefore barred. (*Banerji and Abdul Raoof, JJ.*) **HINGO SINGH v. JURI SINGH.**

40 All 590=18 A. L. J. 462=46 I. C. 390

—O. 9, R. 4—Execution of decree—Appeal—Dismissal for default—Sufficient cause—Allegations not supported by affidavit.

An application to execute decree was dismissed for default. No question was made to set aside the order passed *ex parte* but an appeal was filed on the allegation, that the appellant had gone to call his pleader and learnt on his return that the application was dismissed. No affidavit from the pleader was filed.

*Held*, that in the absence of an affidavit from the pleader the appeal must be dismissed. It was the duty of the appellant to file an application in the lower court either soon after the *ex parte* order under appeal was passed against him or on the following day to set aside the order. (*Shah Din, J.*) **SHIKH PIARA v. NITYA NAND.** 64 P. L. R. 1918.

—O. 9, R. 4—Refusal to set aside dismissal of suit—No appeal.

No appeal lies against an order refusing to set aside a dismissal of a suit under R. 4 of O. 9 of the C. P. Code. (*Mookerjee and Beachcroft, JJ.*) **PITAMBAR DHAYAL v. RAI BAIDYA-NATH SHET.** 27 C. L. J. 117=23 I. C. 374.

—O. 9, R. 4—Refusal to set aside dismissal—Not appealable.

No appeal lies from an order under O. 9, R. 4, refusing to set aside the dismissal of a suit under O. 9, R. 3. (*Richards, C. J. and Banerji, J.*) **RAMJI DAS v. BHAGWAN DAS.**

43 I. C. 180.

—O. 9, Rr. 6 and 9—Presence of one out of six plffs.—Appearing plff. general attorney for others—Dismissal of suit for want of prosecution—Dismissal on merits—Second suit on the same cause of action—Bar. See C. P. CODE, O. 9, RR. 3, 6 AND 9.

16. A. L. J. 462

—O. 9, R. 8—Execution proceedings—Non-appearance of decree-holder—Procedure.

G. P. CODE, (1908) O. 9, R. 9.

Where an application for execution is preferred by a person in claiming to be the heir of the decree-holder and the judgment debtor objects to execution, it is not obligatory on the court to dismiss the execution application if on the date when the execution application is called on for hearing the applicant does not appear. O. 9, of the C. P. C. does not apply to execution proceedings. (*Mullick and Thornhill, JJ.*) **BABNI RITU KUAB v. BALM ALAKDEO NABAIN SINHA.**

(1918) Pat. 265=5 Pat. L. W. 208=47 I. C. 155

—O. 9, Rr. 8 and 9—Suit—Appearance of plaintiff—What amounts to—Plaintiff's pleader absent but plaintiff present in court though not appearing in person—Dismissal of suit—Effect—Application for restoration—Maintainability.

Where the plaintiff is not appearing in person and his pleader is absent, the mere presence of the plaintiff in court is an appearance and the dismissal of the suit in such a case was a dismissal for default within the meaning of O. 9, R. 8, of the Code. (*Roe and Jwala Prasad, JJ.*) **LALJI SAHA v. LACHMI NABAIN SINGH.** 3 Pat. L. J. 355=47 I. C. 186.

—O. 9, R. 9 and O. 17, R. 3—Application on day fixed for hearing by plff's pleader for postponement on the ground of plff's inability to attend owing to illness—Dismissal of suit—Application to set aside—Procedure—Duty of Court See. 1917 DIG COL 226; **DURGA KANTA SARMA v. ANTO KOCH.**

22 C. W. N. 671=42 I. C. 649.

—O. 9, R. 9—Application to set aside dismissal for default Court must act on evidence. See 1917 DIG. COL. 225 **DURGA KANTA SARMA v. ANTO KOCH.**

22 C. W. N. 671=42 I. C. 649.

—O. 9, R. 9—Award, *ex parte*—Setting aside—Provisions of R. 9 C. P. C. not applicable—Proper course to remit award to arbitrators for re-consideration. See C. P. CODE. SCH. II, PARA 14.

46 I. C. 195.

—O. 9, R. 9 and O. 21, R. 100—Claim dismissal of for default—Application to restore competency of.

Where a person who is a stranger to a decree made a claim under O. 21, R. 100 of the C. P. Code and his claim was dismissed for non-appearance on the date fixed for hearing and he made an application under O. 9, R. 9, of the C. P. Code for re-hearing of the case and the Munsif restored the case for re-hearing

*Held*, that the authority of 17 All. 106 does not preclude an application of the ordinary procedure in suits to cases where a party not

## C. P. CODE, (1908) O. 9, R. 9.

bound by the decree has instituted proceedings for the release of property from execution, which is in nonsense an application for execution.

An application under O 21, R. 100 is in the nature of a summary suit and the provisions of the C. P. Code should apply 41 Cal. 1 not foll. (*Roe and Jwala Prasad JJ*) SATYA NARAYAN LAL v. GOBIND SAHAY

3 Pat L. J. 260=4 Pat L. W. 102=43 I. C. 951

— O. 9, R. 9—Dismissal of suit for default—Application to restore suit—Order dismissing—Appeal. See (1917) DIG. COL. 226; JAGDISH NARAIN PRASAD SINGH v. HARBANS NARAIN SINGH. 2 Pat L. J. 720=

2 Pat L. W. 221=43 I. C. 54.

— O. 9, R. 9—Dismissal of suit in the presence of pleader of plff.—Not a dismissal for default—Application to set aside incompetent. See C. P. CODE, O. 3 R. 1 AND O. 9, R. 9.

46 I. C. 492.

— O. 9, R. 12—Party when bound to appear—Consequence of non-appearance. See (1917) DIG. COL. 227; VAIGUNTHAMMAL v. VALLIAMMAL. 41 Mad 256=

(1917) M. W. N. 743=6 L. W. 337=41 I. C. 749.

— O. 9, R. 13 and O. 43, R. 1 (d)—Compromise decree—Application to set aside by person not a party—Refusal—Order appealable. See C. P. CODE, O. 43, R. 1 (d).

22 C. W. N. 571.

— O. 9, R. 13. and O. 17, R. 2—Decree against minor—Non-service of summons—Subsequent suit to set aside decree if competent.

Mere non-service of summons on a party to a suit is not a sufficient ground for setting aside the decree in a fresh suit unless it is part of a scheme of fraud.

If an *ex-parte* decree is passed against a minor under O. 17, R. 2 of the C. P. Code the remedy of the minor acting through his guardian lies in the provisions of O. 9, R. 13 of the code, and he cannot obtain relief in a separate suit unless the conduct of the guardian has resulted in such an injustice to the minor as would amount to gross negligence on the part of the guardian.

A minor once represented by a guardian does not cease to be so represented merely because an *ex-parte* decree is passed against him owing to the absence of his guardian. (*Batten O. J. C.*) VITHORA v. SEGO.

45 I. C. 852.

— O. 9, R. 13—*Ex-parte* decree—Setting aside—No proper service of summons—No order under O. 5, R. 19.

## C. P. CODE, (1908) O. 11, R. 2.

Where an *ex-parte* decree is passed against a deft., then unless he was duly served and service declared sufficient by O. 5, R. 19 C.P.C. he is entitled as of right, under R. 13 of O. 9 of the C. P. Code, to have the decree set aside. (*Richards, C. J. and Banerjee, J.*) CHAMPAT SINGH v. MAHABIR PRASAD.

43 I. C. 632.

— O. 9, R. 13—*Ex-parte* decree against a dead man—Effect—Application by his representative to be brought on record as legal representative—Limitation.

A dead man is not a defaulter, and in such a case the representative can get the usual period of six months for applying to be brought on to the record, the order of dismissal for default being inappropriate and inoperative as a bar. (*Chevis, J.*) DAULAT RAI v. JAGAT RAM.

96 P. R. 1918=

47 I. C. 962.

— O. 9, R. 13—*Ex parte* decree—Setting aside—Order conditional on payment of costs within prescribed period—Refusal to extend time—Effect of. See (1917) DIG. COL. 230. CHANDRA GOUNDAN v. PALANIAPPA GOUN-DAN. 23 M. L. T. 7=

(1917) M. W. N. 870=42 I. C. 961.

— O. 9, R. 13—*Ex-parte* decree—What is—Pleader asking for time and retiring from case on courts not granting time—Decree against defendant expressly stating it was after contest—Application to set aside decree—Maintainability. See C. P. CODE, O. 17, R. 2, AND 3. (1918) Pat. 236.

— O. 9, R. 13—*Ex-parte* final decree in mortgage suit—Application to set aside maintainability—Decree in R. 13.

An application to set aside a final decree in a mortgage suit, alleged to be passed *ex parte*, is maintainable under the provisions of O. 9, R. 13 of the C. P. Code. There is nothing to limit the word decree in O. 9, R. 13 to the preliminary decree in cases where the law contemplates preliminary and final decrees. (*Abdur Rahim and Kumaraswami Sastri, JJ.*) KANAKASUNDBAM PILLAI v. SOMASUNDARAM PILLAI. 35 M. L. J. 375=48 I. C. 71.

— O. 10, R. 4—Parties—Personal Attendance—Order requiring—Validity—Conditions.

The parties to suits should not be required to attend the court under O. 10, R. 4 of the C. P. Code, unless questions material to the case which are to be answered have first been put to their pleaders and they have been unable or have refused to answer them. (*Stuart and Kanhaiya Lal, A J.C.*) SADESHWAR NARAIN v. QADIR BAKHSH. 21 O. C. 252=

48 I. C. 269.

— O. 11, Rr 2, 6, 7 and 21—Practices—Interrogatories—Suit for breach of contract—Irrelevant interrogatories.

## C. P. CODE, (1908) O. 11, R. 21.

In a suit to recover damages on a breach of a contract, the deft. put in a list of ten interrogatories for the plff. to answer. The plff. answered three and objected to the rest as being irrelevant. Later on the deft. put in an application in which it was prayed that the plff. be ordered to answer the remaining interrogatories and the court thereupon passed an *ex-parte* order to this effect. "The plff. be asked to answer the interrogatories. If he fails to comply he will do so at his own risk." The plff. subsequently presented another application in which the court was asked to reconsider the *ex-parte* order and in which the former objection was re-terated. The Court refused to reconsider the *ex-parte* order and, said that the order was not "prejudicial to the plff." The deft. then put in an application asking the court to dismiss the suit which was then set down for hearing on a subsequent date. On that date the court held that the interrogatories were not irrelevant, and without giving the plff. a further opportunity of answering them, it dismissed the suit.

*Held*, that the order of the court was wrong inasmuch as it was not justified by anything in O. 11 of the C. P. Code in postponing its adjudication on the question whether the interrogatories were relevant or not to the date of the hearing and then refusing the plff. the option of complying or refusing to comply with a clear and specific order directing him to answer such interrogatories as might be held to be relevant.

*Held also*, that on objection under R. 6 of O. 11 required adjudication by the court, that the rule gave the plff. an alternative remedy and not that he was to ask the interrogatories to which he objected to be struck out. (*Banerjee and Piggott, JJ.*) BHAGWAN DAS GONDKA v. RAM KUMAR RAMESHWAR DAS. 15 A. L. J. 762=46 I. C. 650.

—O. 11, R. 21—Penalty for non-discovery—Infliction of, after case is closed, improper.

The infliction of the penalty imposed by O. 11, R. 21, C. P. C., for non-discovery, after the whole trial is closed, is improper. (*Batten, A. J. C.*) DINBAI v. FROMROZ. 43 I. C. 71.

—O. 12, R. 6—Admission of portion of claim—Judgment on that admission—Discretion of court—Trial with regard to remainder of the claim.

Under O. 12, R. 6 of the C. P. Code, 1908, though the party has no absolute right, the Court has got discretion to pass judgment for the amount admitted and to allow the plff. to prove the balance of his claim in the ordinary way. (*Sanderson, C. J. and Meekjee, J.*) PREMSEKH DAS ASSARAM v. UDAIRAM GUNGA BAX. 45 Cal 133=22 C. W. N. 204=28 C. L. J. 498=44 I. C. 233.

## C. P. CODE, (1908) O. 13, R. 10.

—O. 12, R. 6 and O. 43, R. 1 (m)—Order rejecting petition to pass a decree in terms of defendant's admission—Order not appealable See C. P. CODE O. 43, R. 1 (m) 44 I. C. 143.

—O. 13, Rr. 1 and 2—Documentary evidence—Non-production of at first hearing—Discretion of Court to admit in evidence

Documentary evidence which has not been produced at the first hearing of a suit in accordance with O. 13, R. 11 may be admitted at a later stage at the discretion of the Court. (*Mr. Ameer Ali*) INAMBANDI v. MUTSADDI. 35 M. L. J. 422=22 C. W. N. 50=28 C. L. J. 409=16 A. L. J. 800=20 Bom. L. R. 1022=5 Pat. L. W. 276=24 M. L. T. 330=47 I. C. 513=45 I. A. 73 (P. C.)

—O. 13, Rr. 1 and 2 and O. 17, Rr. 1 and 2—Hearing of the suit—Evidence, production of—Delay if reasonable—Discretion—Appellate Court—Interference by.

O. 17, R. 1 of the C. P. Code which gives a Court power to adjourn the hearing of a suit draws a distinction between the hearing of the suit and the hearing of the evidence.

*Held*, therefore, that the trial Court had under O. 17, R. 2 of the Code, a discretion to refuse to accept the documentary evidence on which the plffs intended to rely, and which were not produced before the date fixed for the hearing of the suit, on which date, the parties had been directed to produce their documentary evidence though the hearing resulted only in an adjournment.

*Held also*, that the Appellate Court ought not to interfere with the discretion exercised by the trial Court on the question whether the delay in producing the documentary evidence was or was not unreasonable, unless it is satisfied that the trial Court exercised the discretion improperly or capriciously. (*Chitty and Richardson, JJ.*) BISWANATH SINHA v. KALI CHARAN SINHA. 27 C. L. J. 119=46 I. C. 246.

—O. 13, R. 4—Documents—Admission of in evidence—Duty of Court—Procedure.

Where documentary evidence is produced in a case the Judge is required by O. 13, R. 4 of the C. P. Code to endorse with his own hand a statement on each document that it is proved against or admitted by, the person against whom it is used, and until this is done the document should not be filed as part of the record. The mere production of a document and the handing it over to an officer of the Court to put it on the file is not sufficient. (*Knox, J.*) SHYAM LAL v. RAM CHARAN. 43 I. C. 525.

—O. 13, R. 10 and O. 41, R. 23—Summary rejection of application to send for record—Remand by Appellate Court.

**C. P. CODE, (1908) O. 16, R. 20.**

Where in a suit by one co-sharer against another co sharer for the settlement of accounts under S 165 of the Agra Tenancy Act the deft. failed to produce the accounts, the plff. applied to the court under O 13 R 10 of the C P Code to send for the patwari's records and to appoint a Commissioner to prepare a statement of the collections made by the deft. After examining the records. The plff stated in the application that duly authenticated copies of the records could not be obtained without unreasonable delay and expense. The court rejected the application summarily and eventually dismissed the suit.

*Held*, that the suit had not been properly tried and should be remanded to the First Court or trial according to the law. (*Banerjee and Ryves, JJ.*) **MAHAMMAD ABDUL AZIZ v. MAHAMMAD ABDUL JALIL.** 43 I C 57.

— O. 16 R. 20—Document production of—Refusal to exhibit as evidence—Effect of.

R. 20 of O. 16 of the C.P. Code authorizes the Court to Pronounce Judgment against a person who without lawful excuse declines to produce the document then and there in his possession or power; if the document is produced, the requirement of the law is fulfilled.

Where the plff. who was present in Court on being asked by Court, produced a certified copy of a judgment in his possession but declined to exhibit it as evidence in the case.

*Held*, that the Court could not pass an order for dismissal of the suit under O. 16 R. 20 of the C P. Code, (*Mookenjee and Walmsley, JJ.*) **RADHANATH SASMAL v. UTIAM CHANDRA MAITI.**

28 C. L. J. 24.—46 I. C. 879

— O. 17 R. 1—Order refusing adjournment—Discretionary relief—Appellate Court—No interference.

Under Rule 1 (1) of O 17 of the C P. Code a Court may at anytime grant an adjournment if sufficient cause is shown but no appeal is allowed from an order refusing adjournment and even where the refusal is impeached in an appeal from the decree, an Appellate Court is generally disinclined to interfere with the trial Judge's exercise of his discretion. (*Drake Brokman J. C.*) **LAXMAN RAO v. VITHOBA.**

45 I. C. 898.

— O. 17 Rr. 2 and 3—Applicability—Appearance of pleader—What amounts to—Defendant pleader asking for time and stating no instructions on courts declining to grant time—Decree against deft—Decree expressly stating that it was after contest—Application to set aside decree—Maintainability—C. P. C. O 9, R. 13—Applicability.

Where a joint petition for time filed by the plff and the deft. was rejected by the trial Court and the plff. was put into the witness box and examined in chief, while the deft's.

**C. P. CODE, (1908) O. 17, Rr. 2 and 8.**

pleader declined to cross-examine, saying that he had no instructions save to ask for time and the trial Court thereon passed the following order:—"Case opened, Plff. examined—Arguments heard. Preliminary decree passed on contest." The deft filed an application for re-hearing of the suit under O. 9, R. 13 and it was rejected on the ground that rule was not applicable as the decree was passed on contest.

*Held*, on appeal that the mere fact that the trial Court said that the decree was made on contest would not make it a decree on contest; the High Court has to look into the circumstances and decide whether it was on contest or not.

Where a pleader has no instructions but to ask for time, his sitting in the court-room is not an appearance.

O. 9 R. 13 does not apply to cases decided under O. 17, R. 3.

It does not make a decision under O. 17 R. 3 because the lower Court erroneously imagined that it was acting under that section. The decision of the suit forthwith in spite of the default contemplated in O. 17, R. 4, is limited to cases in which there is already prior to the default sufficient material for a decision. If there is no material on the record at all the case would be obviously dismissed against the plff. If it is necessary to bring on the record evidence sufficient to give the plff, a decree, it could not be said that the decision was made forthwith. When what happened was not a decision made forthwith but a hearing of the plff's witness and a decision in the absence of the defts. it was a proceeding under O. 17, R. 2 and not under O. 17 R. 3 and O. 9, R 13 applies to it. (*Roe and Coultis, JJ.*) **RAM KISHUN LAL v. JATADHARI LAL.**

3 Pat. L. J. 481—  
(1918) Pat. 236—46 I. C. 488.

— O. 17, Rr. 2 and 8—Applicability—Existence of sufficient material on record to enable court to pronounce judgment—Effect. (*Shadi Lal and Wilberforce, JJ.*) **HARGOPAL v. HARISH CHANDAR.**

66 P. L. R. 1918—169 P. W. R 1918—  
47 I. C. 596.

— O. 17 R. 2—Delay in production of evidence during hearing of suit—Discretion, exercise of Interference by Appellate Court. See C. P. CODE, O. 13, Rr. 1 AND 2.

27 C. L. J 119.

— O. 17 Rr. 2 and 3—Dismissal of suit for plff's failure to produce evidence—Decree—Second appeal, lies. See C. P. CODE, S. 2 (2). eic. 48 I. C. 200.

— O 17, Rr. 2 and 3—Scope of—Rules independent and mutually exclusive—Rule 3 applies only when parties are present on the adjourned date.

## C. P. CODE, (1908) O. 17, R. 3.

*Per Sadasiva Aiyar and Kumaraswami Sastri, JJ.*, Rules 1 and 3 of Order 17 of the C. P. C. are independent and where the requisites of rule 2 are satisfied that rule and not rule 3 should be applied, although in addition to the absence of the party circumstances exist which would satisfy the requirements of R. 3.

Rule 3 applies only to cases where the parties are present and have not satisfied the court as to the existence of any adequate reason for their not having done what they were directed to do. 33 M. 241, foll.

*Per Chief Justice* : When a case is called and the defendant is absent and the Court resolves to proceed against him *ex-parte* there is nothing to prevent the court from applying the provisions of O. 17 R. 3 and disposing of the suit notwithstanding the defendant's failure to do what he had been granted time to do but that disposal will be none the less *ex-parte* and the decree will be liable to be set aside under O. 9 R. 13.

There is no conflict at all between the two Rules O. 17 rules 2 and 3, and each may be fully applied at the proper stage of the case.

The decision in 33 Mad 241 in so far as it laid down that the two rules must be read as mutually exclusive went too far. (*Wallis, C. J., Sadasiva Aiyer and Kumaraswami Sastri, JJ.*) *PICHAMMA v. SREERAMULU*.

41 Mad. 286=34 M. L. J. 24=  
23 M. L. T. 1=(1918) M. W. N. 92=  
43 I. C. 566 (F. B.)

—O. 17, R. 3—Default in paying translation or copying charges—Dismissal of appeal—Power of Court.

A Court has power to dismiss a suit or appeal where the materials essential for the progress of the case such as translation of vernacular documents, preparation of copies, etc., are wanting owing to the plaintiff's or appellant's default. (*Twomey, C. J. and Maung Kin, J.*) *MA ON BWIN v. MA SEWE MI*. 47 I. C. 691.

—O. 17 R. 3—Dismissal of suit for plff's failure to produce evidence—Decree—Second appeal. See C. P. Code, S. 2 (2) etc.

45 I. C. 200.

—O. 18 R. 2—Death of party before hearing of arguments—Necessity of bringing legal representative on record. See C. P. CODE, O. 22, R. 6.

43 I. C. 161.

—O. 18, Rr. 5 and 6—Deposition—Object of provision requiring deposition to be read over to ensure accuracy. See EVIDENCE ACT, SS. 80 and 91.

27 G. L. J. 377.

—O. 18, R. 5—Object of—Substantial compliance with provision of rule—What amounts to non-compliance with provision of rule—Effect on its admissibility in evidence in petition for sanction to prosecute deponent.

## C. P. CODE, (1908) O. 20, R. 6.

The provisions of O. 18, R. 5 of the Code would be sufficiently complied with if the deposition were read over in a place within the sight of the presiding Judge and from which the witness could draw the attention of the Judge to any mistakes or omissions discovered by him. *Held*, further that even if a deposition was not read over in the manner and circumstances specified, by O. 18, R. 5 it would not be altogether inadmissible in evidence, though that fact might affect its evidentiary value. Such deposition is admissible in evidence in a petition for sanction to prosecute the deponent. (*Ayling and Phillips, JJ.*) *MEANGO v. BAVIAH*. 23 M. L. T. 242=(1918) M. W. N. 239=7 L. W. 435=  
45 I. C. 597=19 Cr. L. J. 603.

—O. 18, R. 18—Local inspection by Court—Examination of witness by Judge.

Where at the instance of the plff. the Munsiff held a local inspection, and in the course thereof at the instance of both the parties he examined a man whose statements he used as confirming his impression formed independently of them.

*Held*, that it was not open to any of the parties afterwards to turn round and say that the Munsiff ought not to have taken those statements. (*Dawson, Miller, C. J. and Mullick, J.*) *NARAIN SINGH v. GABURAIL URSON* (1918) Pat. 131=4 Pat. L. W. 189=  
44 I. C. 262

—O. 20, Rr. 1, 2 and 3—High Court—Case heard by a Bench of two Judges—Pro. nouncement of judgment of colleague on leave by single Judge—Judgment valid. See PRACTICE, HIGH COURT. 22 G. W. N. 263.

—O. 20, R. 2—Judgment written and signed by Judge who tried the case—Judgment pronounced in court by his colleague—C. P. Code, S. 99.

A judgment written and signed by the Judge who heard the case does not become invalid merely because it is read out in open Court by his colleague.

Even if such a procedure is unauthorized by the terms of C. P. Code, it is a mere irregularity not affecting the merits of the case and is clearly covered by S. 99 of the C. P. Code. (*Fletcher and Huda, JJ.*) *SHIEKH ALA BUX v. SHIEKH KADIR AHMED*. 46 I. C. 618.

—O. 20, R. 6—Form of decree—Suit on promissory note—Conditional decree on giving indemnity—Propriety of. See PROMISSORY NOTE, SUIT ON. 43 I. C. 551.

—O. 20 R. 6 (2)—Decree for arrears of rent—Restriction on mode of execution, improper.

A Court decreeing a suit for arrears of rent has no right to impose a condition as to the

C. P. CODE, (1908) O. 20, R. 11.

mode of execution of the decree by making the decree executable only against the defaulting jama. (*Chitty and Smither, J.J.*) CHANDRA KUMAR ROY CHOWDHURY v. ASWINI KUMAR DAS. 45 I. C. 250.

—O. 20, R. 11 (2)—Time granted for payment of decree on condition of paying higher interest—Disallowance of higher interest as penalty.

Where one of the conditions of the granting of time to pay the decretal amount was that the amount of interest should be increased from 6 per cent. to 12 per cent. per annum and although it received the sanction of the Court, yet as the increase in the rate of interest seemed to be a penalty the High Court disallowed the increased rate of interest. (*Sharfuddin and Rao, J.J.*) RAI BENODE BEHARY BOSE v. HIRA SINGH. (1918) Pat. 76= 44 I. C. 726.

—O. 20, R. 12—Mesne profits—Duty of Court to ascertain in the course of the suit itself and to pass final decree—Question not to be left to execution—Difference between the old Code and the new. See RES JUDICATA, MESNE PROFITS. 16 A. L. J. 182.

—O. 20, R. 12—Partition suit—Mesne profits—Decree for, form of.

In a partition suit the award of profits prior to plaint should be made in the decree which gives possession, that is, the final decree, and the profits after it may be the subject of a direction in that decree for an enquiry and of a separate final decree after its conclusion. (*Oldfield, J.*) VANKAMAMIDI MAHALAKSHMAMMA v. VENKAMAMIDI RAJAMMA 43 I. C. 458.

—O. 20, R. 13—Administration decree—Procedure—Secured and unsecured creditors—Rights of—Crown debts—Priority.

The administration of an estate under a decree of Court is governed by O. 20, R. 13 (2) of the C. P. Code under which the same rules have to be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities proveable, as are in force in respect to estates of persons adjudged or declared insolvents, and when the administration is under a decree of the High Court, under S. 49 of the Pres. Towns Insol. Act, all debts due to the Crown shall be paid in priority to all other debts. (*Chaudhuri, J.*) THE BANK OF UPPER INDIA v. THE ADMINISTRATOR-GENERAL OF BENGAL. 45 Cal. 653=22 C. W. N. 793= 47 I. C. 529.

—O. 20, R. 14—Pre-emption Decree—Expiry of time fixed—No power to extend time. See PRE-EMPTION DECREE. 16 A. L. J. 892.

C. P. CODE, (1908) O. 21, R. 1.

—O. 20, R. 14—Pre-emption Suit—Appeal by vendee—Pre-emptor, failure of to pay extra sum directed by Appellate Court, effect of.

In an appeal by the vendee in a pre-emption suit the pre-emptor was directed by the Appellate Court to pay into Court an extra sum within the time fixed by the original Court. The pre-emptor had twelve days after the date of this order within which the amount could be paid into Court, but he failed to make the payment.

Held, that the Consequence of the pre-emptor's default was that the decree be came final and that his suit must be dismissed. (*Rattigan C. J.*) TARA BAZ v. HAMID AND CO. 92 P. L. R. 1918=48 I. C. 470.

—O. 20, R. 15—Date of dissolution of partnership—Declaration in decree—Judicial discretion.

The discretion given to a Court by O. 20, R. 15 of the C. P. Code to fix a date from which a partnership is to be declared dissolved is a judicial and not an arbitrary exercise of discretion.

Ordinarily the Court should direct dissolution from the date of any notice 'given' in that behalf by one of the partners from the date of the plaint, and where the parties have been at arm's length since the filing of the plaint, it should not declare that the partnership should stand dissolved from the date of the judgment. (*Ayling and Seshagiri Iyer, J.J.*) SAMBASIVA AIYAR v. GANAPATHY AIYAR. 45 I. C. 727.

—O. 20, R. 15—Suit for dissolution of partnership and accounts—Preliminary and final decree—Opportunity to produce accounts to be given to parties.

In a suit for dissolution of a partnership and for accounts sufficient time should be given to the parties to produce accounts and a final decree should be passed on evidence taken by the Court. It will not do to pass an *ex parte* final decree on the mere statements of the plff. (*Rattigan, C. J. and Shah, Din, J.*) RADHA KISHEN v. TIRATHRAM. 31 P. L. R. 1918= 31 P. W. R. 1918=43 I. C. 718.

—O. 20, R. 13 (2)—Partition—Decree—Preliminary and final—Supplemental final decree—Power of court to pass. See PARTITION DECREE. 44 I. C. 671.

—O. 21, R. 1—Joint decree-holders—Payment to one—Certificate by him, if a discharge—Right of other decree-holders to execute decree.

A payment to two out of 4 partners who hold a decree jointly is not a discharge of the decree and the certificates of payment given by

## C. P. CODE, (1908) O. 21, R. 1.

them cannot bind the others, unless they had given authority, express or implied, to the two partners to certify satisfaction. (1916) 1 M. W. N. 471 ref.

*Per Napier, J.* Where payment has been made to all the partners, certificates of some of them would be legally valid certificates of satisfaction. To allow one of several joint decree-holders who have received payment to come in and apply for execution after the other decree-holders have certified discharge of the debt would open the door to fraud and defeat the object of the section which is not aimed at the prevention of payment out of court but merely requires notice of it to prevent execution issuing. (*Sadasiva Iyer and Napier, JJ.*) THIMMA REDDI v. SUBBA REDDI.

(1918) M. W. N. 567.

———— O. 21, R. 1—Money decree—Decree for mesne profits.

A decree for mesne profits is a decree for money. (*Mullick and Thornhill, JJ.*) LACHMAN OJHA v. CHARITAR OJHA. (1918) Pat. 257.

==5 Pat. L. W. 191=  
48 I. C. 183

———— O. 21, R. 2—Adjustment certified under—Effect on courts power. See C. P. CODE O. 34, Rr. 2 (c) and 5. 35 M. L. J. 579.

———— O. 21, R. 2—Applicability of Agreement between parties that no decree should be obtained therein—Not to be gone into in execution See C. P. Code S. 47 and O. 21, R. 2 (1918) M. W. N. 547==8 L. W. 265.

———— O. 21, R. 2—Attachment by decree-holders of a decree of the judgment-debtor—Application by latter to record satisfaction of his decree—Objection by attaching decree-holder of collusion and fraud—Court cannot allow withdrawal of application to record satisfaction. See C. P. CODE, S. 115 O. 21, R. 2. 35 M. L. J. 253.

———— O. 21, R. 2—Inchoate contract to adjust decree—Not a bar to execution.

An inchoate contract, which, if completed would bar the execution of a decree cannot be pleaded as a bar to execution and the judgment-debtor cannot claim that the contract should be completed and then be evoked in bar of execution. (*Seshagiri Iyer and Bakewell, JJ.*) RAMAKRISHNA KADIVELUSAMI v. EASTERN DEVELOPMENT CORPORATION LTD. 43 I. C. 537.

———— O. 21, R. 2—Satisfaction of decree—Decree-holder's application for entering up—Procedure—Limitation—Notice to judgment-debtor—Necessity—Locus standi of judgment-debtor to oppose application.

*Held*, that O. 21, R. 2 of the C. P. Code does not contemplate an enquiry being made into the truth of the statements made by the

## C. P. CODE, (1908) O. 21, R. 2.

decree-holder where he comes to Court to certify a payment and the judgment debtor has no *locus standi* to question the right of the decree-holder when he (D. H.) makes no application under that provision of law.

No particular time is fixed during which the decree-holder is bound to give this information to the Court.

When the decree-holder comes and informs the Court that certain payments have been made all that the court has to do is to make a note of the statements made by the decree-holder and no notice need issue to the judgment-debtor even if the decree-holder asks this to be done.

*Held* further, that these certificates are not conclusive in any way and the judgment-debtor is entitled to show either that no such payments were in reality made or that if they were made they do not operate to extend the period of limitation for the execution of the decree. (*Lindsay, J. C.*) HAIDER MIRZA v. KAILASE NARAIN DHAR. 21 O. C. 161==47 I. C. 177.

———— O. 21, R. 2—Uncertified payment executing court or court hearing suit precluded from recognizing payment—Fraud, effect of. See C. P. CODE. SS. 47, and 151. 26 Bom. L. R. 929,

———— O. 21, Rr. 2 (1) and (3)—Scope of—Certified or recorded—Meaning of—Form of certificate—Omission to record, meaning of.

A certificate under O. 21, R. 2 need not be in any particular form and the mention of payment to the court at any time by the decree-holder, as for example in his execution petition is a sufficient certificate. (1916) 1 M. W. N. 471 Ref.

The word "certified or recorded" in O. 21, R. 2 (3), do not mean (certified and recorded) where there is a certificate by the decree-holder under sub. R. (1). The mere neglect of the court's duty to record cannot prejudice the judgment-debtor. The record by the court being formal matter may be made at any time or even be treated as having been made.

*Per Napier, J.* The real question is whether there had in fact been a discharge and whether the fact of discharge had been brought to the notice of the court for the purpose of staying further execution proceedings. (*Sadasiva Aiyar and Napier, JJ.*) THIMMA REDDI v. SUBBA REDDIAR (1918) M. W. N. 507.

———— O. 21, R. 2—Uncertified satisfaction—Fraud on court—Power of court to take cognizance of.

During the course of an execution the decree was satisfied out of Court but the satisfaction was not certified to or brought to the notice of the Court. The decree-holder brought the equity of redemption belonging to the judgment-debtor to sale and purchased it himself.

C. P. CODE, (1908) O. 21, R. 5.

*Held*, that the execution sale was a nullity inasmuch as in failing to certify the satisfaction of the decree to the Court, the decree-holder had committed a fraud on the Court, and that therefore the judgment-debtor was entitled to redeem the property. (*Lindsay, J.C.*)  
GHASI RAM v. DALED SINGH.

5 O. L. J. 92=45 I. C. 222.

—O. 21, Rr. 5, 8 and 15—Joint decree-holders—Transfer of one-third of the decree to another Court for execution—Execution of whole decree, validity of. See (1917) DIG. COL. 239; PRAKASH CHANDRA SARKAR v. CANDE RAM NARAIN.

3 Pat. L. W. 247=43 I. C. 186.

—O. 21, R. 8—Decree—Transmission for execution to Dt. Court—Transfer by it of decree to Sub-Court of A for execution—Sale by that Court in execution—Validity—Jurisdiction—Transfer, prior to sale, of territorial jurisdiction over property to Sub-Court of B—Property within territorial jurisdiction of Sub-Court of A at time of transfer of decree—Effect on pending proceedings—Effect on, of transfer of territorial jurisdiction over property concerned. See (1917) DIG. COL. 239; VISWANATHAN CHETTY v. MURGUAPPA CHETTY. 33 M. L. J. 750=

23 M. L. T. 24=(1918) M. W. N. 132=

43 I. C. 79.

—O. 21, R. 14—Mortgage decree—Application for attachment unnecessary in execution.

A preliminary attachment is not necessary in cases where an application is made for sale in execution of a decree passed for sale of mortgaged property, and therefore O. 21, R. 14 of the C. P. Code does not apply to such an application. (*Daniels, A. J. C.*) IQBAL NARAIN v. JASKARAN. 47 I. C. 639.

—O. 21, Rr. 15 and 19. (b)—Cross claims under one decree—Execution of.

In an application for execution of a decree deducting the amounts due in respect of cross claims under the decree the Court under the provisions of O. 21, R. 19 (b) of the C. P. Code should first ascertain what amounts were due from each party to the other and thereafter allow execution to proceed for the difference, making such order as is necessary for protecting the interests of the persons who had not joined in the application for execution. (*Tenon and Neubould, JJ.*) RAM LAL MANDAL v. ASHUTOSH MANDAL.

44 I. C. 445.

—O. 21, R. 15—Joint decree-holders—Death of one—Right of survivors to execute decree—Claim by representative of deceased to be brought on record—Procedure.

On the death of one of several decree-holders the surviving decree-holders are entitled to

C. P. CODE, (1908) O. 21, R. 16.

execute the decree for their own benefit and for the benefit of the legal representatives of the deceased joint decree-holder, under O. 21, R. 15 C. P. C. If in the course of execution, any person claims to be brought on the record as the heir of the deceased, the court should enquire into the matter and dispose of it according to law. (*Abdur Rahim and Oldfield, JJ.*) POTTAMMA v. AUDINARAYANA. 43 I. C. 1008.

—O. 21, R. 15—Joint decree-holder—Transferee of the interest of some of them—Right to apply

A transferee of the interest of some of several joint decree-holders ought to apply for the execution of the decree for the benefit of himself and the other plfs. under O. 21, R. 15. (*Sadasiva Iyer and Napier, JJ.*) THIMMA REDDI v. SUBBA REDDI, (1918) M. W. N. 597.

—O. 21, R. 16—Applicability—Companies Act—S. 186—Order for payment under—Right to enforce—Right of transferee—Recognition of transfer—Necessity—Application to which court must be made. See COMPANIES ACT, SS. 186, 200, and 201.

92 P. R. 1918.

—O. 21, R. 16—Assignee of decree—Benamidar for another—Rights of benamidar assignee to execute decree—Matter to be enquired into by the Court.

*Per Sadasiva Iyer, J.* An assignee of a decree who is a benamidar of the real decree-holder assignor, is entitled to execute the decree in his own name at least in cases where no title to immoveable property is in question.

*Per Bakewell, J.* The question how far a person to whom a decree is transferred by assignment can execute the decree is concluded by the provisions of O. 21, R. 16 of the C. P. Code and the only matter for enquiry by the High Court in an application for execution by such assignee is any objection by the assignor or the debtor to the execution of the assignment.

*Per Sadasiva Iyer, J.* Where it is practically admitted that the real beneficiary owner of a decree purposely assigned the decree in the name of another in order to enable the latter to execute the decree for the benefit of the former, the latter (benamidar) would be entitled to execute the decree, the assignment constituting him a trustee for the former. (*Sadasiva Iyer and Bakewell, JJ.*) CHELLAM CHETTI v. SEENI CHETTI.

(1918) M. W. N. 226=7 L. W. 221=

43 I. C. 801.

—O. 21, R. 16—Assignment of decree—Consideration, absence of—Assignee if can execute decree.

C. P. CODE, (1908, O. 21, R. 16.

C. P. CODE, (1908, O. 21, R. 22.

The absence of consideration for the assignment of a decree is immaterial and will not deprive the assignee of his right to execute the decree provided the assignment is not a sham transaction. (1918) M.W.N. 226 foll. (*Sadasiva Iyer and Napier, JJ*) *THINNA REDDY v. SUBBA REDDY*. (1918) M. W. N. 507.

—O. 21, R. 16—Assignee of decree pending appeal—Right to execute appellate decree passed in favour of the original assignor.

What is really transferred when a decree is assigned is not the decree itself but the interest of the decree holder in the decree as finally determined.

*Held*, therefore, that an assignee of a decree *pendente lite* is entitled to execute the decree passed in appeal therefrom (*Spencer and Kumaraswami Sastri, JJ*) *PONNUSAMI PILLAI v. CHIDAMBARAM CHETTIAR*.

35 M. L. J. 254=23 M. L. T. 213=  
(1918) M. W. N. 154=7 L. W. 566=  
44 I. C. 349.

—O. 21, R. 16—Decree—Transfer in favour of pleader of judgment-debtors—Right of transferee to execute—Pleader and client—Duty of pleader.

The wife of the pleader of the judgment-debtors took an assignment of a mortgage-decree and applied to the Court to have her name substituted in the place of the decree-holder. The judgment-debtor lodged an objection to the effect that the wife was not the real assignee of the decree, but that her husband, who was the pleader for the judgment-debtor in the execution case, was the real purchaser of the decree, and that the effect of the purchase of the decree by the pleader for the judgment debtors was to satisfy the decree and to discharge the judgment debtors :

*Held*, that the Pleader was not and could not be a party to the execution case and no question could consequently be decided as between him and his wife as to who was the beneficial owner of the decree.

The effect of the purchase of a decree by the Pleader for the judgment-debtors is not to satisfy the decree and to release the judgment-debtors from liability, although the Pleader holds the decree assigned to him in trust for his clients, and, if called upon by his clients, to do so, is bound to assign the decree to them. No Court will, however, decree such a re-conveyance except upon equitable terms. (*Mookerjee and Walmsley, JJ.*) *NAGENDRA BALA DASST v. DEBENDRA NATH MAHIS*. 22 C. W. N. 491 =27 C. L. J. 388=44 I. C. 13

—O. 21, R. 17—Sale of certain lots after amount of decree had been realised—Stranger purchaser—Sale, if invalid.

O. 21, R. 17 C.P.C., has nothing to do with the invalidity of the sale made to a stranger who bought without notice of the fact that

the amount realised by previous sale of other lots of the property attached was more than sufficient to satisfy the decree in execution. (*Fletcher and Huda, JJ*) *SURENDRA NATH SAHA v. BOLA RAM PODDAR*. 45 I. C. 699.

—O. 21, Rr. 17 (2) and 18—Decree—Application for execution—Application in accordance with law—Properties specified in list furnished under O. 21, R 13 C. P. Code not competent to be proceeded with in execution—Filing of a fresh list of properties—Continuation of original application.

A decree was passed on the 26th Nov. 1911 and on the 23rd Nov. 1914, an application for execution was made which, on the face of it, was in accordance with law. Subsequently on the objection of the judgment-debtor it was discovered that against the properties specified in the list furnished under O. 21, R. 13, proceedings could not be taken and accordingly on the 14th January 1915 the decree-holder, made an application to the Court for acceptance of a further list of properties with a prayer that the execution should proceed by attachment and sale of those properties, and the lower appellate Court disallowed the prayer and held that the application for execution having been admitted and registered the proposed amendment could not be accepted and the decree-holder was to make a fresh application in execution. *Held*, that the supplemental list should be taken as part of the original application under the provisions of O. 21, R. 1 (2) or if a fresh application were at all necessary, then the subsequent application furnishing a supplementary list of properties should be treated as one made in continuation of the application first presented on the 23rd Nov. 1914; that in this view no question of limitation arose and that the decree holder would be at liberty to proceed in execution as on his application, dated 23rd Nov 1914. 17 Cal. 681; 19 C. L. J. 538 Ref and dist. (*Teunon and Newbould, JJ.*) *GNANENDRA KUMAR ROY CHOWDHRY v. RISHENDRA KUMAR ROY*. 22 C. W. N. 540=27 C. L. J. 398=44 I. C. 553.

—O. 21, Rr. 18 and 19—Cross decrees—Execution of—Appellate decree alone to be considered.

When an appeal has been decided, then original decree is merged in the appellate decree and for the purposes of execution as for purposes of the amendment the appellate decree, even when it merely affirms the original decree is to be taken as embodying and superseding that decree. (*Teunon and Newbould, JJ.*) *BEPIN BEHARI SEN v. KRISHNA BEHARI SEN*. 46 I. C. 246.

—O. 21, R. 22—Notice under—Omission to give—Sale void for want of Jurisdiction. See C. P. CODE, S. 47 AND O. 21 R. 22.

27 C. L. J. 528.

C. P. CODE. (1908; O. 21, R. 22.

—O. 21, R. 22—Sale in execution without notice to or substitution of legal representative of deceased judgment debtor, if invalid, against other judgment debtors.

One of several judgment-debtors died pending execution of an *ex-parte* decree and the widow of deceased judgment-debtor made an application for setting aside the *ex-parte* decree, which was dismissed for default. Thereafter the decree-holder, without making an application to execute the decree against the widow of the deceased judgment-debtor and without serving a notice on her under O. XXI, R. 22 of the C. P. Code, put up the attached properties to sale after due publication of such processes, and they were sold to a stranger to the decree on two successive days. An application was made by all judgment debtors including the widow of the deceased judgment-debtor to set aside the sale.

*Held*, that as the widow of the deceased judgment-debtor was not a party to the appeal the mere fact that the sale might have been capable of being avoided or void against the widow on account of the failure of the Court to issue a notice under O. 21, R. 22 of the C. P. Code could not affect the sale as against the other judgment-debtors more especially when the appeal was preferred only on their behalf and the widow was satisfied with the judgment of the lower Court, holding that the interest of her husband was liable to be sold in execution of a decree according to which each of the judgment-debtors was liable to pay the whole decretal amount.

The question whether the sale was invalid was *res judicata* between the purchasers in execution and the widow of the deceased judgment-debtor by reason of the decision of the Courts below, namely, that the interest her husband had in the property was liable to be sold in discharge of his judgment-debt so that it could not be re-opened by the other judgment-debtors in support of their contention that the whole sale was invalid on account of irregularity in conducting it as against the widow. (*Fletcher and Shamsul Huda, JJ.*) SURENDRA NATH SAHA v. BOLA RAM PODDAR. 45 I. C. 699.

—O. 21, R. 22, (2)—Attachment—Seal, absence of, on warrant—Attachment invalid. See PENAL CODE SS. 147 AND 114.

3 Pat. L. J. 636.

—O. 21, R. 32 and S. 47—Decree for—Endorsement of promissory notes by defendant in plaintiff's favour—Failure of deft. to comply with decree—Notes barred in consequence—Remedy of plaintiff—Fresh suit for damages—Maintainability.

Where under a compromise decree deft. bound himself to endorse certain promissory notes in plf's favour, and on his failing to do so, plf brought the present suit for damages

C. P. CODE. (1908; O. 21 R. 32.

against deft., as the promissory notes had become barred.

*Held*, the suit is not maintainable as it is barred under S. 47 of the C. P. Code.

The proper course is to proceed under O. 21, R. 32 or 35. (*Oldfield and Sadasiva Iyer, JJ.*) ALAGAPPA CHEETIAR v. KANAKASABAI PILLAI 24 M. L. T. 34=(1918 M. W. N. 333=7 L. W. 563=45 I. C. 689.

—O. 21, R. 32—Decree for prohibitory injunction—Enforcement of—Remedy of decree-holder—Separate suit or execution—O. 21, R. 32 cl. (5)—Applicability to prohibitory injunctions.

A suit is not maintainable for enforcement of a prohibitory injunction embodied in a decree but the remedy lies by way of execution under O. XXI R. 22 of the C. P. Code.

Per *Richardson, J.*—O. 21 R. 32, cl. (5) of the Code applies both to mandatory as well as to prohibitory injunctions.

The expression 'the act required to be done' means what has to be done to enforce the injunction. (*Richardson and Beachcroft, JJ.*) SACHI PRASAD MUKHERJEE v. AMAR NATH RAI CHOUDHURY. 22 C. W. N. 857=27 C. L. J. 506=45 I. C. 864.

—O. 21, R. 32—Injunction, decree for—Execution mode of—Decree in regard to a hereditary office right claimed as legal representative—appointment of Commissioner, to see to proper performance of duties, propriety of.

A decree for a perpetual injunction was passed in favour of the plff. and certain other persons called defts. of the third party against persons who were called defts. of the second party. The right claimed in the suit was the right to perform 'Arti' in a certain temple, the parties asserting their right thereto as descendants of the original founders. The defts. of the second party were restrained from interfering with the performance of the 'Arti' by the plff. and defts. of the third party. The defts. of the second party having obstructed the performance of the 'Arti' one of the defts. of the third party applied that the decree might be enforced through the Superintendent of Police. The application was granted. *Held*, that O. 21, R. 32 of the C. P. Code prescribed the mode of executing a decree for an injunction and the Court was not justified in ordering the police to interfere in the matter, nor was it justified in appointing a Commissioner to see that the decree-holder performed without obstruction the duties appertaining to his office. Clause (5) of R. 32, O. 21 does not authorize the passing of such orders and provides for a different state of things.

*Held also*, that the decree related to a hereditary office which the plff. claimed and which the defts resisted and was not passed against the defts. as individuals but as descendants of

C. P. CODE. (1908) O. 21, R. 32

the original founder. *Barmerja and Byres J.J.*) GOSWAMI GORDHANLALJI v. GOSWAMI MADHUSUDAN BALLABH. 40 All. 545= 16 A. L. J. 700=43 I. C. 26

—O. 21, R. 32—*Injunction*—*Meaning of*—*Order to furnish account under preliminary decree*.

An order to furnish an account, which was contained in a preliminary decree, is not an injunction within the meaning of O. 21, R. 32. The word "injunction" as used in O. 21, R. 32 has a more extended meaning than it has in the Specific Relief Act. The decisions in 7 Cal. 654 and 27 All. 374 on the effect of S. 260 of the C. P. Code of 1882 have been overruled by the provisions of O. 21, R. 32 of the Code of 1908.

It is not every order of a court directing a person to do a certain act that is an injunction. In its essence an injunction is a relief consequential upon an infringement of a legal right. (*Mullick and Atkinson, J.J.*) ARJAN SUIE v. EMPEROR. 3 Pat. L. J. 166= 44 I. C. 787=19 Cr. L. J. 335.

—O. 21, R. 35 (1)—*Decree in partition suit*—*Delivery of formal possession*—*Subsequent application for physical possession*.

A decree-holder in a partition suit, who has been given partial possession of the portion of the property allotted to him in an execution case which was dismissed after the delivery of the formal possession, can maintain a fresh application in execution for actual possession under sub-rule 1 of rule 35 of O. 21, of the C. P. Code. (*Richardson and Beachcroft, J.J.*) KHETRA MOHAN KUNDU v. JOGENDRA CHANDRA KUNDU. 45 I. C. 7.

—O. 21, R. 37—*Execution*—*Arrest of judgment debtor*—*Application for Refusal on the ground that he resides out of jurisdiction*.

The fact that the judgment-debtor does not reside within the territorial jurisdiction of the court is not a sufficient reason for refusing to issue a warrant for his arrest, although such a warrant can be executed only within the Court's territorial jurisdiction.

In issuing such a warrant the court should fix a date for its return (*Chamier, C. J. and Sharfuddin, J.*) KRISHNA PRASAD v. BIDYA NANDA. 3 Pat. L. J. 95=44 I. C. 226.

—O. 21, R. 53—*Decree for costs and mesne profits, whether a decree for money*—*Attachment and sale of decree-holder*—*Validity*—*Proper procedure*.

A decree for mesne profits cannot be sold under S. 60 of the C. P. Code. The only procedure that the decree-holder can legally take is to attach the decree and to execute it under the provisions of O. 21, R. 54 of the Code. 24 Mad. 341 dist (*Mullick and Thornhill, J.J.*) LACHMAN OJHA v. CHARITER OJHA.

(1918) Pat. 257=5 Pat. L. W. 191= 48 I. C. 183.

C. P. CODE (1908) O. 21, R. 53.

—O. 21, R. 53 (3)—*Execution of Decree by attachment of decree for maintenance charging immoveable property*—*Procedure*.

Where a decree-holder in execution of his decree attaches a decree for maintenance charging immoveable property, his proper course is to apply for execution of the maintenance decree, purchase the interest and bring a separate suit under O. 34, R. 14, C. P. C. for sale. Alternatively, he may as representative of the maintenance decree-holder under O. 21, R. 53 (3) attach and bring to sale the property of the debts in the maintenance decree. (*Spencer and Bakerell, J.J.*) VENKATARAMANURTHI v. SUNDARA RAMIAH.

25 M. L. T. 355=47 I. C. 630

—O. 21, Rr. 54 and 55—*Attachment*—*Execution Sale in pursuance of*—*Sale set aside*—*Attachment revives on fresh application* See. ATTACHMENT.

3 Pat. L. J. 310.

—O. 21, R. 55—*Execution*—*Sale Proclamation*—*Conspicuous publication of order necessary*—*Property consisting of a right of fishing extending over many miles*. See EXECUTION SALE, SETTING ASIDE OF.

(1918) Pat. 33.

—O. 21, R. 54—*Sale proclamation*—*Publication of*—*What amounts to*—*Property sold*—*Right of fishing in river about 20 miles long*—*Mode of publication*. See C. P. CODE, O. 21, R. 50. (1918) Pat. 33.

—O. 21, Rr. 55 and 53—*Decree against same judgment-debtor in favour of several decree-holders*—*Property brought to sale by all*—*Private alienation by judgment-debtor for raising funds to pay off one of the decrees*—*Money paid into the Court*—*Rateable distribution*. See C. P. CODE, S. 73 and O. 21 Rr. 55 and 53. 35 M. L. J. 150.

—O. 21, R. 57 and O. 38, Rr. 5 to 11—*Attachment before judgment*—*Order before judgment for attachment*—*Actual attachment after judgment*—*Dismissal of execution-petition*—*Attachment does not cease*—C. P. Code, O. 21, R. 57 not applicable to attachment before judgment. See C. P. CODE, O. 38 Rr. 5 to 11. 35 M. L. J. 387.

—O. 21, R. 58—*Applicability*—*Sale in execution of mortgage-decree*—*Unnecessary attachment before sale*—*Effect*—*Court entertaining a claim when it ought not to*—*Revision*—*Interference by High Court*—C. P. C. S. 115.

O. 21, R. 58, C. P. C., does not apply when the property in dispute is directed to be sold under a mortgage decree and the mere fact that there has been an unnecessary attachment does not make the rule applicable. The rule does not apply to attachments before decree. In the above mentioned cases the court has no jurisdiction to entertain an application for claim or to pass any order upon it, and, if it does, the High Court will interfere under S. 115, C. P. C. (*Leslie Jones, J.*) RATAN

C. P. CODE, (1908) O. 21, R. 58.

LAL v. BALA PARSHAD. 58 F. R. 1913=  
28 F. W. R. 1913=44 I. C. 383.

—O. 21, Rr. 58, 60 and 61—Applica-  
tion—Investigation—Dismissal on the  
ground of delay—Order, form of. *See* (1917)  
DIG. COL. 241, NGA SAN BABU v. MITHAN.  
11 Bur. L. T. 41=  
(1916) II U. B. R. 136=39 I. C. 345.

—O. 21 Rr. 58, 59 and 60—*Claim proce-*  
*dings—Conditional order allowing claim, if*  
*valid.*

A Court has no jurisdiction to make an order allowing a claim preferred under O. 21 R. 58 of the C. P. Code to a property attached in execution of a decree, conditional on the claimant paying a certain sum to the decree-holder on the ground that in the conveyance by which the claimant purchased the property there was an undertaking on his part to pay that sum to the decree holder as part of the consideration. If such a claimant is in possession of the property on his own account under title of a conveyance executed in his favour by the judgment-debtor, his claim should be allowed and allowed unconditionally (*Richardson and Walmsley, J.*) KAMALA KANTA SEN v. DURGA KUMAR SEN.  
44 I. C. 1007.

—O. 21, Rr. 58 and 63—*Dismissal of*  
*claim for want of evidence—Omission to sue*  
*within one year—Bar—Lim. Act, Art. 11.*

Where an objection under O. 21, R. 58 of the C. P. Code was dismissed because the objector failed to produce any evidence, and no suit was brought to challenge the validity of that order within one year from the date of the order under Art. 11 of the Lim. Act, *held*, that the order had become conclusive.

The only order under O. 21 R. 58 of the C. P. Code upon which the character of finality is impressed is an order made after enquiry. It does not follow, however, that because a claimant does not adduce evidence or is absent, there are no materials before the Court to enable it to enquire into it. (*Piggot and Walsh, J.*) GOKUL v. MOHRI BIRI.  
40 All. 325=16 A. L. J. 256=44 I. C. 1005.

—O. 21, Rr. 58 and 63—Dismissal of  
claim for default-suit on title—Limitation  
Act, Art. 11 applicable. *See* LIM. ACT, ART. 11.  
44 I. C. 265.

—O. 21, Rr. 58 to 63—*Lim. Act, Art. 11.*  
—*Order refusing to investigate a claim, whether*  
*comes within the terms of O. 21, R. 63 and Lim.*  
*Act, Art. 11—Order that a claim be notified to*  
*bidders—Whether covered by Art. 11 of the*  
*Lim. Act—Practice of notifying claim without*  
*any decision thereon condemned.*

Where a court purports to make an order under the proviso to R. 58 of O. 21 that is say, an order refusing to investigate a claim, such an order comes within the terms of O. 21, R. 63 and Art. 11 (1) of the Lim. Act, 2 L. W. 206;  
31 M. L. J. 241 foll.

C. P. CODE. O. 21, R. 63.

Where the order passed on a claim petition is that the allegation of the claimant will be notified to the bidders the order is one made against the claimant and amounts to a rejection of the claim petition.

Per *Seshagiri, Iyer, J.*: On the presentation of a claim petition, if the order is not that the property be released from attachment it must be taken to be an order against the claimant.

The practice of notifying claims to intending bidders is not warranted by anything in the Code. It often leads to the depreciation in value of the property to be sold and is not calculated to advance the right of the claimant in any way. Consequently the procedure adopted by some of the subordinate courts of notifying objections by claimants at the time of the rule without expressing any decision upon those objections should be discouraged. (*Wallis, C. J., Oldfield and Seshagiri Iyer, J.*) MACHI RAJU VENKATARATNAM v. SRI RATAH RANGANAYAKAMMA.

41 Mad. 985=35 M. L. J. 335=24 M. L. T.  
197=(1918) M. W. N. 593=8 L. W. 292  
=48 I. C. 270. (F. B.)

—Or. 21, Rr. 60 and 61—*Claim—In-*  
*vestigation—Scope of—Question of title if*  
*for what purpose can be gone into.*

In an investigation of claims to property under attachment the court should consider whether the judgment-debtor was or was not in possession of the property, and if in possession whether he was in possession on his own account, or in trust for some other person. If this involves a decision as to the *bona fides* of an alleged sale, or the legal effect of the deed of conveyance, and the circumstances attending its registration, the Court ought to go into such matters. (*Hartnoll O. C. J. and Twomey, J.*) N. M. K. CHETTY v. CHARTERED BANK OF AUSTRALIA, INDIA AND CHINA.  
11 Bur. L. T. 118=48 I. C. 182.

—O. 21, R. 63—*Applicability to cases of*  
*attachment before judgment.*

O. 21, R. 63 C. P. Code applies to orders on claims preferred to property attached before judgment. 41 M. 23 overruled.

The general policy of the law is that questions of title raised by claim against attachments before or after judgment should be promptly disposed of immediately. (*Wallis, C. J., Oldfield and Seshagiri Iyer, J.*) MALLIKARJUNA PRASAD NAIDU v. MATLAPALLI VIRAYYA. 41 Mad. 849=35 M. L. J. 231=  
24 M. L. T. 134=(1918) M. W. N. 699=  
8 L. W. 197=47 I. C. 1000. (F. B.)

—O. 21, Rr. 63 and 58—*Claim—*  
*Summary order rejecting claim without in-*  
*vestigation—Defeated claimant bound to sue*  
*within one year. See LIM. ACT, ART. 11.*

45 Cal. 785.

—O. 21, R. 63—*Claim suit—Dismissal*  
*of claim without investigation—Suit not*  
*governed by Art. 11. See LIM. ACT, ART. 11.*  
44 I. C. 528.

C. P. CODE, (1908) O. 21, R. 63.

—O. 21, R. 63—Claim suit—Scope of—Right of suit only to the aggrieved claimant or the decree-holder—Suit by judgment-debtor against claimant does not enure to the benefit of the decree-holder. See C. P. CODE, S. 47 AND O. 21, R. 63. 44 I. C. 262.

—O. 21, R. 63—Suit for declaration—Independent right—Consequential relief.

Independently of the provisions of O. 21, R. 63 of the C. P. Code, a decree-holder may sue for a declaration that certain property attached in execution of his decree belongs to the judgment-debtor, although at the time of the suit the attachment might have been withdrawn and the property may not be in the possession of the decree-holder. To such a suit the proviso to S. 42 of the Specific Relief Act does not apply. (*Maung Kin, J.*) MAUNG BA KYAW v. LAN. 45 I. C. 972.

—O. 21, R. 63—Suit under—Valuation of.

Where a suit is brought for a declaration that certain property attached in execution of a decree is not saleable the proper valuation to put on the suit for purposes of jurisdiction is not the value of the property but the amount of the decree for which execution was taken out. (*Richards, C. J. and Bannerjee, J.*) ANANDI KUNWAR v. RAM NIRANJAN DAS. 40 All. 505=16 A. L. J. 374=45 I. C. 494.

—O. 21, R. 63—Suit by unsuccessful claimant—Onus of proof—Decree of foreign court effect of—Foreign judgment—Validity—Judgment based on wrong view of law—Judgment opposed to natural justice—What is.

Where, in execution of decree passed by the Cochin Court against a person described as the manager of a joint Hindu family and transferred to the British Court under S. 44 of the C. P. Code property of the alleged joint family was attached, and a claim preferred to the same by the younger brother of the judgment-debtor on the ground amongst others that even before Cochin suit he and his brother (the judgment-debtor) had become divided was rejected *held* in a suit brought by the unsuccessful claimant under O. 21, R. 63 of the Code to establish his right, that the onus was on him of proving the division set up by him.

A wrong view as to onus will not have the effect of rendering a foreign judgment one not given on the merits.

A mere incorrect view of law by a foreign court will not give jurisdiction to our courts to say that its judgment is opposed to natural justice.

Meaning of the term "natural justice" when used in reference to foreign judgments. (*Seshagiri Iyer and Bakewell, JJ.*) RAMA SHENOI v. HALLAGNA. 41 Mad. 205=

34 M. L. J. 295=45 I. C. 703.

C. P. CODE, (1908) O. 21, R. 66.

—O. 21, R. 63—Suit for declaration by unsuccessful claimant—Attaching decree-holder debt.—Plea that sale was fraudulent under S. 53 of the T. P. Act—Remedy of creditors. See (1917) DIG. COL. 247: SUBRAMANIA AYYAR v. MUTHIA CHETTIAR. 41 Mad. 612=33 M. L. J. 705=6 L. W. 750=43 I. C. 651.

—O. 21, R. 63—Suit under, frame of—Suit to set aside fraudulent alienation of property by judgment-debtor, impleading alienee as party.

O. 21, R. 63 of the C. P. Code does not provide anything about the frame of the regular suit instituted under that rule and does not embrace any provision excluding any particular prayer out of the scope of such a suit.

A decree-holder being in a sense a person deriving title from the judgment-debtor, has a right to attach property which has been fraudulently or collusively conveyed by the judgment-debtor and also a right to set aside fraudulent transfers and collusive decrees even though they may be binding upon the judgment-debtor. (*Mitra, A. J. C.*) DHONIRAM MANGNIRAM v. RAMGOPAL KANIRAM. 43 I. C. 960.

—O. 21, R. 63—Unsuccessful claimant—Declaratory suit—Attaching decree-holder—Defendant's plea that sale was fraudulent under S. 53, T. P. Act—Validity—Fraudulent sale—Remedy of persons defrauded—Representative action—Necessity—Judgment creditors and ordinary creditors—Distinction between English and Indian Law—Judgment creditors in England and India—Rights of—Distinction. See (1917) DIG. COL. 247 PALANIANDI CHETTI v. APPAVU CHETTI. 30 M. L. J. 865=22 M. L. T. 474=19 M. L. T. 390=34 I. C. 773=45 I. C. 52.

—O. 21, R. 65—Appeal—Order settling terms of sale proclamation not appealable. See C. P. CODE, S. 47 AND O. 21, R. 66. 46 I. C. 564.

—O. 21, Rr. 66 and 93—Execution sale—Notice to judgment-debtor—Omission to give—Irregularity. See (1917) DIG. COL. 248; RAMASWAMI CHETTY v. MA. U. THA. 11 Bur. L. T. 40=33 I. C. 993.

—O. 21, R. 66—Notice—Issue of, if directory or mandatory.

The provisions for notice under O. 21, R. 69 of the C. P. Code are directory and not mandatory; they have not been enacted for the judgment-debtor but with a view to ascertain the exact rights which should be set forth in the proclamation for sale. (*Mitra, A. J. C.*) KRISHNAJI v. BALIRAM. 44 I. C. 252.

C. P. CODE, (1908) O. 21, R. 66.

—O. 21, R. 66—Sale proclamation—Objections to—Issue of sale proclamation before objections are disposed of—Propriety of

It is competent to issue a sale proclamation before objections filed by the judgment-debtor had been judicially disposed of though it may be that the property cannot be sold until the the objections put forth are disposed of. (Fletcher and Newbould, JJ.) HARENDRA NATH BANERJEE v. HARI CHARAN DUTT 43 I. C. 250.

—O. 21, R. 67—Sale proclamation—Fis-hery right in river 20 miles long—Mode of publication. See C. P. CODE O. 21, R. 90. (1918) Pat. 35.

—O. 21, R. 71—Execution sale—Purchaser's default to pay whole price—Re-sale in consequence—Deficiency in price—Purchaser's liability for—Nature and extent of—Enquiry under rule 71—Nature of—Notice to defaulting purchaser—Necessity for—Rights of auction-purchaser after purchase and before confirmation of sale—Execution sale—Caveat emptor—Applicability of, doctrine of.

Per *Kumaraswami Sastri, J.* Though R. 71 of O. 21, C. P. C. does not expressly provide for the issue of a notice to the defaulting purchaser it is the duty of the Court to give him notice and to hear and decide on his objections before it orders execution to issue against him. The objections which a defaulting purchaser can urge under R. 71 are only those which can be urged in an application to set aside a sale under O. 21 of the Code.

The reasonable construction to place on rule 71 is that the re-sale should be within a reasonable time after the first sale and the property re-sold should be substantially the same and that any difference will not matter if the difference in the condition of the property or the title thereto is one which would occur in the ordinary course of things having regard either to the nature of the property or the transactions in respect thereof having legal force at the date of sale or was brought about by the first purchaser's default.

A judgment-debtor had conveyed his property to a third party with a right of re-purchase if the money was paid before 31st August 1914. The property was sold in execution of a decree against the judgment-debtor on the 31st August 1914, and was purchased by A who paid one-fourth of the purchase money but defaulted to pay the remainder within 15 days as required by the rules. On the property being brought to sale again the date of re-purchase from the third party having elapsed, the sale fetched a lower price. On an application by the decree-holder under R. 71 for the recovery from A of the deficiency.

*Heid, (by the Chief Justice, Ayling and Kumaraswami Sastri, JJ.)* that A was bound to complete the purchase, and having defaulted was bound to repay the deficiency.

C. P. CODE, (1908) O. 21, R. 89.

Per *Kumaraswami Sastri, J.* In the circumstances of the case A was under a duty to pay the amount received for procuring a reconveyance on the date fixed for the purpose and to keep the title to the property alive and neither the decree-holder nor the judgment-debtor was under any such duty.

Even prior to the confirmation of his sale A had sufficient interest in the property entitling him to tender the amount required to procure a reconveyance.

There is no warranty of title in the case of sales by Court.

Nature of interest acquired by execution purchaser prior to date of confirmation of sale considered. (Wallis, C. J. *Ayling and Kumaraswami, Sastri, JJ.*) VENKATACHELLAM ATTA v. NILAKANTA GIRJEE. 41 Mad 474= 34 M. L. J. 156=23 M. L. T. 9=(1918) M. W. N. 121=7 L. W. 159=43 I. C. 685.

—O. 21, R. 72—Leave to bid—Application for to be made to court to which decree is transferred for execution. See C. P. CODE S. 70 AND O. 21, R. 72. 20 Bom. L.R. 708.

—O. 21 R. 83—Money paid into court after private alienation, to satisfy one decree—Right to rateable distribution. See C.P. CODE, S. 73 AND Or. 21, Rr. 55 AND 83. 35 M. L. J. 150.

—O. 21, Rr. 89 and 90—Application under R. 90 dismissal of, for default—Maintainability of a subsequent application under—Withdrawal of petition, meaning of. See (1917) DIG. COL. 249: MURLIDHAR v. BALDEO SINGH 26 O. C. 329=43 I. C. 340.

—O. 21, Rr. 89 and 92, O. 43, R. 1 (j)—Appeal Order setting aside sale on deposit under O. 21 R. 89—Appeal by stranger auction purchaser, maintainability of. See C.P. CODE O. 43, R. 1 (j). 16 A. L. J. 433.

—O. 21, Rr. 89 and 92—Deposit in Court—Meaning of—Deposit in treasury, if proper—Auction sale not set aside—Revision—No interference if matter within jurisdiction—C. P. Code S. 115.

The word "court" in Rules 89 and 92 of O. 21 of the C. P. Code means the Civil Court.

The provisions of rule 89 are an indulgence to a judgment-debtor, and an auction-purchaser is entitled to the benefit of his purchase unless the section has been strictly and completely complied with. Whether or not the section has been so complied with is clearly a question which a Court has jurisdiction to decide, and in the exercise of such jurisdiction, if the Court has come to an erroneous conclusion, its decision cannot be interfered with in revision by the High Court. Hence where a judgment-debtor deposited the purchase money plus five per cent compensation for payment to the

C. P. CODE, (1908) O. 21, R. 90.

auction-purchaser into the Treasury owing to the Civil Court being closed, and the court below refused to set aside the sale because on the court re-opening the money had not been withdrawn and re-deposited in the Civil Court. *Held* that the court had exercised its jurisdiction and even though the decision must be erroneous, it could not be interfered with in revision. (*Richardson, C. J. and Banerji, JJ.*)  
**FAZAL RAB v. MANZUR AHMAD.**

40 All. 425=16 A. L. J. 433=45 I. C. 773

—O. 21, R. 90—Applicability to contract of sale of—Receiver appointed under Provincial Insolvency Act. See PROV INS ACT, S. 22.  
 7 L. W. 406

—O. 21, R. 90 and O. 43 R. 1 (i)—Application to set aside sale for fraud—Dismissal of—Second appeal not maintainable.

An application was made to set aside an auction sale on the ground of fraud in publishing the sale under O. XXI, R. 90 of the C. P. Code. The application was rejected. The applicant appealed to the Dt. Judge who dismissed the appeal. Thereupon the applicant preferred a second appeal to the High Court:—*Held*, that no second appeal lay to the High Court having regard to O. 43, R. 1 read with S. 101 of the C. P. Code. *Held*, also that the new Code has altered the law in an important aspect inasmuch as an application based on fraud in publishing or conducting a sale comes within the purview of O. 21, R. 90 and not under S. 47. (*Richards, C. J. and Banerji, J.*)  
**SHEO PRASAD SINGH v. MUSSANMAT PREMNA KUAR**

40 All. 122=15 A. L. J. 920=43 I. C. 522.

—O. 21, R. 90—Execution sale—Irregularities in—Judgment-debtor waiving objections and obtaining adjournment of sale—Conclusion of sale on adjourned date—Judgment-debtor estopped from objecting to sale on the ground of irregularity. See ESTOPPEL.  
 47 I. C. 331.

—O. 21 R. 90—Execution sale—Material irregularity—Under valuation, effect of. See (1917) DIG. COL. 252; **SAKHICHAND v. KALANAND SINHA**

(1917) Pat. 357=4 Pat. L. W. 83=42 I. C. 394.

—O. 21, R. 90—Execution sale—Sale held after passing of *ex parte* order staying execution, obtained by fraud—Subsequent cancellation of order—Sale valid. See EXECUTION, SALE.  
 16 A. L. J. 46.

—O. 21 R. 90—Execution sale setting aside—Irregularity and injury—Connection between, necessary.

An execution sale cannot be set aside on the ground of irregularity under O. 21, R. 90 of the

C. P. CODE, (1908) O. 21, R. 91.

C. P. Code if there is nothing to warrant the necessary or at least reasonable inference that the inadequacy of the price was the result of the irregularity. (*Teoman and Newbould, JJ.*)  
**TAIMUDDI BEPARI v. LAKPAT BEPARI.**

45 I. C. 212.

—O. 21, R. 90 and S. 47—Fraud—Fraud committed after the publication of the sale proclamation—Sale in contravention of private arrangement with judgment-debtor—Application to set aside—O. 21 R. 90, applicable. See C. P. CODE, S. 47 AND O. 21, R. 90 ETC.  
 3 Pat. L. J. 645.

—O. 21, R. 90—Setting aside of—Gross under valuation in proclamation of sale—Insufficient description and insufficient proclamation—C. P. Code O. 21 R. 54.

Where the annual income actually realised from a property was over Rs 1,000 and the valuation stated in the sale proclamation was Rs 2,500 and the property was sold for Rs 2,500 and where the property sold was a right of fishing in a river which was about 20 miles long and it was described merely by a Tazui number and a name whereas in fact the estate ran through as many as 138 villages.

*Held*, that the sale proclamation was materially irregular both in the description of the property and the valuation put upon it and for that reason alone, the sale was liable to be set aside.

In the case of such a property any particular spot on the river is not a conspicuous part of the property. The principle of the rule laid down in R. 54 of O. 21 of the C. P. Code must be applied in such circumstances and the copy of the order must be conspicuously displayed at various portions of the estate. When a copy of the order was affixed in only one out of 138 villages through which the river ran, it was held that the principle of the rule was not applied.

In such a case the sale should have been advertised in the local newspapers or in the Gazette. (*Chapman and Jwala Prasad, JJ.*)  
**CHATTERPAT SINGH v. SURENDRA NATH SINGH,**  
 (1913) Pat. 33=  
 44 I. C. 412.

—O. 21, R. 90—Proviso—Execution sale—Setting aside—No proof of substantial injury—Order setting aside sale interfered with in revision—C. P. Code, S. 115. See C. P. CODE, S. 115 AND O. 21, R. 90.  
 5 Pat. L. W. 15.

—O. 21, R. 91—Execution—Auction sale—Suit to set aside by purchaser—Mortgage not notified in sale proclamation maintainability—Proper remedy.

It is not open to a party who purchases at an auction sale to impugn the validity of his own purchase except on the ground that the judgment-debtor had no saleable interest.

## C. P. CODE, (1908) O. 21, R. 91.

If he purchases a property, the title as to which is defective, and if he has been misled on account of any fraud or omission on the part of the decree-holder, it is open to him to seek his remedy against the decree-holder by a suit for damages. (*Mullick and Thornhill, J.J.*)  
**KHETRO MOHAN DATTA v. SHIEKH DALWAR.** 3 Pat. L. J. 516.  
 =5 Pat. L. W. 151=46 I. C. 614.

—O. 21, Rr. 91 and 93—Execution sale—Confirmation—Sale subsequently held to have passed no interest—Auction-purchaser's right to refund of purchase money—Remedy.

An auction-purchaser who has deposited money in Court for a sale in court-auction, if he finds that no interest has passed to him, can only apply under O. 21, R. 93 of the C. P. Code, after having got the sale set aside under R. 91 before confirmation. He has no substantive right to recover his money after the sale is confirmed and a suit is brought by a stranger wherein the sale was held to pass no interest. (1912) M. W. N. 1180 and 14 A. L. J. 1216 foll.

Difference between the old and the new code pointed out. (*Oldfield and Sadasiva Aiyar, J.J.*)  
**SUBBU RINDDI v. PONNAMBALA REDDI.** (1918) M. W. N. 655.

—O. 21, R. 92—Execution sale—Confirmation of—Pre-emption—Ottidar's right to—Not a bar to confirmation. See **MALABAR LAW, PRE-EMPTION** 41 Mad 582 (F. B.)

—O. 21, Rr. 92 (2) and 93—Persons obtaining orders for rateable distribution if "persons affected" within the meaning of proviso. See C. P. CODE, S. 115.  
 35 M. L. J. 604.

—O. 21 R. 93—Auction sale under old code—Sale of property in which Judgment-debtor had no saleable interest—Purchaser's right to refund of money—Suit or application proper remedy—Right of suit accrued under old code—Effect of new code on such right—Repealing statute—Construction of C. P. Code (1882). Ss 318 and 315 See (1917) DIG. COL. 255; **TIRUMALAISWAMI NAIDU v. SUBRAHMANIAN CHETTIAR.** 40 Mad. 1009=45 I. C. 109.

—O. 21, R. 93—Execution of decree—Sale property sold in auction a second time after previous sale—Suit by purchaser for refund—suit, maintainability.

Where on the date of an auction sale held under the C. P. Code of 1882 the judgment-debtor had no saleable interest in the property by reason of the fact that the property had been previously sold by auction the purchasers at the second sale acquired no interest by their purchase and became entitled to maintain a suit for the refund of the money paid by

## C. P. CODE, (1908) O. 21, R. 93.

them into Court. (*Piggott and Walsh, J.J.*)  
**GIRDHAR DAS v. SIDHESWARI PRASAD**  
 40 All. 411=16 A. L. J. 236=43 I. C. 697

—O. 21 R. 93—Execution sale—Refund of purchase money to auction purchaser on sale being set aside—Remedy by application and not by suit—Old Code and New—Difference between. See C. P. CODE. O. 21 Rr. 91 AND 93. (1918) M. W. N. 655.

—O. 21 R. 93—Execution sale—Set aside by first Court—Auction purchaser with-drawing money from Court—Sale confirmed on appeal—Inherent power to direct purchaser to bring back purchase money. See C. P. CODE, S. 151. 5 Pat. L. W. 132.

—O. 21, R. 93—Order for refund if purchase money executable as a decree—C. P. Code. S. 35.

A purchaser at a court sale which had been subsequently set aside, obtaining an order for refund of the purchase money, can execute the order as if it were a decree. (*Spencer and Bakewell, J.J.*)  
**VENKATARAMANAMURTHI v. SUNDARA RAMIAH.** 23 M. L. T. 355  
 =47 I. C. 630.

—O. 21 Rr. 92 and 93—Suit for refund of purchase money, when sale not set aside of maintainable.

In execution of a decree against A certain property was attached and one B came forward with a claim that the property was his and not liable to sale. His claim was disallowed and the property was sold at auction and purchased by C who sold the property to D who obtained possession. In the meantime, B succeeded in the appeal against the dismissal of his suit and in due course ousted D. C. had to refund to D the money received by him C then transferred his right to the plffs. The auction sale had not been set aside. In a suit for refund of the purchase money held, that the suit was not maintainable (*Tudball, J.*)  
**MAN MOHAN LAL v. GOPINATH.** 16 A. L. J. 511=46 I. C. 103.

—O. 21, R. 93—Suit to recover purchase money—Not maintainable—Remedy by application.

The plff purchased an occupancy holding in execution of a decree obtained by the mortgage of the property and took possession of it, he was sued in ejectment by the landlords in whose favour a decree was subsequently made. The plff sued to recover the purchase money with interest.

Held that under the present C. P. Code the suit was incompetent (*N. R. Chatterjee and Richardson, J.J.*)  
**JURANU MAHAMMAD v. JATHI MUHAMMAD.** 23 C. W. N. 760  
 =46 I. C. 783.

C. P. CODE, (1908) O. 21, R. 84.

—O. 21, R. 84—Sale certificate—Particulars in, not to be corrected with reference to the plaint. See EXECUTION SALE.

43 I. C. 908.

—O. 21, R. 95—Nature of remedy under—Execution sale—Purchase by decree-holder with leave of Court—Suit by him for possession of property purchased—Failure to seek remedy under O. 21, R. 95 on failure in proceedings under that rule—Effect. See C. P. C., S. 47, 3 P. R. 1918.

—O. 21, R. 95—Order delivering possession under—Not appealable.

No appeal lies from an order delivering possession under O. 21, R. 95 of the C. P. Code, and a Court entertaining an appeal therefrom acts without jurisdiction (*Banerjee and Laddan JJ.*) BUDDHU MISSIR v. BHAGIRATHI KUAB 43 All. 242=15 A. L. J. 150.

—O. 21 R. 96—Possession, delivery of—Effect as against strangers.

Formal possession the nature of which is described in O. 21, R. 96 of the C. P. Code is no possession at all against any party whose rights are not affected by the decree. (*Lindsay, J. C.*) TASADDUQ HUSAIN v. ASGHAR KHAN. 21 O. C. 70=45 I. C. 606.

—O. 21, R. 95—Symbolical possession—Delivery of—Interruption of adverse possession as against judgment-debtor See ADVERSE POSSESSION, INTERRUPTION.

34 M. L. J. 97 (P. C.)

—O. 21, R. 96—Order under directing delivery of possession—Judicial order—Appeal from maintainable. See C. P. CODE S. 47 AND O. 21, R. 96. 45 I. C. 608 (Mad.)

—O. 21 R. 96—Symbolical possession—Paper delivery—Distinction between.

Symbolical possession is given only in cases where the party in actual possession is entitled to remain in such possession as in cases of delivery under O. 21, R. 96 of the C. P. Code, and should not be confounded with cases where a party is entitled to actual possession but obtains only what is called a paper delivery i. e., where he gets no possession at all. (*Spencer and Krishnan, JJ.*) GOVINDASAMI PILLAI v. PETHAPERUMAL CHETTY.

44 I. C. 839.

—O. 21 Rr. 97 and 98—Applicability of—Insolvency proceedings—Sale by Official Receiver—Rules of O. 21 O. P. C. not applicable. See PROV. INS. ACT SS. 18 AND 47.

(1918) M. W. N. 479.

—O. 21 R. 97—Decree-holder, auction purchaser—Suit for possession barred—Remedy by execution. See C. P. CODE, S. 47 AND O. 21 R. 95. 44 I. C. 563.

C. P. CODE, (1908) O. 22, R. 2.

—O. 21, R. 100 and O. 9 R. 3—Application by stranger under O. 21, R. 100—Dismissal for default—Power to restore. See C. P. CODE, O. 9, R. 3 and O. 21 R. 100.

4 Pat. L. W. 102.

—O. 21, R. 100—Application under—Order dismissing—Remedy of aggrieved party—Appeal—Suit—Order under rule so and so—Meaning of—C. P. C., S. 47 and O. 21, R. 103—Effect. See (1917) DIG. COL. 257 : ZIRRU v. HARISUPDU SHET.

42 Bom. 10=19

Bom L. R. 774=43 I. C. 73.

—O. 21, R. 100—Rights to apply under—Purchaser of a holding not transferable by custom, if entitled to possession against landlord purchasing in execution of rent decree.

Where a sixteen annas landlord purchases a holding in execution of a rent decree obtained against the recorded tenant a purchaser against the recorded tenant who has purchased without the landlord's consent has no right in the absence of a custom of transferability of holdings without the landlord's consent to make a claim under O. 21 R. 100. (*Roz and Jwala Prasad, JJ.*) PANCHRATAN KOERI v. RAM SAHAY. 3 Pat. L. J. 579=4 Pat. L. W. 129=43 I. C. 969.

—O. 21, Rr. 101 and 103—Order under—Order to be passed on investigation—Dismissal for default or non-prosecution—Not an order under R. 101.

However short or summary the investigation under O. 21, R. 100, C. P. Code may be, the order under R. 101 must be an adjudication on the merits of the application: the Court must be satisfied as to whether the applicant was in possession or not. If, however in the opinion of the Court there are not materials before it for an investigation, then no order on the merits need be passed. A mere dismissal in default for non-prosecution does not amount to an order on the merits under O. 21, R. 101.

The test as to whether an order is on the merits or not is not whether the applicant was present or not, but whether there has been an investigation and the order has to be passed on the results of the investigation. (*Mitra, O. A. J. C.*) BHIMRAO v. MARTAND.

14 N. L. R. 66=45 I. C. 102.

—O. 21, R. 103—Order passed without investigation under R. 101—No bar to suit within ordinary period. See C. P. CODE, O. 21, R. 101. 14 N. L. R. 66.

—O. 22, R. 2—Right to sue—Survival of—Joint decree in favour of landlords—One of the heirs of the landlord not on record—Want of necessary parties.

A and B, landlords, applied under S. 105 of the B. T. Act for settlement of fair rent and

C. P. CODE, (1908) O. 22, R. 3.

for enhancement of rent. A died after the decision of the lower appellate court, leaving a major son C and a minor one D, surviving him as heirs. The tenants defis appellants caused the appeal against D one of the heirs of A (deceased) to be dismissed for non-prosecution:

*Held*, that the appeal by the tenants was incompetent for want of necessary parties. 6 C. W. N. 196; 10 C. W. N. 981; 19 C. W. N. 290 foll. (*Walmsley and Panton, JJ.*) AZIMUDDIN MANDAL v. TARA SANKAR GHOSE

23 C. L. J. 201=27 I. C. 638.

—O. 22, R. 3 and O. 41 R. 4—Decree on ground common to all defendants—Death of one appellant during pendency of appeal—No abatement.

During the pendency of an appeal one of the appellants died and no application was made to bring his legal representatives on the record till after the period of limitation had expired.

*Held*, that the decree of the trial Court having been passed on a ground common to all the defendants (appellants) the case was covered by O. 41, R. 4 of the C. P. Code, and the appeal could, therefore, proceed. 63 P. R. 1914, 88 P. R. 1914, foll. 62 P. R. 1913, 21 I. C. 951 and 32 I. C. 829, dist. (*Chevis and Broadway, JJ.*) PIYARE LAL v. CHURA MANI.

32 P. R. 1913=46 I. C. 50.

—O. 22, Rr. 3 and 10—Right to sue—Survival of—Application for letters of Administration by residuary legatee—Death of legatee—Substitution of heir of residuary legatee—Abatement.

The right to a grant of administration is a personal right derived from the Court.

If on the death of the testatrix, the residuary legatee under her will had obtained a grant of administration to her estate with a copy of the will annexed, his title would have been derived from the Court and would not devolve on his heir. The heir of the residuary legatee may be the proper person to obtain a grant of administration not by virtue of any right to administration which he inherited from the residuary legatee, but by virtue of the fact that as heir of the residuary legatee, he is the person most interested in the estate of the testatrix 36 Cal. 599 Ref. (*Greaves, J.*) HARIBHUSAN DATTA v. MANMATHA NATH DATTA. 45 Cal. 362.

—O. 22, R. 3 (2)—Appeal—Death of some appellants pending appeal—Effect of—Total abatement.

Where some of the appellants in an appeal died and no application was made in time to bring their legal representatives on record the appeal does not abate *in toto* if it can be shown that the remaining appellants by themselves could have instituted the suit in the

C. P. CODE, (1908) O. 22, R. 4.

court of first instance. (*Scott Smith, J.*) SAWAN v. MEHR DIN. 123 P. W. R. 1913 =45 I. C. 963.

—O. 22, Rr. 4 and 12—Joint decree—Execution—Appeal by judgment-debtor—Death of one decree-holder—Legal representative not brought on record—Abatement.

Where in an appeal relating to the execution of a joint decree one of the decree-holders-respondents dies and his legal representatives are not brought on the record within the prescribed period, the appeal cannot proceed against the surviving respondents alone. (*Woodroffe and Smither, JJ.*) BAKSH ALI SARKAR v. SARAT CHANDRA ROY CHOWDURY. 46 I. C. 911.

—O. 22, R. 4 (2)—Mortgage decree against widow and reversioner—Execution against both—Objection to rate of interest after decree, by widow only—Death of widow—Reversioner can raise the plea.

A, a Hindu widow, in possession of her husband's estate and B, the next reversioner jointly executed a mortgage bond on which the creditor obtained a decree against both and executed the same against both, claiming interest at the bond rate until actual payment A alone made an objection as regards interest subsequent to the period of grace but her objection was disallowed. Pending execution A died and B was substituted in her place, B then filed a fresh objection on the ground that the decree-holders was not entitled to the interest after the period of grace under the terms of the decree. About the same time he filed an application for the amendment of the decree on the ground that it was in accordance with the judgment.

*Held*, that B was entitled to defend his newly acquired title by all means accessible to his new character. (*Chatterjee and Walmsley, JJ.*) UDIT NARYAN JHA v. MUSSAMMAT JASODA SAHUN KALAN. 27 C. L. J. 576=46 I. C. 469

—O. 22, R. 4 and O. 41, R. 22—Statement—Appeal and cross-objections by one of the respondents—Death of respondent after memo, of objections preferred—Omission of appellant to bring legal representative on record—Legal representative, application by to be brought on record in memo of objections—Effect—Appeal whether abates, Practice.

Under O. 41, R. 22, cl. (1) of the C. P. Code a person should be a respondent in the appeal before he can file any memorandum of cross-objections. Where, therefore, a respondent who has preferred a memorandum of cross-objections is dead and the appellant fails to bring his legal representative on record within the time limited by law, but such legal representative brings himself on record to

C P. CODE, (1908) O. 22, P. 4.

the purpose of prosecuting such cross objections.

*Held*, (1) that the bringing on record of the legal representative in respect of the memo of cross-objections would be in effect for the purposes of the appeal as well, and (2) that the appeal did not abate as against such legal representative. (*Wallis, C.J. and Krishnan, J.*)  
VATHIAR VENKATA CHARIAR v. PONNAPPA IYENGAR. 7 L. W. 614=45 I. C. 959.

———O. 22, R. 4 (3)—Mortgage suit—Preliminary decree—Pendency of suit till passing of final decree—Death of party in the interval—Abatement. See C. P. CODE, O. 34 RR. 4 and 5. 40 All. 203 also 7 L. W. 138 also 16 A. L. J. 143.

———O. 22, R. 5—Death of a party—Legal representative made a party—Dispute by the other side as to the right of the legal representative—Determination of the dispute by the court.

One of the several plffs. having died, a person claiming as her adopted son was on his application brought on record as her heir and legal representative. The daughters of the deceased plff. disputed the adoption and applied to the court to be brought on record as her legal representatives. The application was dismissed by the trial Judge on the ground that he could not alter his previous order relying on O. 22 R. 3. The defts. applied to the High Court. *Held*, that the question having arisen as to whether the person who had been brought on the record was the legal representative of the deceased plff. it should be determined by the court. (*Scott, C.J. and Shah, J.*) VATSALABHAI v. SAMBHAI. 20 Bom. L. R. 902=47 I. C. 757.

———O. 22, R. 5—Dispute as to who is the proper legal representative—Duty of Court to inquire and decide. See MAD. ESTATES LAND ACT, SS 192 AND 205. 35 M. L. J. 632.

———O. 22, R. 5—Legal representative—Duty of court to decide—Order under—Not appealable.

Where a question arises as to who are the legal representatives of a deceased plff., it is obligatory on the Court to decide it.

Where the Court of first instance, without deciding the question, added the rival claimants as legal representatives and the lower appellate court called for a finding on the question and itself decided its decision is final and no appeal lies therefrom: nor can the question be agitated in an appeal from the decree.

An appeal does not lie from the decree, where the only question raised in the appeal was the propriety of the order passed under O. 22, R. 5 of the C. P. Code. (*Ayling and Phillips, JJ.*) SUBRAHMANYA IYER v. MUTHU VAITHILINGA MUDALIAR.

(1918) M. W. N. 198=44 I. C. 987.

C P. CODE, (1908) O. 22 R. 9.

———O. 22, R. 6 and O. 23 R. 1 (2) Death of party after hearing and before judgment if can be pronounced—Withdrawal of suit, if can be allowed.

O. 22, R. 3 not only covers cases where a judgment is delivered in ignorance of the fact that a party has died between the conclusion of the hearing and the delivery of judgment, but also provides for the delivery of judgment where the Court is aware of such death, and they make it clear that the death of a party is not sufficient cause for refusing to deliver judgment or allowing the withdrawal of a suit which has been completed in very respect except for such delivery of judgment.

The provisions of O. 23, R. 1 of the C. P. Code should not be arbitrarily applied. (*Saunders, J. C.*) MA KIN NYUN v. MA TIN. 44 I. C. 620.

———O. 22, R. 6—Death of party before hearing of arguments—Power of Court to pronounce judgment—Jurisdiction—C. P. Code, S. 99 and O. 10 R. 2.

A Court has no jurisdiction to proceed with the trial and decision of a part heard case without regard to the death of a party thereto and this defect is not cured by S. 99 of the C. P. Code.

The completion of hearing before judgment which is required by O. 20 R. 1 of the C. P. Code is such a hearing as is provided by O. 13 and includes the hearing of argument as shown by O. 13 R. 2, (*Stanyon, A. J. C.*) MANIBAMLALA v. AMBAR SINGH. 14 N. L. R. 71=43 I. C. 161.

———O. 22, Rr. 9 and 11—Abatement—Setting aside—Grounds for—Ignorance of death of opposite party, not a ground.

It is the duty of the person prosecuting an appeal to keep himself informed of the existence of his adversary. A mere plea of ignorance of the death of the opposite party is not a sufficient ground for setting aside an order that an appeal should abate. (*Lindsay, J. C.*) MAHOMED ASKARI v. LALU. 21 O. C. 68=45 I. C. 594.

———O. 22, R. 9 (2)—Delay in application for bringing on record legal representative of deceased respondent—Distant place of abode.

One of the respondents to an appeal died and the application to bring his legal representative on the record was not made till after the expiry of 8 months from his death. It appeared from the affidavit of the appellant that the deceased lived in Multan city while the appellant himself lived in a village in Muzaffargarh District and that, therefore, he did not know of the death of the respondent till shortly before he made the application:

*Held*, that the appellant had sufficient cause for not making the application within the

G. P. CODE, (1908) O. 22, R. 10.

the prescribed period of limitation. (*Shah Din and Soan-Smith, J.J.*) *ADLAKH YAR V. THAKAR DAS.* 24 P. L. R. 1318=

48 P. W. R. 1913=44 I. C. 9.

—O. 22, R. 10—Assignment pending suit—Assignee not party—Decision against assignor—Right of assignee to appeal and to continue suit—Application under O. 22, R. 10, maintainability. See G. P. CODE, S. 146 AND O. 22 R. 10. 41 Mad. 810.

—O. 22, R. 10—Devolution pendente lite—Adoption by widow.

An adoption is not the creation of an interest within O. 22 R. 10 C. P. C. but is the creation of a status. It does not operate as a devolution of interest or as an alienation. (*Batten, Pridoux and Mittra, A.J.C.*) *GANPAT RAO V. LAXMI BAI.* 43 I. C. 64.

—O. 22, R. 10—'Interest' meaning of—Addition of party—Discretion of court—Delay fatal.

The 'interest' contemplated in O. 22, R. 10 of the C. P. Code is any interest which will be vitally affected by the suit. The addition of a party, however, to a suit under that rule is a matter within the discretion of the Court. Deliberate delay in applying for the addition of a party, will be a ground for rejecting the application. (*Koc and Imam, J.J.*) *HARIHAR P'ROSDAD V. GENDI LAL.* 43 I. C. 811.

—O. 22, R. 10—Letters of administration—Application for by residuary legatee—Death of legatee, pendente lite—Heir of residuary legatee, substitution of—Abatement of proceedings. See G. P. CODE O. 22 RR. 3 AND 10. 45 Cal. 862.

—O. 23, R. 1—Application for leave to withdraw with liberty to institute a fresh suit—Partition suit—Pendency of proceedings under the Partition Act—Application made at a late stage—Refusal to grant leave. See PARTITION ACT, SS. 2 AND 3. 16 A. L. J. 583.

—O. 23, Rr 1 and 3—Leave to withdraw—Adjustment of suit—Dismissal of suit at the request of parties—Leave to withdraw with liberty not to be presumed.

Where the parties after having adjusted a suit out of court filed a petition of compromise and requested the Court to dismiss a suit. Thereupon the Court, without passing any formal decree under O. 23, R. 3 of the C. P. Code dismissed the suit.

*Held*, that the pff. must be taken to have withdrawn the suit without permission to bring a fresh suit.

Where a suit had been adjusted out of Court an application addressed to the Court to record the adjustment in whatever language it may

G. P. CODE, (1908) O. 22, R. 1.

be couched, cannot properly be treated as the original contract between the parties. It must be held to be a mere recital of the contract independently entered into between them and does not require registration. (*Drake Brickman, J. J.*) *MAHOMED ALI KHAN V. SHIYAT ALI KHAN.* 46 I. C. 913.

—O. 23, R. 1—Leave to withdraw—Application for—Not to be granted at a late stage in second appeal.

A pff. will not be given leave to withdraw a suit with liberty to sue afresh, at a late stage of the case in second appeal. (*Mittra A. J. C.*) *BALIRAM V. GANPAT.* 47 I. C. 966.

—O. 23, R. 1—Leave to withdraw—Erroneous grant of—Propriety of order granting leave not to be raised when fresh suit brought. See RES JUDICATA, HEARD AND DECIDED. 4 Pat. L. W. 299.

—O. 23, R. 1—Leave to withdraw—Minor—Duty of Court to protect interests of minor.

Courts should be very jealous of the interests of the minors and should not allow a suit or part of a suit instituted on a minor's behalf to be withdrawn without being satisfied that it is for his benefit. Where the next friend of a minor withdraws a suit or abandons a portion or the claim without the leave of the court the minor is not prevented from bringing a fresh suit for the same reliefs. The pffs. during their minority along with others sued for a declaration of their reversionary rights and in the alternative for pre-emption. Subsequently the plaint was amended and the other pffs. alone claimed pre-emption. Later on all pffs. put in application for permission to withdraw the prayer for declaration. The court did not give permission and eventually a decree was passed in favour of the adult pffs. but by mistake the names of all were entered in the decree.

*Held*, that inasmuch as no reason was given by the next friend for withdrawing the suit on behalf of the minors, nor was the Court asked to allow the pff. to withdraw from part of the suit with liberty to institute a fresh suit in respect of the subject-matter of such part, nor was the interest of the minors considered, the minors were entitled to bring a separate suit for the relief which was abandoned in the previous suit. (*Scott-Smith and Martineuz, J.J.*) *RAJADA V. GHULLA.* 104 P. W. R. 1918=47 I. C. 508.

—O. 23, R. 1—Leave to withdraw suit—Suit to recover jote—Failure to prove right—Leave to withdraw, not to be given.

A suit brought to recover a jote on the footing that it was a kaemi jote was dismissed by the trial court as well as by the Appellate Court on the ground that the jote was not kaemi.

*Held*, that the pffs. could not be allowed to withdraw the suit with liberty to bring a

C. P. CODE. (1908) O. 23, R. 1.

fresh suit on the ground that the plffs. had an occupancy right to the land. (*Fletcher and Hudc. JJ*) AMBICA CHARAN CHAKRAVARTHY v. SARAT CHANDRA BASU. 45 I. C. 913.

—O. 23, R. 1—Leave to withdraw with liberty—Formal defect, nature of, to be clearly specified.

A plff. who has misunderstood his case is not entitled on that ground to be allowed to harass the opposite party again. If he wishes to obtain an order under O. 23, R. 1 of the C. P. Code, he must specify the formal defect or the ground on which his application is based, and the court must show by its order the facts which make the provisions as to withdrawal applicable. A mere general statement that there are formal defects is not sufficient. (*Stanyon, A. J. C.*) PUNDALIK v. CHANDRABHAN. 43 I. C. 346.

—O. 23, R. 1—Leave to withdraw with liberty to sue again—Application made after evidence concluded and during arguments—Grant of leave—Revision—No interference—C. P. Code, S. 115.

A suit was instituted in the Court of the Munsiff. After the evidence had concluded and either during or after arguments the plffs. applied for leave to withdraw with liberty to bring a fresh suit on the ground that he had failed to give formal proof of a plaint which was essential to the plff's success. The Court granted leave to bring a fresh suit.

Held, that the Court had jurisdiction to grant the leave, and the fact that in so acting the court came to a wrong decision was not sufficient to bring a case within S. 115 of the C. P. Code, (*Richards, C. J. and Bannerjee J.*) JHUNKU LAL v. BISHESHAR DAS. 40 All 612=16 A. L. J. 495=46 I. C. 71.

—O. 23, R. 1—Leave to withdraw on payment of costs within 2 months—Conditional order—Suit instituted without payment of costs.

An order granting permission to withdraw a suit ran as follows:—"Leave to withdraw with liberty to bring a fresh suit on payment of deft's. costs here and below within two months."

Held, that the payment of costs was not a condition precedent to the institution of the suit within two months. (*Ayling and Seshagiri Iyer, JJ.*) DASARATHY NAIDU v. PALA KUMARAMULL RAJA. 24 M. L. T. 311

=(1918) M. W. N. 427=7 L. W. 557  
=43 I. C. 969.

—O. 23, R. 1—Scope and object, withdrawal with liberty—Order for—Validity—Existence of formal defect—Necessity—Statement by Court that such a defect exists—Sufficiency of—Order granting leave to withdraw—Revision under C.P.C.S. 115—Maintainability—C.P.C.S. 115—"Case" meaning of.

Where after the close of the plff's evidence

C. P. CODE. (1908) O. 23, R. 1.

and the examination of some of the deft's. witnesses, the plff. was permitted to withdraw from the suit with permission to bring a fresh suit on the ground that some legal defects occurred in the suit and that there was defect of parties when in fact there was no real defect. Held, that it is not sufficient that the trial Court should say or suggest that there is a formal defect but the existence of such a defect is a condition precedent to the exercise of jurisdiction under O. 23, R. 1.

The object of O. 23, R. 1 is not to enable a plff. after he has failed to conduct his suit with proper care and diligence after his witnesses have failed to support his case, to obtain an opportunity of commencing the trial afresh in order to avoid the result of his previous misconduct of the case and prejudice the opposite party.

The word 'case' in S. 115 of the C. P. Code is a word of general import and should be understood in its broadest sense unless there were specific reasons for narrowing its meaning. 18 Bom. 85; 14 Cal. 768, 7 All. 661 and 41 Cal. 632 ref.

Where the defts. have been seriously prejudiced by the order of withdrawal under O. 23, R. 1, the High Court is justified in interfering with such order by way of revision and to declare the newly instituted suit to be null and void and to direct the lower Court to proceed to deal with the case from the stage at which the order granting withdrawal was made (*Mullik and Thornhill, JJ*) NATHUNI RAM v. MUSSAMMAT SHEO KUAR.

3 Pat. L. J. 460=5 Pat. L. W. 104=  
(1918) Pat. 220=46 I. C. 179.

—O. 23, R. 1—Scope of—Suit in ejectment without notice—Withdrawal of suit without the leave of the Court for fresh suit—Second suit after notice—Subject-matter of both suits not the same—Second suit maintainable.

The plff. first brought a suit for the ejectment of defts. who claimed to be Mirasdars (permanent tenants) on the allegation that they were not Mirasdars and that he was entitled to determine the tenancy. As there was no sufficient notice to quit, he withdrew the suit without obtaining the leave of the Court. Having then given a formal notice to quit, the plff. brought a second suit for ejectment. A question having arisen whether the second suit was barred under O. 23, R. 1 of the C. P. Code:

Held, that the suit was not so barred, for the term "subject-matter" in the rule meant "the series of acts or transactions alleged to exist giving rise to the relief claimed and the two suits were not in respect of the same subject-matter as in the first suit the series of acts was incomplete owing to want of notice while in the second suit the series of acts was complete because of the notice to quit.

Held, also that the same result followed if the term "subject-matter" was to be taken to

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be "the cause of action" in the sense of the bundle of facts which have to be proved in order to entitle the plff. to relief. The causes of action in both suits were not the same for in the first suit there was no cause of action for want of notice and in the second suit the giving of notice constituted a cause of action. (*Scott, C. J. and Batchelor, J.*) **RAKHMABAI v. MAHADEO.** 42 Bom. 155=

29 Bom. L. R. 35=43 I. C. 752

———O. 23, R. 1—*Withdrawal with liberty—Order allowing—Effect—Fresh suit—Maintainability—Suit dismissed for want of evidence—Appeal by plff—Application to withdraw on ground of insufficient evidence—Order granting and dismissing suit—Res judicata.*

If a suit is dismissed on the ground that as constituted it could not succeed, the dismissal is not *res judicata*, however erroneous may be the idea that the frame of the suit barred a decision. If however, it is dismissed for want of evidence, the decision is final.

Where the plff's suit was dismissed by the first court and the plff. appealed and applied to the appellate court for leave to withdraw the appeal on the ground that he had not been able to adduce evidence necessary for the substantiation of the case held, that the order of the appellate court granting leave to withdraw amounted to a decision that the evidence on the record was not sufficient to support the plff's case, and therefore, a subsequent suit between the same parties in which the same matters were substantially in issue was barred by the rule of *res judicata*. 23 C. L. J. 499, 11 C. L. J. 45, 11 C. L. J. 512, 18 M. L. A. 160, 24 I. A. 160, 24 I. A. 50 and 21 All. 505 ref. (*Chapman and Roe, J.J.*) **SATYABADI GOUNTIA v. BEDIADHAR BAR PANDA.**

3 Pat. L. J. 404=46 I. C. 392.

———O. 23, Rr 1 and 3—*Withdrawal of suit or proceedings after decree—Compromise in guardianship proceedings—Appointment of guardian—Effect of withdrawal—Guardians and Wards Act, Ss. 40 and 42.*

O. 23, R. 1 does not allow a plff. who has appealed to get rid of the decree that has been made by the simple process of withdrawing the suit. The procedure of withdrawal laid down in O. 23, R. 1 applies only to pending suits and before the decree has been made, 29 Bom. 13; 35 B. 261 foll. A party in whose favour a decree or order is passed would however get it set aside by adjustment or compromise under O. 23, R. 9. But a guardian appointed by the Court cannot be removed by a compromise as it would have the effect of withdrawing from the jurisdiction of the Court the question of the welfare of the minor and would defeat the provisions of Ss 40 and 42 of Guardians and Wards Act. (*Pratt, J. C. and Crouch, A. J. C.*) **SHEIK MAHOMED v. MUSSAMMET RADHIBAI.** 12 S. L. R. 14=47 I. C. 317.

## C. P. CODE. (1908) O. 23, R. 1.

———O. 23, R. 1 (2)—*Leave to withdraw portion of claim with liberty to bring fresh suit—Formal defect—Sufficient ground.*

In a suit to recover possession of certain items of properties, one of the items (a house) was valued at Rs. 200 but on enquiry it was found to be worth more than Rs. 6,000 and the plffs applied for leave to withdraw their claim with respect to that item with liberty to file a fresh suit:

Held, that the application must fail as the defect was not of a formal nature and there was no sufficient ground within the meaning of O. 23, R. 1 cl (2). (1914) M. W. N. 892 foll. (*Abdur Rahim, J.*) **JAGATHAMBAL v. KANNUSWAMI PILLAI.**

(1918) M. W. N. 105=7 L. W. 131.  
=43 I. C. 985.

———O. 23, R. 1 (2)—*Formal defect—Defect curable by amendments of pleadings, not a ground for granting leave.*

An application to withdraw from a suit with liberty to bring a fresh suit under O. 23, R. 1 should not be granted if the defect on the basis of which the leave to withdraw is asked for can be cured by the amendment of the pleadings. (*Lindsay, J. C.*) **RAMESHWAR BAKSH SINGH v. MIRZA RASUL BEG.**

21 O. C. 66=45 I. C. 603.

———O. 23, R. 1 (2)—*Leave to withdraw—Death of defendant, after hearing and before judgment—Not a sufficient ground for giving leave to withdraw with liberty to file a fresh suit. See C. P. CODE, O. 22 R. 6 AND O. 23 R. 1.* 44 I. C. 620.

———O. 23, R. 1 (2) (a) and (b)—*Leave to withdraw suit or abandon portion of a claim—Sufficient ground—Ejusdem generis—Gross under-valuation—Objection by deft—Absence of jurisdiction—Leave to abandon part of a claim with liberty to sue a fresh not to be granted—Material irregularity—Revision—C. P. Code, S. 115.*

Plff brought a suit in the Court of a Dt. Munsif for possession of several items of property including a house, from the deft. The house was valued at Rs. 200 and the other items at Rs. 1917-10-0 in the plaint. The deft. pleaded that the plaint was grossly undervalued and that the suit would probably, if properly valued, be beyond the jurisdiction of the Dt. Munsif's Court. A Commissioner was appointed to value the house and on his report the court found that the house alone was worth Rs. 8500 and that the total value of the plaint for purposes of jurisdiction and court-fees was more than Rs. 8,400. The plff. thereupon applied for leave to withdraw the suit so far as the house was concerned with liberty to bring a fresh suit and the Dt. Munsif gave the leave asked for, in spite of the opposition of the deft. The deft. applied to the High

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Court under S. 115 of the C. P. Code to revise the order of the Dt. Munsif granting leave. *Held*, that assuming that the Court below had jurisdiction to pass the order in question, it did not do so in the exercise of a judicial discretion but acted with such material irregularity in the exercise of its jurisdiction as to justify the High Court in setting aside the order in revision.

Per *Sadasiva Iyer, J.*—The Court below having once arrived at the conclusion that the suit as brought was beyond its jurisdiction, it had no jurisdiction to pass any other judicial order in the suit except an order returning the plaint for presentation to the proper court. Therefore the order sought to be revised was one passed without jurisdiction.

Per *Sadasiva Iyer, J.* (Oldfield, J. dissenting.) The sufficient cause referred to in O. 23 R. 1 (2) (b) need not be *ejusdem generis* with the defect referred to in R. 1 (2) (a). The scope and applicability of the doctrine of *ejusdem generis* discussed by *Sadasiva Iyer, J.*

Per *Sadasiva Iyer, J.*—Objections to a suit on the ground of pecuniary jurisdiction and insufficient court fee are analogous to the formal defect required in O. 23, R. 1 (a) and are sufficient to justify the grant of leave to withdraw a suit with liberty to sue afresh (*Oldfield and Sadasiva Iyer, JJ.*) *KANNUSWAMI PILLAI v. JAGANATHAMBAL.* 41 Mad. 704 = 35 M. L. J. 27 = 23 M. L. T. 46 = (1918) M. W. N. 497 = 8 L. W. 145 = 46 I. C. 265.

—O. 23 R. 1 (2) (a) (b)—*Withdrawal of suit—Grounds for—Formal defect—Other sufficient grounds—Ejusdem generis*

Leave to withdraw a suit with liberty to bring a fresh suit can only be given when the suit must fail by reason of some formal defect, or if there are other sufficient grounds for allowing the plaintiff to institute a fresh suit.

The "sufficient grounds" contemplated in the second clause of O. 23, R. 1 of the C. P. Code 1908 should be grounds analogous to the grounds given in the first clause.

It is not sufficient for the court merely to record a vague opinion that there is a defect which may materially affect the decision.

The Court is required to make a serious enquiry as to whether the suit must fail or not. (*Roe and Jwala Prasad, JJ.*) *MAHENDRA RAM v. SINGI MAL.*

3 Pat. L. J. 651 = 48 I. C. 197.

—O. 23, R. 1 (2) (b)—*Other "sufficient grounds"—Ejusdem generis with defect referred to in R. 1 (2) (a).*

The words "sufficient grounds" in O. 23, R. 1 (2) (b) of the C. P. Code, are *ejusdem generis* with the defect referred to in R. 1 (2) (a) of the Code, so that permission to withdraw a suit with liberty to bring a fresh suit cannot be granted except on grounds which are of

## C. P. CODE, (1908) O. 23, R. 3.

the same nature as the grounds specified in clause (a). 26 I. C. 57, 16 M. L. T. 253, 89 I. C. 933, rel. (*Scott-Smith, J.*) *MUNNA LAL v. CHHABIL DAS.* 46 I. C. 181.

—O. 23, R. 1 (3)—*Leave to withdraw with liberty to sue on payment of costs—Institution of fresh suit without payment of costs. If valid—First suit pending till costs paid.*

Where a plaintiff is allowed to withdraw a suit with permission to bring a fresh suit on payment of the defendant's costs in the first suit, and no limit of time is provided within which such costs are to be paid, the second suit is maintainable even though the costs of the first suit are not paid until after the institution of the second suit.

*Semble*—that the second suit would be maintainable even though the period of limitation expired before the institution of the second suit inasmuch as the first suit would be pending until the costs have been paid.

Where a suit is allowed to be withdrawn with permission to bring a fresh suit on payment of costs the court should limit the time within which the costs should be paid and should direct that on failure to pay the costs within that time the original suit shall stand dismissed. 31 Cal. 965 foll. (*Chamier, C. J. and Sharfuddin, J.*) *KULDIP SINGH v. KULDIP CHOUDHURI.* 3 Pat. L. J. 63

= 4 Pat. L. W. 134 = 44 I. C. 79.

—O. 23, R. 3—*Mortgage decree—Preliminary—Adjustment before final decree—Rule applicable*

The proceedings after a preliminary decree in a mortgage suit are proceedings in a suit to which O. 23 R. 3 of the C. P. Code applies. (*Mitra, A. J. C.*) *DHARAM SINGH v. GANESH RAM.* 43 I. C. 399.

—O. 23, R. 3—*Adjustment of suit—Agreement that a suit should abide the result of another suit—Decision in the second suit—Effect.*

An agreement between the parties to a suit that it should abide and follow the result of another suit between the same parties is a valid and binding agreement. As soon as a decision is given in the second suit, there is a lawful adjustment of the first suit within the meaning of O. 23, R. 3 of the C. P. Code. 37 Mad. 405 dist. (*Spencer and Krishnan, JJ.*) *SREENIVASA CHARIAR v. KUMARA THATHACHARIAR.* 8 L. W. 470 = (1918) M. W. N. 746.

—O. 23 R. 3—*Adjustment of suit—Ex parte decree set aside on the ground of fraud—Position of parties—Revival of suit—Decree in terms of adjustment.*

A suit for ejectment and for arrears of rent was decreed *ex parte* and the defendants instituted a suit to set aside the *ex parte* decree on the ground of fraud, the fraud alleged being that

C. P. CODE, (1908) O. 23, R. 3.

the plffs. had received a sum of money from the defts. in consideration of withdrawing from the suit but had omitted to mention the arrangement to court and obtained an *ex parte* decree. The *ex parte* decree was set aside on the ground of fraud. *Held* that the original suit was revived by the setting aside of the *ex parte* decree, and that the arrangement between the parties, viz that the plff. do withdraw from the suit should be carried into effect by a decree under O. 23 R. 3. C. P. C. (*Woodroffe and Mookerjee JJ.*) ROMENDRA NATH ROY v. BROJENDRA NATH DASS

45 Cal. 111=21 C. W. N. 792=27 C. L. J. 158  
=41 I. C. 944.

—O. 23, R. 3, Sch. II, para 16—*Arbitration*  
—*Reference to—Private reference in pending suit—Award without intervention of Court—Award if a mounts to adjustment.*

The parties to a pending litigation are not competent, without any reference to the court to refer the subject-matter of that litigation to private arbitration, and having obtained award thereon, to seek the assistance of the court in having the same filed and enforced by a decree.

Neither an agreement to refer, without intervention of the Court, the subject-matter of a pending suit, nor a disputed award made thereon, also without the intervention of the Court, can be brought within the purview of R. 3, O. 23 of the C. P. Code, (*Stanyon J.*) PUSPI BAI v. ANSUYA BAI.

45 I. C. 902.

—O. 23, R. (3)—Decree on compromise  
—Compromise pleaded in bar of suit, denied by the plaintiff—Dismissal of suit upholding compromise—Decree—Appealability. See C. P. CODE, S. 96 (3) AND O. 23, R. 3

43 I. C. 775.

—O. 23, R. 3 and O. 43, R. 1 (m) —  
Decrees under O. 23, R. 3—Appeal against—  
Right of person not party to challenge. See  
OATHS ACT, S. 11.

53 P. R. 1915.

—O. 23, R. 3—Compromise beyond the  
scope of the suit—Duty of court to record the  
whole of the compromise—Matter falling with-  
in the scope of the suit to be made executable  
—Rest to be left to be enforced by whatever  
means the parties think proper. See REGIS-  
TRATION ACT, S. 17 (2) (VI).

3 Pat. L. J. 255.

—O. 23, R. 3—Compromise decree—Pro-  
perty not included in the suit forming subject  
matter of compromise and decree thereon—  
Decree, validity of—Admissibility of, in-  
evidence without registration. See REGISTRA-  
TION ACT, S. 17 (2) (VI).

3 Pat. L. J. 43.

—O. 23, R. 3—Execution proceedings  
—Applicability of rule—Agreement to adjust—  
Enforceability of.

C. P. CODE, (1908) O. 26, R. 9.

The provisions of O. 23, R. 9 are inapplicable to execution proceedings. Plff. obtained a decree for the possession of land and mesne profits against a minor deft. He subsequently agreed to sell the field to the minor judgment-debtor at a certain price, but the transfer was not completed.

*Held*, that this did not amount to an adjustment of the decree but was only an agreement to adjust and that there being nothing to show that the decree-holder gave up his rights under the decree upon the mere execution of the agreement, the contract was an executory one and was not capable of being specifically enforced by the minor for want of mutuality. (*Mitra, A. J. C.*) SAKHARAM v. BHIVRABAI.

44 I. C. 163.

—O. 24 Rr. 1, 2 and 3—Execution pro-  
ceedings—Applicability of provisions to—Decree  
amount paid in part—Judgment-debtor alleging  
it to be whole—Interest if ceases on amount  
paid.

A decree for dower for Rs. 5,000 with interest and costs was passed in favour of the widow of a deceased Mahomedan, realisable from his estate in the hands of heirs. The judgment-debtors in execution proceedings objected that the widow could get the decree executed for three-fourths of the amount only, the decree holder being entitled only to one-fourth of the estate as heir. The judgment-debtors deposited three-fourths of the amount with interest and costs while taking the objection. The objection was overruled up to the High Court. Upon the decree-holder claiming interest on the full amount until three months after the decision of the High Court, *held*, that the amount deposited in court might have been immediately on deposit paid out to the decree-holders in part discharge of her claim and the judgment-debtors were relieved from paying any interest on that amount. (*Richards, C. J. and Bannerji, J.*) AMTUL HABIB v. MUHAMMAD YUSUF.

40 All. 125=16 A. L. J. 15=43 I. C. 520.

—O. 25 R. 1—Security for costs—Bank-  
ruptcy or insolvency of plff. not by itself a  
sufficient ground for directing security for  
costs. See INSOLVENCY. 22 C. W. N. 1018.

—O. 26 R. 1—Examination of witnesses  
on commission—Grounds for.

The Courts should not allow witnesses to be examined on commission without adequate reason. The grounds upon which Courts can issue commission to examine witnesses are ordinarily those specified in O. 26 R. 1 of the C. P. Code (*Batchelor, A. C. J. and Shah J.*) PANACHAND v. MANOHARALAL.

42 Bom. 136=20 Bom. L. R. 1=43 I. C. 729.

—O. 26, Rr. 9, 16, 17 and 18—Commis-  
sioner's report—Admissibility in evidence—C. F.

C. P. CODE, (1908) O. 23, R. 10.

Code—Provisions of—Applicability of, to suits under Agra Tenancy Act, S. 194, S. 1017, D.C. CODE 239; BAKHTAWAR LAL v. SUREO PRASAD 33 All. 694=15 A. L. J. 766=42 I. C. 720.

—O. 26 R. 10—Commissioner's report—Not of much value without his evidence given in the case. See MAL COMPN. FOR TEN. IMP. ACT, Ss. 3 (2), 5 ETC. 35 M. L. J. 219.

—O. 26 R. 10—Report—Acceptance of by court without examination—Discretion.

It is within the discretion of a Judge to accept the report of a Commissioner.

A Court is bound to see that there is some real ground for examining a gentleman who had undertaken the duty of a Commissioner. It has a discretion in such matter to permit or refuse a party to examine the Commissioner. (Fletcher and Panton, JJ) CHOWDHURY JADAVENDRA v. GAJENDRA NARAIN DAS. 28 C. L. J. 263=47 I. C. 350.

—O. 26 R. 10 (3)—Local investigation—Report of amín—Court not satisfied with—Court is bound to order fresh investigation.

It is not compulsory on the appellate court to direct a fresh investigation when it is dissatisfied with the map and report of the Amin. No error of law is committed in deciding on the other evidence before it. 30 Cal. 291 ref. (Richardson and Wainsley, JJ) MAHARAJAH SIR MANINDRA CHANDRA NANDI BAHADUR v. KUMAR SARADINDU RAY. 27 C. L. J. 599. =45 I. C. 468.

—O. 26, R. 15—Commission for local investigation—Suit pending in sub-court—No power to Dt. Court to disallow a portion of fee to Commissioner.

The Dt. Judge has no power to disallow a portion to the remuneration claimed by a Commissioner for local investigation in connection with a suit pending in the Court of the Subordinate Judge. The matter is one which must be dealt with by the Subordinate Judge in whose court the suit is pending. (Teunon and Neubould, JJ) PANCHANAN SEN v. MADHU SUDAN MULLICK.

44 I. C. 496.

—O. 30 Rr. 1 and 6—Suit against a Firm—Right of plaintiff to a disclosure of partners thereof—R. 6—Individually—Meaning.

Held, that under O. 30, rule 1 of the Code of Civil Procedure a plaintiff suing a firm is entitled to know who the persons are who constitute that firm and the information cannot be withheld.

Held also, that the word "individually" in rule 6 of the order is not synonymous with

C. P. CODE, (1908) O. 30, R. 4.

"in person"—no partner can be forced under this rule to appear in person, but in his absence, after service of summons he will be dealt with *ex parte*. And if appearance is put in for him, it will be reckoned as his individual appearance. *Le Rossignat, J.* BRIDGES AND CO. v. SHAMAS DIN & CO.

78 P. R. 1918=155 P. W. R. 1918 =47 I. C. 422.

—O. 30, R. 4—Suit by a firm—Death of one partner—Decree for full amount in favor of surviving members and legal representative of, deceased—Succession Certificate—Production of, unnecessary. See SUCCESSION, CERTIFICATE ACT, S. 4. 44 I. C. 911.

—O. 30 R. 4—Suit by persons as proprietors of firm—Death of one of the respondents—No substitution—Appeal, competency of—Defect of parties—Contract Act, S. 45.

O. 30, R. 4 of the C. P. Code applies only to a case where the suit is brought in the name of the firm.

A suit was brought by A and several other persons. In the plaint the description of the plffs. was:—"The proprietors and the malik" of the firm styled A Roy Chowdhury Brothers and then the names of the plaintiffs were mentioned. The court below gave a decree to the plffs. and in the decree the names of A and other persons were described as the plffs. without the addition of the words that they were maliks of the firm of Roy Chowdhury Brothers. After the appeal was filed, one of the plffs, respondents died and his legal representatives were not substituted.

Held, that the appeal failed for defect of parties. (N. R. Chatterjee and Greaves, JJ.). MONMOHAN PANDAY v. BIDHU BHUSAN RAY, CHOWDHURY. 28 C. L. J. 268=48 I. C. 309.

—O. 30 R. 9—Scope of suit for recovery of money advanced by one partner against himself and another constituting a firm—Maintainability of. See PARTNERSHIP. 33 M. L. J. 408.

—O. 30, R. 9—Suit by a partnership consisting of some of the members of the joint family—Against joint family—Maintainability of. See LIM. ACT, ARTS. 57, 61, ETC. 34 M. L. J. 32.

—O. 31, R. 1—Suit by administratrix—Application by person claiming to be beneficiary whose position as such had not been proved, to be added as party—Right to be added on proof of *prima facie* case. See C. P. CODE, S. 115 AND O. 1, R. 10 (2). 44 I. C. 564.

## C. P. CODE, (1908) O. 32 R. 2.

—O. 32, R. 1, 2 and 12—*Suit by minors without next friend—Minor attaining majority—Pending suit—Application to proceed with suit as major—Plaint ordered to be struck off—Legality—Revision.*

A minor filed a suit without a next friend. It was reported that the minor would come of age two days after the date when the suit was filed. On the date fixed for deciding this question an application signed by the plff. and his pleader was filed in which it was denied that the plff. was a minor and it was also stated that if he was so on the date of the suit he had in the interval come of age and he prayed for permission to go on with the suit. The plaint was registered and notice was issued to the deft. Upon the deft. objecting the Court ordered the plaint to be taken off the file: *Held*, in revision, that the order was bad inasmuch as the Court had refused to exercise jurisdiction which was vested in it by law and the High Court could interfere in revision. (*Banerjee and Piggott, JJ.*) *NASIR-UD-DIN HUSAIN v. ASHFAQ HUSAIN.*

15 A. L. J. 737=46 I. C. 747.

—O. 32, R. 3 (4)—*Guardian ad litem, appointment of—Notice to minor, if necessary—Mother acting as guardian—Effect of.*

Two minors represented by the plff. to be majors were substituted as defts. on the death of their father. Their mother, also a deft., in the suit appeared and filed her written statement, in which she stated that her two sons improperly described as majors, were in fact minors. She also stated that the suit could not proceed without proper service of notice to the minors and the appointment of a guardian. But the original Court, without notice to the minors or to the mother, made an order appointing the mother as guardian and decreed the suit.

*Held*, per *Tennon, J.*: that the provisions of O. 32, R. 3 (4) imperatively required service of notice upon the minors, and the same not having been complied with, the minors were not represented in and were properly speaking, no parties to the suit. The decree consequently was not binding on the minors.

Per *Huda, J.*—Further notice on the minors was not necessary, as the mother by appearing in the suit for herself and for her minor sons consented to act as guardian of the minors and the order appointing her as such guardian was quite correct. (*Tennon and Shameul Huda, JJ.*) *SYED ALI SARKAR v. MANIEJAN BIBI.*

43 I. C. 728.

—O. 32 R. 3 Cl. 4—*Minor—Guardian ad litem appointment of—Non-compliance with provisions of rule as to—Effect on validity of decree against minor—Suit by minor to set aside*

## C. P. CODE, (1908, O. 32 R. 7.

*decree—Decree indivisible—Decree if will be set aside as against all defendants—Practice—Effect of setting aside of to restore suit.*

In a suit against amongst others, the infant son of a deceased divided Hindu, notice of suit was not served upon his mother and natural guardian. The paternal uncle of the infant was appointed guardian *ad litem* and was served with notice of the suit on behalf of the infant. The uncle did not express his consent to act as guardian, but entered appearance though he subsequently absented himself and took no steps to defend the suit although there was a good and valid defence available. A decree was accordingly passed as against all the defendants. In a suit brought by the infant to set aside the decree on the ground of fraud and negligence *held* (1) that the non-compliance with the provisions of O. 32 Rule 3 cl. 4 vitiated the trial and the decree was therefore not binding upon the infant (2) that the decree being indivisible must be set aside as against all the defendants: and (3) that the effect of setting aside the decree was not to revive the suit in which it was passed. (*Juala Prasad, J.*) *BHARIO PRASAD SAHU v. RAM CHANDRA PRASAD.* 4 Pat L. W. 373=45 I. C. 253.

—O. 32, R. 4 (2)—*Guardian ad litem appointment of—No other person entitled to represent minor in litigation. See C. P. CODE S. 115. AND O. 23, R. 4 (2).* 56 I. C. 316.

—O. 32, R. 4 (3)—*Guardian-ad-litem—Consent—Expression of—Appointment of certificated guardian.*

The consent referred to in O. 32, R. 4 (3) of the Code, may be either expressed or implied and where the proposed guardian of a minor deft. in a suit is also the certificated guardian of the minor, the omission of such guardian to appear before the Court in response to a notice intimating the proposal to appoint him as the guardian of the minor deft. is tantamount to an indication of his willingness to act as guardian *ad litem* and the Court is fully justified in appointing such guardian as the guardian of the minor deft. (*Kanhaiya Lal, J. J. C.*) *BAIJ NATH v. RADHA RAWAN PRASAD.* 43 I. C. 563.

—O. 32, R. 7—*Applicability—Reference to arbitration out of court—Minor plaintiff represented by his mother and guardian applying to court for decree in terms of award—Decree passed without reference to O. 32 R. 7—Validity—C. P. Code Sch. II cl. 20.*

A minor represented by his mother referred a dispute to arbitration out of Court. After the award was published, the mother on behalf of her minor son applied to the Court, under cl. 20 of the second schedule of the C. P. Code, 1908, that the award be filed in Court

C. P. CODE, (1908) O. 32, R. 7.

in order that a decree be passed in terms of it. The Court accordingly passed a decree, but without certifying that it was for the benefit of the minor. The minor by his mother next filed a suit to have the decree set aside and contended that he was entitled to set aside the decree as there was no certificate under O. 32 R. 7 of the C. P. Code:

*Held*, that O. 32 R. 7 of the C. P. Code has no application to the facts of the case inasmuch as it could not be said that there had been an agreement on behalf of the minor with reference to the suit in which the next friend was acting.

There is no conflict between the two cases (1396) P. J. 609 and 26 Bom 238 (*Scott C. J. Macleod and Shah, JJ.*) HANMANTRAM v. SHIVNARAYAN. 20 Bom L R 970. =43 I. C 233.

———O. 32, R. 7—Minor—Compromise not binding on—Compromise binding on parties other than minors.

A compromise not binding on the minor parties to a suit by reason of want of sanction will be binding on the other parties and will be enforceable against them. (*Chapman, Atkinson and Imam, JJ.*) CHARU CHANDRA MITRA v. SAMBHU NATH PANDEY.

(1918) Pat. 193=3 Pat. L. J. 255=  
4 Pat. L. W. 393=45 I. C. 358.

———O. 33, R. 1—Leave to sue in forma pauperis—Application by wife—Husband's means, if relevant to the enquiry.

The mere fact that the applicant's husband has property is not a sufficient reason for disallowing her application for leave to sue in forma pauperis. (*Ros and Imam, JJ.*) SHARFUNESSA v. NAZNI KHANUM.

3 Pat. L. J. 178=44 I. C. 723.

———O. 33, R. 1—Leave to sue in forma pauperis—Grant of—Institution of suit—Continuation of suit by receiver, on insolvency of pft. See PROV. INS. ACT, S. 20 (d).

16 A. L. J. 440.

———O. 33, R. 1 Expl. 3 and 5 (e)—Person, meaning of—Company—Right to sue in forma pauperis—Liquidator—Financial condition of, immaterial—Agreement to remunerate liquidator for winding up company, if falls within the mischief of R. 5 (e).

On proof of pauperism, a company represented by its liquidator, can be granted leave to sue in forma pauperis for the recovery of a debt due to the company. The word 'person' in the explanation to rule 1 of O. 33 of the C. P. Code, is to be understood in the sense in which that term is defined in the General Clauses Act and includes a company or association or body of individuals whether incorporated or not.

C. P. CODE, (1908) O. 34, R. 1.

Where a company represented by its liquidator applies for leave to sue in forma pauperis the only question is whether the company is a pauper, and the financial standing of the liquidator is immaterial.

Where a Court or a Company appoints a liquidator, he is an officer who is appointed under statutory authority and the fact that he is paid a percentage of the collections does not bring the case within O. 33 R. 5 (e). (*Bakerell and Kumaraswami Sastri, JJ.*) PERUMAL GOUNDAN v. THIRUMALARAYAPURAM JANANUKOOLA DHANASEKHARA NIDHI, LTD. 41 Mad. 624=34 M. L. J. 421 =45 I. C. 164.

———O. 33, R. 5 (a) and 18—Rejection of pauper application as not being properly framed—Subsequent application not barred. See (1917) DIG. COL. 278: HOWA v. SIT SHEIN. 11 Bur. L. T. 77=42 I. C. 803.

———O. 33, R. 5 (d)—Application for permission to sue as pauper—Doubtful question of limitation—Decision on whether permissible.

O. 33, R. 5 (d) applies only to cases where the allegations of the petitioner do not show cause of action and this should appear clearly on the face of the petition.

The Court is not justified in determining a doubtful question of limitation or hold an elaborate enquiry into doubtful and complicated questions of law at the stage contemplated by O. 33, R. 5 (*Bakerell and Kumaraswami Sastri, JJ.*) GOVINDASWAMY PILLAI v. THE MUNICIPAL COUNCIL, KUMBAKONAM. 41 Mad. 620=

34 M. L. J. 399=45 I. C. 95.

———O. 23, R. 6—"Individually"—Meaning. See C. P. CODE, O. 30, R. 1.

78 P. R. 1918.

———O. 34 R. 1—Mortgage—Suit against some of the co-owners of the mortgaged property—Fresh suit against the other co-owners, barred See C. P. CODE, O. 2, R. 2.

8 L. W. 152.

———O. 34, R. 1—Mortgage—Suit—Parties—Application by purchaser of portion of equity of redemption to be made party—Refusal—Suit decree—Purchaser at mortgagee's sale—Suit by original purchaser for redemption.

Where an application by a purchaser, A, of mortgaged property to be made a party in the mortgage suit was on the mortgagee's objection refused and he was thus prevented from exercising the right of redemption amongst other reliefs which he desired to claim:

*Held*, that in a suit by B, the purchaser at the sale in execution of the mortgage decree, to recover the property from A who was in

C. P. CODE (1908) O. 34, R. 1.

C. P. CODE (1908) O. 34, R. 2.

possession. A was entitled to redeem B 8: C. 512. 12 C. 41, 33 Cal 448. ref. (*Richardson and Beachcroft, JJ*) *REBATH MOHAN DAS v. NADIABASHI DE.* 22 C. W. N 543= 28 C. L. J. 156=44 I. C. 521.

—O. 34, R. 1—Mortgage—Suit for redemption—Parties withdrawn of suit as against one of several mortgagees—Effect.

Where in a suit for redemption of a mortgage effected in favour of these persons the mortgagor plaintiff withdrew the suit as against one of them, held that the suit was liable to be dismissed under O. 34, R. 1, C.P.C. on the ground of non-joinder of parties. (*Imam, J.*) *DHURI PATAK v. TIMAL SINGH.* 4 Pat. L. W. 331=45 I. C. 650.

—O. 34, R. 1—Mortgage suit—Parties—Persons claiming paramount title, not proper parties.

In a suit brought by a mortgagee to enforce his mortgage a person claiming a title paramount to the mortgagee and the mortgagee is not a necessary party, and the question of the paramount title cannot be litigated in such a suit. 31 All. 11 and 33 Cal. 425 ref. (*Banerji and A. Raoof, JJ.*) *GOBARDHAN v. MANNALAL* 40 All. 584=16 A. L. J. 639=46 I. C. 559.

—O. 34, R. 1—Mortgage suit—Parties—Suit for sale by prior mortgagee—Duty to implead Puisne mortgagee as party—Omission—Puisne mortgagee not bound by order for sale. See T. P. ACT S. 85.

35 M. L. J. 1 (P. C.)

—O. 34, R. 1—Mortgage suit—Parties to—Title paramount not to be involved in—Rule—Exception.

In an ordinary mortgage suit a title paramount to and independent of the mortgagor is not a necessary issue and should as far as possible be excluded from the trial of a mortgage suit, but that is not an absolute principle. Where the leaving of such an issue undetermined would lead to inconvenience or hardship, it is proper that it should be tried in a mortgage suit. (*Muller, C. J. and Jwala Prasad, J.*) *SYED ZAKIE RAZA v. MADHUSUDHAN DAS.* 4 Pat. L. W. 417=45 I. C. 691.

—O. 34, R. 1—Paramount title—Not to be investigated in mortgage suits. See RES-JUDICATA, MORTGAGE SUIT.

16 A. L. J. 639.

—O. 34, R. 1.—Several mortgages on same property—Sale in execution—Priority between purchasers as to present right of possession—Right of sale of prior and puisne mortgages.

Per *Crouch, A. J. C.* Where two separate suits are filed by the 1st and 2nd mortgagees, respectively neither impleading the other and each brings the property mortgaged to him to

sale the present right of possession and enjoyment passes to the purchaser and the right cannot be sold again.

If a puisne mortgagee impleads the prior mortgagee the court should not ordinarily permit a sale subject to the 1st mortgage for it is the duty of a court to make a decree which shall deal finally with the question between the parties.

If the sale under the 2nd mortgage is made subject to the decree for sale obtained under the 1st mortgage the purchasers get only the right to redeem the 1st mortgage and the right to prevent possession. The pliffs, as first mortgagees have a right to bring the property mortgaged to them to sale-free of all encumbrances.

If the equity of redemption only has been sold the purchasers have merely bought a right to redeem the prior mortgage and the purchasers must to prevent a further sale redeem the 1st mortgage. (*Hayward and Crouch, A. J. C.*) *PAMANDAS v. HIRANAND.* 12 S. L. R. 1=47 I. C. 792.

—O. 34, R. 2 (c) 5—Mortgage—Suit for sale—Preliminary and final decree—Adjustment out of court between dates of—Power of court to recognise at time of passing final decree—Adjustment certified under O. 21 R. 2—Effect on courts powers.

On an application for the passing of a final decree in a suit for sale the court is bound to pass a decree for sale for the whole of the amount fixed by the preliminary decree in cases in which that amount or a portion thereof has not been paid into court within the time limited. The court has no power to inquire into and recognise an alleged adjustment of the decree out of court.

*Semble:* If between the passing of the preliminary decree and the passing of the decree for sale the defendant (mortgagor) obtains a certificate under O. 21 R. 2 C. P. C. he can take advantage of that to reduce the amount for which the property is to be sold. 25 C. L. J. 553 foll. (*Wallis, C. J. and Seshagiri Aiyer, J.*) *SINGA RAJI v. PETHU RAJA.*

35 M. L. J. 579=8 L. W. 497  
=24 M. L. T. 501=(1918) M. W. N. 809  
=48 I. C. 196.

—O. 34 Rr. 4 and 5—Interest after period of grace—Provision for, in final decree otherwise interest not claimable.

The proper period for allowing further interest after the period of grace would be when the decree absolute is made. If the decree absolute does not contain any mention of interest, it should be considered as disallowed. (*D. Chatterjee and Walmsley, JJ.*) *UDIT NARAYAN v. JASODA SAHUN.* 27 C. L. J. 576  
=46 I. C. 469.

—O. 34 Rr. 4 and 5 — Mortgage-decree—Decree not in accordance with T. P.

C. P. CODE. (1908) O. 34, R. 4.

Act, S. 85 (C. P. Code O. 34 R. 4)—Sale in execution—Purchase by mortgagee—Decree-holder with leave of Court—Fresh suit for redemption barred—Remedy by applying under S. 47 C. P. C. to set aside the sale. See C. P. CODE, S. 47. 41 M. 403 (P. C.)

—O. 34 R. 4 and 5—Suit on mortgage-decree passed by High Court in appeal—Application for decree absolute—Limitation—Limitation Act S. 5 and Art. 131—C. P. Code, O. 22 R. 1 (3)—Death of sole deft.—Bringing on record legal representatives of the deceased—Limitation—Abatement.

An application for a decree absolute under O. 34 R. 4 of the C. P. Code is beyond time when it is made more than three years after the date of the decree in appeal passed by the High Court and S. 6 of the Lim. Act will not save limitation inasmuch as an application for a final decree in a mortgage suit is not an application for execution. (Richards, C. J. and Banerjee, J.) NIZAMUDDIN SHAH v. BOHRA BEHM SEN. 40 All 203=13 A. L. J. 85=43 I. C. 870.

—O. 34, R. 5—Application for final decree for sale—Limitation. Starting point, See LIM. ACT, ART. 131. 21 O. C. 176.

—O. 34 R. 5—Decree absolute for sale—Redemption right of, lost.

Under O. 34, R. 5 C. P. Code a mortgagor has no right to redeem the mortgage after a decree absolute for sale. (Mitra A. J. C.) DHARAM SINGH v. GANESH RAM. 43 I. C. 399

—O. 34, R. 5—Decree—Preliminary and final—Proceedings between—Proceedings in suit—Application for final decree, nature of.

A final decree in a mortgage suit, is a decree in the suit itself and an application for a final decree cannot be deemed to be an application in execution. A second application, therefore, cannot be regarded as the revival of an application which has been disposed of. (Richards, C. J. and Banerjee, J.) AHMAD KHAN v. GAURA. 40 All 235=16 A. L. J. 143=43 I. C. 518.

—O. 34, R. 5—Final decree for sale—Effect—Substitution of a right of sale for the mortgage security. See T. P. ACT, S. 89. 35 M. L. J. 1 (P. C.)

—O. 34 R. 5—Preliminary decree for sale under T. P. Act—Application for final decree after the enactment of new C. P. Code—Limitation—Application, one in execution. See LIM. ACT, ARTS. 131 AND 132. 35 M. L. J. 194.

—O. 34 R. 5—Scope of—Property not in the possession of mortgagee and therefore incapable of being transferred to person re-

C. P. CODE. (1908) O. 34, R. 6.

leasing the security—Effect of. See MORTGAGE, REDEMPTION. 3 Pat. L. J. 490.

—O. 34 R. 5 (2)—Application for final decree for sale—Confirmation of preliminary decree on appeal—Limitation—Starting point. See LIM. ACT, ART. 131. 35 M. L. J. 507.

—O. 34, R. 5 (2)—Mortgage suit—Preliminary decree after present C. P. Code—Application for final decree—Limitation. See LIM. ACT, ARTS. 131 AND 132. 7 L. W. 438.

—O. 34 R. 6—Application for decree under, not an application in execution—Lim. Act, Art. 131 governs the application. See LIM. ACT, ART. 131. 16 A. L. J. 437.

—O. 34, R. 6—Application for personal decree—Objection to, not adjudicated in suit if can be barred before passing the decree.

A mortgage decree made no mention of plff's right to proceed under O. 34, R. 6 of the C. P. Code. The sale proceeds of the mortgaged property were insufficient to satisfy the decree and the plff. made an application under O. 34, R. 6. The deft objected that part of the account covered by the decree was barred at the time of the institution of the suit.

Held, that the deft. was not estopped from raising the objection inasmuch as it had not been adjudicated upon in the suit. (Mullick and Thornhill, JJ.) BOUKAI SAFU v. MOSAHEB ALI. 46 I. C. 892.

—O. 34 R. 6—Mortgage—Right to apply for personal decree—Suit for sale by puisne mortgagee against mortgagor and prior mortgagee—Decree declaring right of prior and puisne mortgagees to apply for sale of property—Effect—Prior mortgagee's right to apply for personal decree.

Where, in a suit for sale brought by a puisne mortgagee against the mortgagor and the prior mortgagee, a decree is passed by which the prior mortgagee as well as the puisne mortgagee are declared entitled to apply for the sale of the mortgaged properties, the prior mortgagee is entitled, as much as the puisne mortgagee himself, to apply for a personal decree in his favour. (Seshairi Ayyar and Bakewell, JJ.) VELUSWAMI NAIRER v. EASTERN DEVELOPMENT CORPORATION. 33 M. L. J. 382=22 M. L. T. 257=(1913) M. W. N. 4=42 I. C. 953.

—O. 34 R. 6—Mortgage-decree—Personal decree—Right of decree-holder to, when hypotheca not completely sold—Rule—Exception—Limits of.

The object of the rule requiring the mortgagee to completely sell the hypotheca before obtaining a personal decree is that the personal liability of the mortgagor should not be improperly increased. It is not however the

G. P. CODE, (1908) O. 34, R. 6.

law that a personal decree cannot be obtained in any case where the whole of the property directed to be sold has not been sold for whatever the cause may be. If a portion of the hypotheca has since the date of the decree become destroyed or become not available for sale by the action of other claimants and not through the acts or default of the mortgagee, the latter can obtain a personal decree against the mortgagor. 33 C. 890, 22 A 40; Ref. (Scanderson, C. J. and Woodroffe, J.) SATISH RANJAN DAS v MERCANTILE BANK OF INDIA. 45 Cal. 702=43 I. C. 322.

—O. 34, R. 6—Personal decree—Application for—Provision in compromise decree making other properties liable—Effect of.

A formal order under O. 34, R. 6 of the C. P. Code is a necessary preliminary to pursue properties not covered by a mortgage even where the original decree is a compromise decree declaring that the judgment debtor's other properties are to be liable in the event of the mortgaged properties not realizing sufficient to cover the decretal amount (Roe and Jucala Prasad JJ.) KARIMULLA SHAH v. MIRZA MUHAMMAD RAZA. 3 Pat. L. J. 649=48 I. C. 608.

—O. 34, Rr 7 and 8—Preliminary decree—Payment of money due under by mortgagor—Subsequent final decree—Suit for recovery of mesne profits from the date of payment under preliminary decree, maintainability of. See RES JUDICATA, MORTGAGE SUIT.

23 M. L. T. 158.

—O. 34, R. 10—Costs—Provision for payment of, by mortgagor—Personal liability of mortgagor—Decree—Construction.

In a suit for sale on a mortgage the decree of the High Court in appeal was drawn upon one of the High Court forms and stated that the appeal was allowed, the decrees of the lower appellate court was reversed and that of the court of first instance restored. In addition it contained the words:—"And it is further ordered that the respondent do pay to the appellant Rs. 554 6-9, the amount of costs incurred by the latter in this Court and the lower appellate court." The mortgagee-decreeholder applied to execute the decree for the appellate costs against the mortgagor personally and the application was allowed: Held that the costs were realisable out of the mortgaged property and not from the mortgagor personally. 20 All 522 foll. (Richards, C. J. and Banerjee, J.) DAMBER SINGH v. KALYAN SINGH. 40 All. 109=15 A. L. J. 914=

43 I. C. 537.

—O. 34, R. 10—Mortgage suit—Accounts—Preliminary decree—Money paid by mortgagee after preliminary decree either for rent or for supporting title to mortgaged property, if can be added to mortgage money.

G. P. CODE, (1908) O. 38, R. 5.

See (1916) DIG. COL. 816. ALLAHABAD BANK LTD. v. MOTI LAL BARMAN. 44 Cal 448=22 C. W. N. 374=35 I. C. 98.

—O. 34, R. 14—Execution sale—Purchase of a maintenance decree charging immoveable property—Right to sue under O. 34, R. 14 C. P. Code. See C. P. CODE, O. 21, R. 13. 23 M. L. T. 355

—O. 34, Rr. 14 and 15—Security bond—Money decree—Lien—Execution—Charged properties, sale of—Lien, suit on. See (1917) DIG. COL. 283; GOBINDA CHANDRA PAL v. KAILASH CHANDRA PAL. 48 Cal. 530=41 I. C. 73.

—O. 38 R. 2—Arrest before judgment—Deposit of money in Court sufficient to insure the claim—Judgment-debtor, insolvency of before decree—Rights of decree-holder and receiver in insolvency.

The debt, in a suit was arrested before judgment under the provisions of O. 38, R. 1 of the C. P. Code and he deposited in court a sum of money sufficient to answer the claim against him under O. 38, R. 2 (1). The plff. eventually obtained a decree for the sum sued for but during the pendency of the suit, and after the money was deposited in Court, the debt. was adjudicated insolvent and his properties vested in the Official Receiver. The plff. claimed a right to appropriate the fund in court to the amount of his decree to the exclusion of the Official Receiver or the general body of the debt's creditors.

Held, that the plff's claim was valid.

The money deposited in court by the debt. under O. 38, R. 2 was paid to the general credit of the suit and was charged with a lien in favour of the plaintiff for the amount that might be decreed in his favour and neither the receiver of the insolvent's estate nor the general body of creditors had a right to the fund in question. (Ayling and Coutts Trotter JJ.) RAMA AIYAR v. GOPALA AIYAR. 41 Mad. 1053=35 M. L. J. 355

—O. 38, Rr. 5 to 11—Applicability—Order before judgment for attachment—Actual attachment after judgment—Validity under rules 5 to 11 of O. 38—Subsequent dismissal of—Execution Application—Effect on attachment.

An attachment applied for before judgment but actually effected after decree has still the force of an attachment before judgment under O. 38 and the provisions of O. 38 do not lay down imperatively that the attachment should be actually effected before judgment.

O. 21, R. 57 does not apply to attachments before judgment under O. 38, and the dismissal of the subsequent execution application will not put an end to the attachment.

C. P. CODE, (1908) O. 38, R. 5.

(*Phillips and Kumraswami Sasiri, JJ.*)  
 RUDEAVARAM VENKATASUBBIAH v. PERLA  
 LUTCHANNA. 42 Mad. 1=35 M. L. J. 387=  
 (1918) M. W. N. 606=  
 8 L. W. 369=48 I. C. 232.

—O. 38, R. 5—Attachment before judgment—Order for when justifiable.

When a party seeks to obtain an order of attachment before judgment, he must have definite evidence to satisfy the Court that there is reasonable cause for believing that the judgment-debtor is about to dispose of the whole or part of his property with a view to defeating his creditors. It is not sufficient to make only general allegations (*Chapman and Atkinson, JJ.*) KHOKA MARWARI v. RAMACHANDRA MARWARI. 44 I. C. 240

—O. 38, R. 5 and O. 50, R. 1—Jurisdiction—Attachment of immovable property before judgment—Validity.

A Small Cause Court has power to attach immovable property before the judgment. The Code of Civil Procedure, 1908 has altered the law in this respect (*Drake Brokenan, J. C.*) KANCHEDI v. KANCHEDI. 14 N. L. R. 1=43 I. C. 123.

—O. 38 R. 5—Surety—Liability of, for amount awarded by arbitrators and decree by court.

When a suit is referred to arbitration and the Court pronounces judgment for the amount of the award, the amount is 'adjudged' by the Court.

Surety under Or. 37, R. 5 of the C. P. Code for the value of the property sought to be attached is liable in execution of a decree in the suit made in the terms of an award of arbitrators to whom the dispute had been referred. Reference to arbitration was an ordinary incident in the suit and the amount awarded was in a judgment against the debt, and was one for which the surety was liable. (*Pratt, J. C. and Hayward, J. C.*) UMERMAL JANIMAL v. FIRM OF BHOJRAJ HASSOMAL. 11 S. L. R. 122=45 I. C. 429.

—O. 38, R. 8—Attachment before judgment—Claim to attached property—Claim allowed—Effect—Lim. Act, Arts. 11 and 13. See (1917) DIG. COL. 284; RAMANAMMA v. KAMARAJU. 41 Mad. 23=5 L. W. 704=39 I. C. 863.

—O. 38, R. 8 and O. 21 R. 63—Attachment before judgment—Claim—Questions of title raised by claim to be disposed of at once—C P. Code, O. 21, R. 63 applicable. See C. P. CODE, O. 21, R. 63. 33 M. L. J. 231 (F. B.)

—O. 38, R. 9 and 11—Attachment before judgment, whether ceases on dismissal of suit—Appeal—Reversal of decree—Attachment does not revive.

C. P. CODE, (1908) O. 39, R. 2.

An attachment before judgment comes to an end when the suit is dismissed.

In order to avoid all possible doubt and difficulty the Court should when dismissing a suit make an order under O. 37, R. 3 of the C. P. Code withdrawing the attachment before judgment. When an attachment ceases by the dismissal of the suit it does not revive when an appeal is lodged. (*Richardson and Beachcroft, JJ.*) ABDU RAHMAN v. AMIR SHARIF. 45 Cal. 780=22 C. W. N. 927=44 I. C. 229.

—O. 39, R. 1—Insolvency proceedings—Attachment before judgment of sum due to debtor order directing payment to decree holder—Injunction restraining payment if valid—Insolvency of debtor, subsequent—Effect of.

Plff. sued the debt. for a sum of money and attached before judgment a sum of money due to debt. from the Dt. Board in the hands of the Dt. Board. Plff. got a decree and at his instance the executing Court issued a precept to the Dt. Board to pay the decree holder the amount in deposit at the credit of the debt. The debt. made an application to the Dt. Court where he had presented an application to be declared insolvent, asking for an injunction directing the Dt. Board to stop payment. Held that the Dt. Court had no power to issue an injunction on the Dt. Board as it was not a party before him. The Dt. Judge had no power to issue an injunction as the conditions laid down in O. 39 R. 1, C. P. C. did not exist. Nor did the facts of the case indicate that justice equity and good conscience required that the decree-holder, who instituted his suit before the insolvency petition was filed, should be kept out of his money. (*Mullick and Thornhill JJ.*) RAM SUNDER RAI v. RAM DREYUN RAM. 3 Pat. L. J. 456=5 Pat. L. W. 250=(1918) Pat. 302=46 I. C. 224.

—O. 39, R. 1—Temporary injunction—Suit for permanent injunction—Grant of relief desirable, when.

In a suit for a permanent injunction a temporary injunction ought not to be refused where the refusal would defeat the object of the suit and amount to denial of justice to the applicant. (*Woodroff and Huda, JJ.*) GUNABALA CHOWDHURANI v. HEM NALINI CHOWDHURANI. 43 I. C. 24.

—O. 39, R. 2—Injunction—Person not party to the suit, if can be proceeded against.

A Court has no jurisdiction to issue injunction against a person not a party to the suit or to summon before it any person not a party to the injunction. (*Roe and Jwala Prasad, JJ.*) MALHIDDIN AHMAD v. ATHER HOSSAIN. 44 I. C. 496.

## C. P. CODE. (1908) O. 39, R. 2.

—O 39, R. 2—Temporary injunction, grant of—Mandatory injunction if can be issued temporarily pending suit—Practice. See (1917) DIG. COL. 235; KANDASWAMI CHETTI v. SUBRAMANIA CHETTI. 41 Mad. 208= 33 M. L. J. 448=(1917. M. W. N. 501= 6 L. W. 140=41 I. C. 384.

—O. 39, R. 2 cl. (3)—Applicability—Contempt of Court—Disobedience to order of Court—Single act.

The provision as to punishment for disobedience to orders of Court is not confined to suits of the nature contemplated by R. 2 of O. 39. O. 39 has to be read along with S. 34.

Clause 3 of R. 2 of O. 39 applies to cases of disobedience to an order to do or abstain from doing a single act. (*Kumaraswamy Sasiri, J.*) VIDYAPURNA THIRTHASWAMY v. THE VICAR OF SURATKAL CHURCH.

7 L. W. 328=44 I. C. 56.

—O. 40, R. 1—Mortgage suit—Simple mortgage — Receiver, appointment of, incompetent.

In the case of a simple mortgage the mortgagor is entitled to remain in possession of the mortgaged property until such time as that property is brought to sale in due course of law and in a suit on a simple mortgage the Court has no power to appoint a Receiver during the pendency of an appeal from the preliminary decree. (*Richards, C. J. and Banerjee, J.*) GOBIND RAM v. JWALA PERSHAD.

43 I. C. 533.

—O. 40, R. 1—Partnership suit—Receiver appointment of when all partners not parties—No jurisdiction.

The appointment of a receiver to manage a partnership business where all the partners are not parties to the suit is *ultra vires* (*Pratt, J C and Hayward, A. J. C.*) MIKANBAI v. DASSIMAL GANGARAM.

48 I. C. 224.

—O. 40, R. 1—Receiver, appointment of—Deft. in uninterrupted possession.

In a case of disputed title where the deft. admittedly the original owner of the property, claims to have been in uninterrupted possession of the property, the appointment of a Receiver can be justified only when a strong case is made out. (*Twomey, C. J. and Parrott, J.*) S. R. M. MEYYAPPA CHETTI v. NARAYAN CHETTY.

43 I. C. 550.

—O. 40, R. 1—Receiver, appointment of—Execution of mortgage decrees—No provision for appointment of receiver in final decree—No power to appoint one in execution See EXECUTION.

43 I. C. 22.

—O. 40, R. 1—Receiver, Appointment of—Floating charge—Suit to enforce—Appointment of receiver without taking evidence—Propriety of. See RECEIVER.

46 I. C. 389.

## C. P. CODE, (1908) O. 40, R. 1.

—O 40 R. 1—Receiver—Appointment of—Grounds for—Old Code and new—Difference between—Appellate Court, when can interfere with discretion of Court—No reason of appointment of receiver when no allegation of waste, etc.

The intention of the Legislature in substituting the words "just and convenient", in place of the phrase "necessary for the realization, preservation, or better custody of management of any property moveable or immovable the subject of a suit or attachment," in O. 40, R. 1 of the C. P. Code was to bring the law in India into conformity with that in England.

The power of appointing a Receiver should be exercised in India in accordance with principles already settled by the Court of Chancery in England, subject to such notifications as conditions peculiar to India may suggest.

These principles are the preservation of the estate pending litigation of the merits of the conflicting parties, the risk to the tenants and other circumstances of the case. The Court, however, is always reluctant to dispossess a party in actual possession under a *prima facie* title.

A Court of Appeal, though slow to interfere, with the discretion of that lower Court in the appointment of a Receiver, would interfere if satisfied that that discretion has not been exercised with settled principles of law.

The appointment of a Receiver is unnecessary where there is an allegation of any act of waste or mismanagement but on the contrary there are partners in the estate other than the litigating parties who are interested in seeing that the property is kept safe and regular accounts are kept of the business (*Pratt and Hayward, A. J. C.*) MIKANBAI v. DASSIMAL GANGARAM.

45 I. C. 224.

—O. 40 R. 1 Receiver—Appointment—Grounds—Insolvency of administrator if a good ground.

The insolvency of an administrator is a good reason for appointing a receiver. The facts that the administrator has been administering the estate for a number of years, and has kept proper accounts, that waste or mismanagement is not alleged, and that all the persons for whom the estate has been administered have not joined in the application are not sufficient reasons for refusing to appoint one. (*Young J.*) OFFICIAL ASSIGNEE v. HAJEE MOHAMED HADY.

11 Bur L. T. 127=

48 I. C. 152.

—O. 40, R. 1—Receiver—Objection to appointment of—Order on—Appeal

An order dismissing an objection to the appointment of a Receiver of property of which the objector is in possession falls within O. 40, R. 1 of the C. P. Code and is appealable.

G. P. CODE, (1908) O. 40, R. 1.

(*Miller, J. J. and Mullick, J.*) AGABEG v. MUSSAMMAT SUNDARI. 3 Pat. L. J. 573= 48 I. C. 133.

—O. 40, R. 1—Receiver—Suit by, for recovery of possession of properties—Illegality of order of appointment of receiver—Not to be raised as a defence to the suit. See DECREE. COLLATERAL ATTACK. 43 I. C. 304.

—O. 40, R. 1 (2)—Receiver—Appointment of in execution of mortgage decree—Objection to receiver's taking possession by lessee of property—Maintainability of—Appeal by person not a party to suit not maintainable.

Where in execution of a mortgage decree the mortgaged property was put up to sale and purchased by one G and where on an application filed by one B to set aside the sale on account of irregularity, a Receiver was appointed by the Court who was to take possession of the mortgaged property and thereupon one I objected to the Receiver's taking possession on the ground that he was a lessee of the mortgaged property though after the execution of the mortgage and that he had paid off debts and other charges prior to the decree in execution of which the sale took place, and on the objection being disallowed, filed appeals to the High Court and also moved it in revision.

Held, that as he was not a party to the suit, he had no right of appeal.

Held, further, in revision, that the Court below had no jurisdiction to overrule the objection made by one unless it was satisfied that the claim was not made *bona fide* or was made really on behalf of one of the parties to the case.

The Lower Court should have dealt with the claim that I was entitled to a prior charge. (*Chapman and Atkinson, JJ.*) INDER DEO NARAIN SINGH v. GOUBI SANKAR.

(1918) Pat. 138=

4 Pat. L. W. 414=45 I. C. 177.

—O. 40, R. 1 (d)—Receiver, powers of—Special leave of Court whether necessary. See (1917) DIG. COL. 285: MEEB MAHO. MED v. HORMASJEE.

10 Bur. L. T. 244=38 I. C. 92.

—O. 41, R. 1—Two decrees in one suit—One appeal to be filed for each decree.

Two or more decrees cannot be challenged in one appeal even when such decrees are based upon one judgment in one suit. (*Roe and Juala Prasad, JJ.*) RAMNARAIN LAL v. HARI KRISHNA PRASAD SAHI. 3 Pat. L. J. 96=

44 I. C. 418.

—O. 41, R. 1 (1)—Decree—Amendment of pending appeal—Copy of amended decree to be produced.

If a decree is amended after an appeal had been preferred against it, and an application

C. P. CODE, (1908) O. 41, R. 3.

to the Appellate Court to attach to the memorandum of appeal a copy of the amended decree is granted, then from that moment the pending appeal becomes an appeal against the amended decree. (*Myerjee and Beachcroft, JJ.*) SADUPADHYA UNESHANAND OJHA v. RAVENESHWAR PRASAD SINGH.

43 I. C. 772.

—O. 41, R. 4 and O. 22, R. 3—Decree on ground common to all debts—Death of one appellant during pendency of appeal—No abatement. See C. P. CODE, O. 22, R. 3 AND O. 41, R. 4. 46 I. C. 50.

—O. 41, Rr. 4 and 33—Mortgage decree—Appeal by purchaser at a revenue sale—Appellant declared not liable—Effect on other parties.

An order in an appeal by one of several debts enures to the benefit of the other debts, only if the interests of the latter are inseparable from the interest of the debt appellant.

Where a decree in a mortgage suit made all the properties covered by the mortgage liable to sale and person who had purchased one of the properties at a revenue sale appealed from the decree, and the appellate court exonerated him from liability under the mortgage, held, that the result of the appeal was to free only the property in which the debt appellant had an interest leaving untouched the decree of the original court in so far as the interests of the mortgagors and puisne mortgagees were concerned. (*Roe and Imam, JJ.*) MAHENDRA KOER v. SAT NARAIN LAL. 3 Pat. L. J. 166=

44 I. C. 762

—O. 41, Rr. 4 and 33—Scope of—Appellate Court—Power of, to vary decree in favour of non-appearing parties.

Except under O. 41 R. 4 of the C. P. Code, an appellate court cannot vary a decree of a lower court as regards its adjudication on the rights and liabilities of the parties who have not joined in the appeal and who are not parties to the litigation in the appellate court.

O. 41 R. 33 of the C. P. Code, does not apply to a person who is not a party to the appeal. (*Fletcher and Huda, JJ.*) HARIDAS DEY v. KAILASH CHANDRA BOSE.

44 I. C. 480.

—O. 41, Rr. 5 and 6 (2)—Application for stay of sale—Power of appellate Court.

An appellate court has power under O. 41, R. 5 of the C. P. Code to stay the sale of immoveable property ordered by the lower court on an application made to such appellate court.

The inherent powers of the appellate court clearly recognised by O. 41, R. 5 cannot be held to have been cut down or limited by the special and exceptional power conferred on the executing court by O. 41, R. 6 which rule

C. P. CODE, (1908) O. 41, R. 5.

seems to have been clearly intended in order that the executing court might be compelled to exercise it in emergent cases for the benefit of the judgment debtor. 23 M. L. J. 677 diss. 20 C. L. J. 512, 34 C. 1037 ref. (*Sada siva Iyer and Napier, J.J.*) **LAKSHMANAN CHETTY v. PALANIAPPA CHETTY.**

41 Mad. 513=34 M. L. J. 470=  
24 M. L. J. 18=(1918) M. W. N. 502=  
7 L. W. 612=45 I. C. 30.

—O. 41, R. 5—Order directing execution on giving security—Acceptance of security without considering objection of judgment-debtor—Order bad.

Where the High Court gave liberty to the decree-holder to execute the decree on furnishing security pending an appeal.

*Held*, that the executing Court was wrong in accepting the securities without holding any enquiry into their sufficiency and that the case must go back to the executing Court for making the necessary enquiries. (*Teunon and Newbold, J.J.*) **RUDRA NARAYAN JANA v. NABA KUMAR DAS.**

22 C. W. N. 657=  
44 I. C. 155.

—O. 41, R. 5 (3) (c)—Stay of execution on furnishing of security by judgment debtor—Right of decree-holder to proceed against other properties on dismissal of appeal, not affected. See C. P. CODE, S. 145.

43 I. C. 454.

—O. 41, R. 10—Applicability—Appeal in forma pauperis—Security for costs—Order against pauper appellant—Jurisdiction. See (1917) DIG. COL. 287; **KHEMRAJ SRIKRISHNA DAS v. KISANLALA SURAJMAL.**

42 Bom. 5=19 Bom. L. R. 771=42 I. C. 67.

—O. 41, R. 10—Application for restoration of appeal dismissed under—Limitation. See (1917) DIG. COL. 287; **GOLJAN BIBI v. NAFAR ALI.**

23 C. L. J. 163=40 I. C. 234.

—O. 41, R. 10—Minor respondent—Appellant directed to furnish security for costs of guardian-ad-litem—Failure—Dismissal of appeal.

On the failure of an appellant to furnish security for the costs of the guardian ad-litem of a minor respondent the appeal was dismissed as against the minor by the Dt. Judge. The appeal was subsequently transferred to the Subordinate Judge, who heard a pleader instructed by a third person on behalf of the minor and allowed the appeal. Subsequently the Subordinate Judge, on being informed of the order passed by the Dt. Judge, vacated his own order against the minor and dismissed the appeal as against him:

*Held*, that the order of dismissal passed by the Dt. Judge was proper order and binding between the parties. (*Fletcher and Huda, J.J.*) **KAILASH CHANDRA KANDOR v. HARIHAR PATRA.**

47 I. C. 928.

C. P. CODE, (1908) O. 41, R. 22.

—O. 41, R. 10—Security for costs—Application for—Grant of relief, when

Applications for security for the costs must be made promptly, not only on the ground that the respondent should apply for security for the costs before he incurs them but also on the ground that it is unreasonable that security should not be applied for till the appellant has incurred the costs of the appeal. 33 Ch. D. 76: 5 C. W. N. 119; 17 M. L. J. 583 Ref. (*Shadi Lal, J.*) **MUSSAMMAT DALIP KOER v. JAGIR SINGH.** 20 P. L. R. 1918=41 P. W. R. 1918=44 I. C. 23.

—O. 41, R. 10. cl. (2)—Appeal, dismissal of—Re-admission—Judge, power of—Lim. Act, Art. 163—Application for re-admission—Limitation for. See (1917) DIG. COL. 288; **GOLJAN BIBI v. NAFAR ALI.**

28 C. L. J. 163=40 I. C. 234.

—O. 41, R. 19—Dismissal of appeal for Default—Restoration, application for—Sufficient cause.

An appeal which was pending in the Court of a Subordinate Judge was transferred, by the District Judge to the Court of the Additional District Judge without any notice to the parties or their pleaders. On the day fixed for its hearing, while the appellants were in the Court of the Subordinate Judge waiting for their cases to come on, the appeal was taken up by the Additional District Judge and was dismissed for default. An application to restore the appeal made on the very next day was dismissed by the Additional District Judge.

*Held*, that the appeal should be restored and heard on the merits on the appellants paying to the respondents their costs within a certain time. (*Fletcher and Huda, J.J.*) **ISABALI v. BHAGABAN CHANDRA SHAHA.**

46 I. C. 881.

—O. 41, R. 21—Ex-parte decree—Application to set aside during pendency of appeal from such decree—Competency—Decree set aside—Second appeal, infructuous.

Where the lower Appellate Court passed an ex-parte decree against the deft. who preferred an appeal to the Judicial Commissioner's Court and also applied under O. 41, R. 21 of the C. P. Code to the Lower Appellate Court *held* (1) that the pendency of the appeal was no bar to the application under O. 41, R. 21 C. P. C. and (2) that when the lower appellate Court set aside the ex-parte decree and passed a judgment in favour of the deft. the "cause of appeal" to the Judicial Commissioners Court disappeared and that the second appeal should be dismissed. (*Stanyon, A. J. C.*) **SADARAM v. DULAR.**

14 N. L. B. 30=43 I. C. 902.

—O. 41, R. 22—Appeal memo of cross-objections; by one of the respondents—Death of respondent after memo of objection pre-

C. P. CODE, (1908) O. 41, R. 22.

ferred—Omission by appellant to bring legal representative on record—Legal representative, application by, to be brought on record in memo. of objections—Effect. *See* C. P. Code. O. 22, R. 4. 7 L. W. 614.

—O. 41, R. 22—*Appeal under Prov. Insol. Act, S. 46—Respondent's right of filing memorandum of objections—Prov. Insol. Act, Ss. 46 and 47—Appeal filed out of time—Whether respondent can present a memorandum of objections.*

A respondent in an appeal filed under S. 46 of the Prov. Insol. Act has the right to present a memo. of objections under O. 41, R. 22 of the C. P. Code.

A memo. of objections, presented in an appeal, which is dismissed as out of time, cannot be heard.

The right of a respondent to proceed by way of memo. of objections is strictly incidental to the filing of the original appeal in time; and it is open to a party against whom a memo. of objections has been filed to set up the bar that the original appeal was filed out of time. (*Wallis, C. J., Spencer and Sadastava, JJ.*) *ALAGAPPA CHETTIAR v. CHOCKALINGAM CHETTY*. 41 Mad. 904=35 M. L. J. 236=24 M. L. T. 137=8 L. W. 240=(1918) M. W. N. 688=48 I. C. 203.

—O. 41, R. 22—*Cross objections against co-respondents.*

It is competent to a respondent in an appeal to file cross-objections against his co-respondents. (*Piggott and Walsh, JJ.*) *MUSLEHA BIBI v. RAM NARAIN*. 40 All 536=16 A. L. J. 887.

—O. 41, Rr. 22 and 33—*Scope of—Cross objection against a co-respondent—Test to be applied in such a case—Appellate Court, powers of.*

A cross-objection by a respondent as against his co-respondent should not be entertained under O. 41, R. 22 of the C. P. Code, where the question raised thereby is entirely distinct from and in no way related to the question in controversy in the appeal. 15 C. L. J. 61 foll. (*Sanderson, C. J., Woodroffe and Mookerjee, JJ.*) *SHIB CHUNDER KAR v. DULKEN*. 23 C. L. J. 123=48 I. C. 78.

—O. 41, Rr. 22 and 33—*Right to file memorandum of objections as to parts of the decree not affected—Land Acquisition Act—Procedure under Appeal by Dy. Collector with regard to the valuation of some of the plots acquired—Memorandum of objections by claimant regarding other plots comprised in same petition.*

When an appeal is preferred to the High Court in respect of the valuation of some of the plots in a land acquisition case, it is open to the respondent to prefer a memorandum of

C. P. CODE, (1908) O. 41, R. 23.

objections relating not merely to the plots covered by the appeal but also to the other plots, which was the subject of the same petition, though not covered by the appeal, under O. 41, R. 23 of the C. P. Code.

A memorandum of objections may be filed against the decree as a whole or against any part of it though it may not be the subject-matter of the appeal.

S. 54 of the Land Acquisition Act makes no departure from the ordinary rule of the C. P. Code, that the memorandum of objection need not be confined to the subject-matter of the appeal. (*Abdur Rahim and Seshagiri Iyer, JJ.*) *THE DEPUTY COLLECTOR, MADURA DIVISION v. MUTHIALA MUDALI*.

35 M. L. J. 83=24 M. L. T. 83=(1918) M. W. N. 458=8 L. W. 271.

—O. 41, Rr. 23 and 27—*Appellate Court—Power of remand—Lower Court improperly refusing to record evidence.*

Where an Appellate Court considers that certain evidence refused to be recorded by the Lower Court ought to have been recorded, it has no power to remand the suit for re-hearing *ab initio* under O. 41, R. 23 of the C. P. Code but can direct any additional evidence to be recorded, under O. 41, R. 27 of the C. P. Code. (*Stuart, A. J. C.*) *FIDA ABBAS v. RAHIM BAKSH*. 5 O. L. J. 139=45 I. C. 832.

—O. 41, Rr. 23, 25 and O. 43, R. 1 (4)—*Appellate Court—Remand of case, after raising new points, not set up in pleadings and direction to take fresh evidence—Appeal.*

It is an elementary rule that the determination of causes depends on the allegations made in the pleading and the proof.

An appellate court is not entitled to raise new point involving fresh evidence in appeal and to remand the case for the trial of questions which never occurred to the parties previously.

Plff. to establish her right of way over certain lands belonging to the deft. based her claim both on prescription and on necessity. The trial Court dismissed the suit on the ground that the plff. had failed to prove her case. On appeal, the Subordinate Judge, although he concurred with the trial Court in holding that on the evidence on the record the plff. had failed to prove that she was entitled to a right of way either on the basis of prescription or on the basis of necessity, went on to discuss the question whether plff. had a right founded either on custom or grant or some right to use the way as a village road, or as a public road, and remanded the case to the Court of first instance to be re-heard not only on the evidence already on the record but on such further evidence as the parties might desire to adduce.

C. P. CODE, (1908) O. 41, R. 23.

*Held*, that the order of remand must be set aside and the suit remitted to the Court of appeal in order that the appeal to that Court might be finally disposed of with reference to the pleadings and the proof.

Although this was not a case in which it was, strictly speaking, open to the Court of Appeal to make an order under rule 23 of O. 41 of the C. P. Code, yet as the order appeared to be in form and substance an order under that rule and not under rule 25, an appeal lay against it. (*Richardson and Beachcroft, J.J.*) BASSEMATI DEBI v. TARIT BASANI DASSI. 44 I. C. 416.

—O. 41, R. 23—Improper rejection of evidence by lower appellate court—Remand for re-hearing.

Where certain documents having some bearing on the case were improperly excluded from consideration by the Appellate Court as being inadmissible in evidence.

*Held*, that as it was impossible to say what effect the consideration of those documents, as evidence, might have had on the judgment of the Appellate Court it could not be said that the Appellate Court had properly considered all the evidence in the case and that, therefore, the decree of the Appellate Court must be set aside and the case remanded for a re-hearing of the appeal on consideration of the whole of the evidence including those documents. (*Chitty and Walmsley, J.J.*) BRINDABAN CHANDRA DE. v. KRISHNA MOHAN DE. 47 I. C. 159.

—O. 41 Rr. 23 and 25—Issue not raised—Evidence adduced and finding given—No remand necessary.

A remand is not necessary merely because no issue has been framed on a particular point when it appears that evidence was led on the point and the Court came to a finding with regard to it. (*Le Rossignol, J.*) HAMID HUS. SATN v. BISHEN SARUP. 137 P. W. R. 1918 = 46 I. C. 659.

—O. 41 Rr. 23 and 25—Remand in cases not covered by—No appeal—Power to be used with great caution. See C. P. CODE, Ss. 107 (1) (b) and (5) etc., 43 I. C. 959.

—O. 41 Rr. 23 and 25—Remand of case—Fresh evidence as to meaning of technical expression.

A suit can be remanded by an Appellate Court for the purpose of taking evidence in order to elucidate the meaning of an absolute or provincial expression. (*Tuonon and Newbould, J.J.*) ANHAYESWARI DEBI v. HATU-SHIEKH. 46 I. C. 646.

—O. 41 R. 23—Remand by High Court—Propriety of order not to be questioned in appeal from revised decree passed by lower court after remand. See RES. JUDICATA, INTERLOCUTORY ORDER. 46 I. C. 816.

C. P. CODE, (1908) O. 41, R. 23.

—O. 41, R. 23—Remand order—Appeal against—Question of fact—Jurisdiction of Punjab Chief Court.

In an appeal from an order remanding the cause under O. 41, R. 23 of the C. P. Code, the Chief Court can no more go into questions of fact than it can in second appeal. 85 P. R. 1914 ref.

The question whether certain *pattis* are real sub-divisions of a village for the purpose of the law of pre-emption is a question of fact. 64 P. R. 1887 ref.

*Semble*, that the question is simply whether there are sub-divisions of the village, not for what reason were the sub-divisions made (*Chevis, J.*) WARYAM SINGH v. HARNAM SINGH. 109 P. R. 1918.

—O. 41, R. 25—Remand—Order of, if can be reconsidered by Judge who made the order or in appeal from final decree after remand.

In a remand under O. 41, R. 25 of the C. P. Code the case remains pending undisposed of on the Appellate Court's file, and the Judge may yield to conviction and change his mind at any time before he has pronounced a final judgment. A remand order under O. 41, R. 23, however, cannot be re-considered in a subsequent appeal from the decision of the first Court after remand. (*Prideaux and Kotwal A. J. C.*) SULTAN BEG v. SUKDEO NANDRAM. 46 I. C. 922.

—O. 41, R. 23—Scope of—Suit for recovery of possession—Remand by appellate court on issues already tried and for local investigation—Impropriety of.

In a suit for recovery of possession the lower Appellate Court made an order of remand under O. 41, R. 23 of the C. P. Code, framing additional issues and directing local investigation for determination of the boundary line of the land in suit:

*Held*, that the order of remand was unnecessary and vexatious as the additional issues framed were covered by some of the issues decided in the judgment of the original Court. The *plffs.* having refrained from applying for local investigation in the first Court, should not be given another opportunity of establishing their case. (*Tuonon and Newbould, J.J.*) KENARAM MONDAL v. ASIMADDI MALLA KARIKAR. 43 I. C. 816.

—O. 41, R. 25—Appellate Court—Raising of new points involving evidence, an appeal though not raised in the pleadings or issues—Remand to first Court for trial *de novo*—Procedure improper—Appeal. See C. P. CODE, O. 41, RR. 23 AND 25 ETC.

43 I. C. 416.

—O. 41, R. 25—Remand for fresh evidence—Attestation, not strictly proved—Fresh evidence not to be allowed.

C. P. CODE, (1908) O. 41, R. 25.

It is an unusual course to remand for fresh evidence on appeal which has been argued and which ought *prima facie* to be decided on the materials which were before the courts below and the Privy Council having found that the mortgage in question had not been proved to have been attested as required by law, refused to remand the case for fresh evidence. (*Viscount Haldane*.) GANGA PRASAD SINGH v. ISHRI PERSHAD SINGH.

45 Cal. 748=20 Bom. L. R. 587=  
16 A. L. J. 409=43 I. C. 1=45 I. A. 94 (P. C.)

—O. 41, R. 25—Remand by High Court—Power of lower appellate court to send the case for trial to the first Court.

Where the Chief Court remanded the case to the lower appellate court for further inquiry held, that it was not the intention of the Chief Court when issuing the remand order, that the lower Appellate Court should be precluded from directing the first Court to record any additional evidence, if necessary. (*De Rossignol, J.*) PARTAP SINGH v. PARTAP.

147 P. L. R. 1917=44 I. C. 907.

—O. 41, R. 27—Additional evidence—Admission of, when justifiable.

It is not open to a Court of Appeal to order additional evidence to be taken except to cure an inherent defect in the evidence already recorded. (*Mullick and Imam, JJ.*) TEJU BHAGAT v. DEOKI NANDAN PRASAD.

47 I. C. 141.

—O. 41, R. 27—Appellate Court allowing documentary evidence to be put in by appellant—No opportunity given to respondent to rebut the evidence—Procedure illegal. See (1917) DIG. COL. 295: MAHOMED SADIQ v. MALIKWAZIRUL HUQ. (1917) Pat. 269=43 I. C. 326.

—O. 41, R. 27—Remand for additional evidence being taken—Grounds for, to be adequately stated. See C. P. CODE, O. 41, RR. 23 AND 27. 27 C. L. J. 596.

—O. 41, R. 27—Scope of—Documents filed along with memorandum of appeal—Findings of Lower Appellate Court based on such evidence, if legal.

An appellate court is not entitled to admit and consider additional documentary evidence in contravention of the provisions of O. 41, R. 27 C. P. C.

Where an appellant attaches certain documents to his memorandum of appeal and the appellate court passed an order that they should remain in the record.

Held, that the appellate court erred in admitting and considering this evidence and that its findings being vitiated by the fact that they were based on evidence wrongly admitted, were liable to be set aside, 31 Bom.

C. P. CODE, (1908) O. 41, R. 31.

351, 11 C. W. N. 721, 4 A. L. J. 461 and 17 M. L. J. 247 foll. (*Scott Smith and Broadway, JJ.*) RATNA v. HARNAM SINGH  
150 P. W. R. 1218=47 I. C. 12.

—O. 41, Rr. 28 and 27—Remand for taking additional evidence—Inherent power—Procedure.

The Appellate Court has inherent power of remand in cases other than those specified in O. 41, R. 23 of the C. P. Code if a remand be necessary for the ends of justice 41 Cal. 923 expl.

Where the Appellate Court remanded a case to the trial Court for a fresh decision after receiving in evidence the documents tendered by the piffs, as also any further evidence which they and the defts, might adduce in support of their respective cases.

Held, that the order was not an order which it was open to the Appellate Court to make under O. 41, R. 23 of the C. P. Code, that the Appellate Court should have taken action under O. 41, R. 27, that in so ordering it did not decide the case on the evidence on the record or deal with it under O. 41, R. 27 if additional evidence was necessary (*Richardson and Wainstay, JJ.*) BEJOY KRISHNA MUKERJEE v. JIBON KRISHNA GANGULY.  
27 C. L. J. 596=46 I. C. 333.

—O. 41, R. 31—Appellate judgment, contents of.

O. 41, R. 31 of the C. P. Code, intends and requires that there should be some statement, however brief, by the Appellate Judge to show that he has exercised his own mind independently on the question involved in the appeal: A litigant is entitled of right to a first appeal and that involves that he is entitled to know however briefly, the reasons which have moved the appellate Judge to his conclusion. (*Bachelor, A. C. J. and Kemp, J.*) GANPATI v. SEVAKRAM. 20 Bom. L. R. 461=46 I. C. 161.

—O. 41, R. 31—Appellate judgment—Contents of—Meagre judgment—Reversal and remand by High Court.

Where a Court of Appeal reverses the decision of the primary Court, the law imposes upon the Court of Appeal an imperative duty and obligation of giving an adequate and satisfactory judgment such as is required by law. 1 Pat. L. W. 193; 33 I. C. 509; 36 C. 927 Ref. (*Atkinson, J.*) BIBI SALEHA v. ANTU RAM. 43 I. C. 973.

—O. 41, R. 31—Judgment, contents of.

Where the Court had not dealt with the points raised in the application.

Held, that the judgment was not only not a judgment in accordance with the law but no judgment at all, and the lower appellate Court had no jurisdiction to revise the order of the lower Court without writing a judg-

G. P. CODE, (1908) O. 41, R. 33.

ment in accordance with law. (*Roe and Jwala Prasad, JJ.*) MUSSAMMAT SOHAGBATI v. BABU SUBENDRA MOHAN SINGH.

4 Pat. L. W. 286=44 I. C. 661.

—O. 41, R. 33—Appellate court—Power of, to pass a decree against persons not parties to appeal.

Where some of several defendants appeal from a decree without impleading their co-defendants as respondents, the appellate court has no jurisdiction to pass any decree against those co-defendants, without adding them as parties to the appeal. (*Chitty and Walmsley JJ.*) DURGACHARAN BOSE v. LAKHI NARAIN BERA. 47 I. C. 917.

—O. 41, R. 33—Appellate—Court—Powers of, to reverse a finding of the lower Court in the appellant's favour, though respondent had not preferred cross objections under O. 41, R. 22, C. P. Code.

Plff. had sold his share in some lands and the buildings thereon along with a passage, to defts. by a Kobala. He subsequently sued for recovery, of a partition of the passage alleging that it had not passed by the Kobala. The Munsif gave a partial decree and the subordinate Judge partially allowed the defendant's appeal, but reversed a portion of the Munsif's decree which was in favour of the defts, and against which the plff. had not preferred any cross-objection.

Held, that in the appeal by the debt, the lower Appellate Court, under the circumstances of the case, was not justified under O. 41, R. 33, in interfering with the portion of the Munsif's decree which was in favour of the defts., as the Plff. had not filed any cross appeal or taken cross-objections under O. 41, R. 22; 22 C. L. J. 990: 20 C. W. N. 542. foll. (*Sanderson, C. J. and N. R. Chatterjee J.*) GOPAL CHANDRA DAS v. NADIAR CHAND DAS. 22 C. W. N. 526=46 I. C. 142.

—O. 41, R. 33—Appellate court—Powers of—Limits to.

O. 41 R. 33 of the C. P. Code must be cautiously applied, for instance, applied generally in cases where but for recourse to it the ends of justice would be defeated. Thus the rule should not be invoked in favour of a litigant so as to enable him to evade the provisions of other statutes like the Limitation Act and the Court Fees Act. (*Sanderson C. J., Woodroffe and Mookerjee, JJ.*) SHIB CHANDRA KAR v. DULCKEN. 28 C. L. J. 123=48 I. C. 78.

—O. 41, R. 33—Appellate Court—Power of varying decree of court below—Extent of.

In a suit to which a puisne mortgagee was a party the prior encumbrancer prayed for and obtained a decree against the sale proceeds of a revenue sale. The puisne mortgagee brought two suits; one for a declaration that the

G. P. CODE, (1908) O. 41, R. 33.

recorded proprietor was the benamidar of the purchaser at the sale, and consequently the latter acquired the property subject to encumbrances, and the second to enforce his mortgage against the property. The Court of first instance held that the purchaser was the real owner of the property and decreed both suits in favour of the mortgagees. Against these two decrees the purchaser appealed against the decree in favour of the prior mortgagee. The High Court heard all the appeals together, and affirming the finding of the court below dismissed the purchaser's appeals and gave the prior mortgagee a decree against the property and in lieu of that against the sale proceeds.

Held, that inasmuch as on hearing the puisne mortgagee's appeal the High Court had before it all the facts that showed all the circumstances relating to the sale, the Court had abundant power under Ss. 151, 107 and O. 41, R. 33 of the C. P. Code, 1908, to vary, as it did, the decree of the prior mortgagee's suit and the omission to appeal did not operate as an estoppel against the puisne mortgagee so as to prevent him from attacking the sale in his own suits, and obtaining consequential relief. (*Lord Buckmaster*) TARINI CHARAN SIKKAR v. BISHUN CHUND. 34 M. L. J. 361=

23 M. L. T. 147=1918 M. W. N. 296=

7 L. W. 315=22 C. W. N. 505=

27 C. L. J. 303=16 A. L. J. 271=

4 Pat. L. W. 249=44 I. C. 304 (P. C.)

—O. 41, Rr. 32 and 22—Appellate Court power of, to vary decree of lower court—Cross objections. See (1917) DIG. COL. 298. MAUNG CHIT PU v. MAUNG PYAVUG.

11 Bur. L. T. 19=(1916) 11 U. B. R. 144=

39 I. C. 380.

—O. 41, R. 33—Mortgage decree—Appeal by purchaser at a revenue sale—Appellant declared not liable—Effect on other parties. See C. P. CODE, O. 41, RR. 4 AND 82.

3 Pat. L. J. 166.

—O. 41, R. 33—Object of—Scope of the powers of Appellate Court

The object of O. 41, R. 33 C.P. Code is to enable the Court to do complete justice between the parties to the appeal. It was not intended to enable a deft. to obtain for a plff. not a party to the appeal, a relief which the latter never asked for. (*Drak, Brockman, J. C.*) VINAYAK RAO v. LAXMAN.

14 N. L. R. 56=44 I. C. 81.

—O. 41, R. 33—Scope of—Decree in favour of non-appealing party when to be passed.

O. 41 R. 33 C. P. C. applies only to cases where for the ends of justice and to the equitable execution of the decree the appellate court thinks it necessary to make a material varia-

## C. P. CODE, (1908) O. 41, R. 33

tion in the decree. In the absence of a cross appeal the amount decreed against a party should not be wiped off on considerations which commend themselves to the appellate court. (*Sharfuddin and Bee, JJ.*) RAMCHANDRA CHAUDHURY v. DWARKA NATH CHATTERJEE. (1918) Pat. 26=5 Pat. L. W. 213=36 I. C. 537.

———O. 41, R. 33—Scope of—Rule not applicable to a person who is not a party to the appeal. See C. P. CODE, O. 41, R. 4 AND 33. 44 I. C. 430

———O. 43, R. 1—Applicability of—Madras Estates Land Act—Suit under—Order inapplicable. See MADRAS ESTATES LAND ACT S. 192. 41 M. 554.

———O. 43, R. 1 (a)—Order returning memorandum of appeal for presentation to proper court—No appeal.

No appeal lies against the order of an appellate court returning a memorandum of appeal to be presented to the proper Court. (*Bannerjee and Rytas, JJ.*) NUR-UD-DIN v. PRAN KISHEN CHAKRABARTY. 40 All 659=16 A. L. J. 630=47 I. C. 16.

———O. 43 R. 1 (a)—Suit under Estates Land Act—Order returning plaint—No appeal See MADRAS ESTATES LAND ACT, S. 192. 41 M. 554.

———O. 43, R. 1 (d) and O. 9, R. 13—Compromise decree—Application to set aside by person not a party—Order refusing—Appeal.

An application by a party to a suit to set aside a compromise decree on the ground that as against him the decree was *ex parte* comes under O. 9, R. 13 of the C. P. Code, and an appeal lies against the order refusing the application 3 C. L. J. 158, 19 C. W. N. 118, 3 C. L. J. 160, 13 C. W. N. 1197 ref. (*Richardson and Walsley, JJ.*) SHEIKH BASIRUDDIN v. SHEIKH SADRU. 22 C. W. N. 571=45 I. C. 690.

———O. 43, R. 1, Cl. (d)—Rejecting an application, meaning of. See (1917) DIG. COL. 293. VENKATASWAMI NAIDU v. SHANMUGAM PILLAI. (1917) M. W. N. 315=6 L. W. 757=43 I. C. 1.

———O. 43, R. 1 (j)—Appeal by stranger auction purchaser from order setting aside the sale under O. 21, R. 89, C. P. Code.

It is open to a stranger purchaser to appeal from an order setting aside a sale on deposit under O. 21, R. 89, C. P. Code, (*Richards, C. J. and Banerji, J.*) FAZAL RAB v. MANZUR AHMED. 40 All. 425=16 A. L. J. 433=45 I. C. 773.

———O. 43, R. 1 (j)—Execution sale—Fraud—Sale set aside by Court professing to

## C. P. CODE, (1908) O. 43, R. 1.

act under S. 47 C. P. Code. Order really coming within O. 21, R. 80—Appeal governed by O. 43, R. 1 (j) See C. P. CODE, S. 47 AND O. 21 R. 89 ETC. 3 Pat. L. J. 645.

———O. 43, R. 1 (j)—Execution sale—Order refusing to set aside on the ground that applicant had no interest—Second appeal, not maintainable. See C. P. CODE, S. 104 (2) AND O. 43, R. 1 (j) 45 I. C. 701.

———O. 43, R. 1 (m), O. 12, R. 6 and O. 23, R. 3—Petition asking for judgment and decree on admission of defendant—Dismissal of—Order not appealable.

Orders rejecting separate petitions filed by the plff. and the defts by which the plff. prays for judgment against the defts and the defts. state that they consent to a decree being made against them, are not appealable under the C. P. Code, unless such petitions are presented and dealt with in the Court on the footing that they taken together amount to a lawful agreement or compromise within the meaning of R. 3 of O. 23 of the C. P. Code (*Richardson and Beachcroft, JJ.*) PRASANNA DEB RAIKAT v. DARPA NARAYAN SINGH. 44 I. C. 145.

———O. 43, R. 1 (o)—Order refusing to extend time—Appealability—C. P. Code O. 34, R. 3. See (1917) DIG. COL. 300; MAHADEO v. GANPAT. 14 N. L. R. 25=42 I. C. 392.

———O. 43, R. 1 (t) and O. 41, Rr. 17 and 19—B. T. Act, S. 109 A. (2)—Dismissal for default of appeal to special Judge—Dismissal of application to re-hear—Appeal, if lies. See (1917) DIG. COL. 300, MANMATHA NATH DEY v. GADADHAR MANA. 45 Cal. 638=28 C. L. J. 155=41 I. C. 751.

———O. 43, R. 1 (u)—Appeal from order of remand—Dismissal of suit by first Court—Reversal of decree by lower appellate Court—Grant of a decree for possession and remand for enquiry into mesne profits—Second appeal—*Ad-valorem* Fee—Not an appeal against order of remand. See COURT FEES ACT, SCH. II. ART. 11. 3 Pat. L. J. 99.

———O. 43, R. 1 (u)—Remand under inherent power, not coming under O. 41, R. 23, C. P. C.—No appeal See C. P. CODE, Ss. 107 (1) (b) AND 151, ETC. 43 I. C. 959.

———O. 43, R. 1 (u) and O. 41, Rr. 23 and 25—Appeal—Remand by Appellate Court purporting to be under R. 23 but in a case falling within R. 25—Appeal maintainable. See C. P. CODE, O. 41, Rr. 23 AND 25 ETC. 44 I. C. 416.

———O. 43, R. 1 (w) and O. 47, R. 7—Order granting review—Appeal, grounds for.

C. P. CODE. (1903) O. 45 R. 1.

An order granting a review of judgment, though appealable under the provisions of O. 48, R. 1 (w) of the C. P. Code is subject to the limitations mentioned in O. 47, R. 7 of the Code namely, that there can be an appeal only upon the grounds mentioned in that rule (*Fletcher and Huda, J.J.*) ABDUL HAMID SADAGAR v. AKHINA KHATUN.

47 I. C. 850.

—O. 44, R. 1—*Appeal to His Majesty in Council—Application for leave to appeal in forma pauperis—No power to grant.*

The High Court has no jurisdiction to grant a party leave to appeal in *forma pauperis* to His Majesty in Council.

O. 44, R. 1 of the C. P. Code does not apply to appeals to his Majesty in Council. That rule contemplates an appellate court perusing the judgment of a subordinate court and not a court whose judgment is appealed against perusing its own judgment. (*Dawson Miller, C. J. and Chapman, J.*) RAM KISHEN LAL v. MANNA KUMBI. 3 Pat. L. J. 179=

44 I. C. 731

—O. 44, R. 1—*Application for leave to appeal in forma pauperis—Rejection of—Refusal to give permission to pay Court fee on memorandum of appeal—Failure to exercise jurisdiction—Revision.*

An application was presented with a memorandum of appeal for permission to appeal as a pauper but the Court had rejected the application and refused permission to put in the necessary court-fee on his memorandum of appeal. *Held*, that the court had rejected the application for leave to appeal in *forma pauperis* and not an appeal and it had failed to exercise jurisdiction in refusing to allow the petitioner to pay in the court fee for his memorandum of appeal. (*Tudball and Rafiq, JJ.*) MUHAMMAD FARZAND ALI v. RAHAT ALI. 40 All. 381=16 A. L. J. 309=45 I. C. 29.

—O. 44, R. 1—*Leave to appeal to Privy Council in forma pauperis—Grant of—Jurisdiction of High Court—C. P. C. O. 44, R. 1 Applicability.*

The High Court has no jurisdiction to grant a party leave to appeal in *forma pauperis* to His Majesty in Council. 3 Pat. L. J. 179 foll. O. 44, R. 1 of the C. P. Code does not apply to appeals to His Majesty in Council. (*Oldfield and Phillips, JJ.*) AMBA alias PADMAVATI v. SHRINIVASA KAMPTHEI.

42 Mad. 32=35 M. L. J. 258=

24 M. L. T. 207=8 L. W. 460=47 I. C. 646.

—O. 45, R. 5—*Valuation of subject-matter—Determination of, by trial Court during the trial for assessing pleader's fee—Valuation not objected to—Party not entitled to have a re-valuation subsequently. See C. P. CODE, S. 110 AND O. 45, R. 5.*

20 Bom. L. R. 418.

C. P. CODE. (1903) O. 47, R. 4.

—O. 45 R. 15 (1)—*Order in Council on appeal from Calcutta High Court—Jurisdiction of Patna High Court to exercise—Letters Patent (Patna), d. 39.*

The High Court at Patna has no jurisdiction to execute an order-in-Council passed in an appeal from the Calcutta High Court on appeal from a subordinate court in Behar.

An application for the execution of such an order should be to the High Court at Calcutta (*Chamier, C. J.*) DALJISAHU v. RAI BAHADUR BAJNATH GOENKA.

2 Pat. L. J. 684=(1918) Pat. 49=4 Pat. L. W. 132=45 I. C. 457.

—O. 46, Rr. 1 and 3—*Invalid reference—Opinion, not binding.*

When a reference is incompetent under S. 617 of the C. P. Code any opinion expressed upon such a reference could not operate as *res judicata* and does not bind the court in subsequent stages of the litigation. (*Mittra A. J. C.*) YESHWANT RAO v. DATATRAYA KRISHNA. 45 I. C. 201.

—O. 47, R. 1—*Review—Grounds for—Mistake of law—Any other sufficient reason—meaning of.*

A mere mistake of law is not in itself a sufficient mistake or error apparent on the face of the record so as to form a ground for review of judgment.

Where the mistake arises from the negligent conduct of the applicant for review, the mistake cannot even be pleaded as "any other sufficient reason," within the meaning of O. 47 R. 1 of the C. P. Code (*Fletcher and Smither, JJ.*) HAZRA SARDAR v. KUNJA BEHARY NAG CHOUDHURY. 44 I. C. 161.

—O. 47, Rr. 1 (1) and (2) and O. 41, R. 11—*Review, after dismissal of appeal under O. 41, R. 11—Review by a co-debt, after dismissal of appeal preferred by debt.—Dismissal of appeal, effect of, upon decree appealed against. See (1917) DIG. COL. 804; CHANDRA KANTA BHATTACHARJEE v. LAKHAN CHANDRA CHAKRAVARTI.*

21 C. W. N. 430=27 C. L. J. 540=36 I. C. 460.

—O. 47, R. 2—*Review—Discovery of new matter—Subsequent decision of High Court on appeal from decision of lower court.*

The judgment of the High Court in an appeal from a decision which the lower court is petitioned to review is a new and important matter which the latter court should consider in deciding the question of review. (*Mullick and Atkinson, JJ.*) KISHEN DEYAL RAI v. MUSSAMAT KULPATI KUER. (1918) Pat 238=3 Pat. L. J. 372=45 I. C. 316.

—O. 47, R. 4 (2) (b)—*Review—Evidence—Strict proof of absence of negligence.*

C. P. CODE, 1909) O. 47, R. 5.

Per *Bhadrachari, J.* The expression "strict proof" in O. XLVII R. 4 (2) (b) of the C. P. Code refers to the formal correctness of the evidence offered, and not to its effect or its result. If the record does contain such "strict proof," that is to say, such formal admissible evidence, it shall be for the trial court only to assess its sufficiency.

Per *Kemp, J.* The Court of appeal can satisfy itself under O. 47, R. 4 (2) (b) as to whether there was sufficient evidence before the lower court, and whether such evidence has been properly appreciated by it when it granted the application. (*Dist. Secy. v. C. J. and Kemp, J.*) *BAI NEMATEU v. BAI NEMATULLAH.* 32 Bom. 299=

20 Bom. L. R. 434=45 I. C. 14.

—O. 47, R. 5—Review—Application—Application made by one of a bench of two Judges, the other having gone on a month's leave—Jurisdiction—Order passed on review—Appeal.

Where one of a Bench of two High Court Judges who had disposed of an appeal, having left the Court on a month's leave, an application for review of the judgment was heard and dismissed by the remaining Judge.

*Held*, that the learned Judge had no jurisdiction to dispose of the application by reason of R. 5, of O. 47 of the C. P. Code, and an appeal lay against that order. 21 C. W. N. 652; 9 Cal. 482. Relied on. (*Sanderson, C. J. and Chatterjee, J.*) *JAGAT CHANDRA ACHARYA v. SHYAMA CHARAN BRUTTACHARYA.*

22 C. W. N. 550=44 I. C. 999.

—O. 47, R. 7—Appeal—Order granting review—Appellate Court, if can entertain question as to sufficiency of evidence—Review on the ground of discovery of new evidence, when to be granted—Appeal on question of fact—See (1917) DIG. COL. 304; *NANDA LAL MULLICK v. PANCHANAN MUKHERJEE* 45 Cal. 60=21 C. W. N. 1076=26 C. L. J. 187=42 I. C. 434.

—O. 47, R. 8—Application for amendment of a decree of Division Bench—Jurisdiction of single Judge to amend decree—Court in granting review, if bound to rehear whole case—Rehearing of case by single Judge without authority from Chief Justice—Jurisdiction. See (1916) DIG. COL. 348. *GOUB SUNDER BHOWMICK v. RAKHAL RAJ BHOWMICK.*

20 C. W. N. 1165=27 C. L. J. 326=34 I. C. 592.

—Sch. II, para 1—Reference to arbitration—"All the parties interested," meaning of.—Test of.

The words "all the parties interested" in para. 1 of Sch. II of the C. P. Code mean that all the parties interested in the litigation only need be parties to the application for reference to arbitration.

C. P. CODE 1909) SCH. II. PARA. 12.

It is a question of fact in each case as to who are the parties interested in the litigation. (*First Inst. v. C. J.*) *SAIDAL TEWARY v. TAPESWARI TEWARY.* 46 I. C. 321.

—Sch. II para 1, cl. (1)—Arbitration—Reference of some of the parties to the suit—Ex-parte award—Award—Award—Award—Objection to award—Question of jurisdiction can be raised at any stage.

The agreement to refer to arbitration and the application to the Court founded upon it must have the concurrence of all the parties concerned and if all the defendants, including those who have not appeared and contested the suit, do not join in the reference to arbitration, the award is wholly invalid and not only against those who joined in it, and is liable to be set aside on the application of any of the parties. 5 C. W. N. 872=25 C. L. J. 339=11 C. W. N. 1152=29 C. 167=18 A. 900 ref.

An objection to the validity of any reference as well as of the award on the ground that all the parties to the suit had not joined in the reference although not taken in the Court of First Instance and not taken specifically in the grounds of appeal before the High Court must be given effect to, as it relates to the jurisdiction of the Court, to make reference and the subsequent invalidity of the award. (*N. D. Chatterjee and Wainstay, J.*) *GIRIH NATH ROY CHOWDHURY v. KANAI LAL MITRA.* 27 C. L. J. 339=43 I. C. 169.

—Sch. II, para 3—Arbitration—Court fixing time for filing award—Award made before but filed beyond that date.

When a case is referred to arbitration, it is the duty of the Court to appoint a date within which the arbitrators are to make their award. If the award is made within such date, it may be received by the Court though not filed in Court before the fixed date. (*Lloyd, J. C.*) *MOHAN LAL v. BAZ KHAN.* 50 C. L. J. 205=46 I. C. 324.

—Sch. II Paras 12 and 14—Arbitration reference to three persons—Award signed only by two—Validity—Application to set aside award—Limitation—Lim. Act, Art. 158.

Where a reference was made by consent of parties to three arbitrators and a decree was passed on the award signed only by two of them.

*Held*, that the award was illegal and must be set aside. The period of limitation, under Art. 158 of the Lim. Act does not apply to proceedings under cl. 12 or cl. 14 of Sch. II of the C. P. Code and there is no limitation for making applications to remit an award for reconsideration of the arbitrators owing to some objection to the legality of the award being apparent on the face of it. (1913) M. W. N. 333 foll.

## C. P. CODE, (1908) SCH. II, PARA. 14.

The fact that an award bore only the signature of two out of three arbitrators is an illegality apparent on the face of the award. 23 Cal. 498 foll. (*Spencer, J.*) *MAMIDI APPAYYA v YEDEM VENKATASWAMI*.

24 M. L. T. 102=8 L. W. 171=  
(1918) M. W. N. 477=47 I. C. 597

—Sch. II, para. 14—*Arbitration—Ex parte award—Failure of one of the parties to appear—Award without evidence.*

A reference to arbitration provided that the arbitrator should determine the case after hearing the evidence and that if one of the parties failed to appear before him, he should have power to proceed to hear the evidence *ex parte*.

*Held*, that on the plff's failure so appear before the arbitrator on the day fixed for trial, the arbitrator could not make an award without taking evidence but should have proceeded to hear the evidence of the other side.

*Held*, also, that the award so made without taking any evidence could not be set aside by the Court on the plff's application under O. 9, R. 9 of the C. P. Code, but should be remitted under para. 14 of Sch. II, C. P. Code to the arbitrator for re-consideration if a proper case was made out by the plff. to excuse his absence before the arbitrator. (*Fletcher and Smither, JJ.*) *GOPAL CHANDRA DAS v. KSHE. TRA MOHAN BHUIA*. 22 C. W. N. 933=46 I. C. 195.

—Sch. II, para. 14—*Award—Not based on any evidence—Remission to arbitrators*. See C. P. CODE, S. 115 AND SCH. II PARA. 14 22 C. W. N. 933=46 I. C. 195.

—Sch. II, para. 14 (c)—*Private reference—Six arbitrators appointed—All arbitrators not taking part in the proceedings—Award invalid.*

Certain disputes between the plffs. and defts. were referred to the arbitration of six arbitrators, the decision in the case to be according to the verdict of the majority. The arbitrators met on two different dates, but on neither of those dates was any award drawn up. The arbitrators of the defts. did not agree with those of the plffs. and they withdrew from the arbitration taking with them the records of the depositions of witnesses. Thereupon on a third date the arbitrators for the plffs. recorded the evidence afresh, and took fresh proceedings in the absence of the defts. and their arbitrators and gave an award. *Held*, that all the arbitrators not having taken part in the fresh proceedings on the third date, the award so passed by the arbitrators was invalid on the face of it under paragraph 14 (c), Sch. II of the C. P. Code. (*Trudball and Abdul Racof, JJ.*) *KALI CHARAN PANDE v. GUPT NATH MISRA*, 16 A. L. J. 307=45 I. C. 34.

## C. P. CODE, (1908) SCH. II, PARA. 15.

—Sch. II, para. 14, cl. (c)—*Scope and effect of—Award—Validity—Illegality patent on face of it, what is—Award based on erroneous view of law—Effect—English law considered.*

In a suit by a member of a Hindu family for partition of joint family properties in which the defence was that the plff was born blind and was not, under the Hindu law, entitled to any share, the parties referred to arbitrators all the questions of fact and of law in difference between them and the arbitrators decided that plff was entitled only to a life interest in his share of the family properties. On objection taken to the validity of the award on the ground that it was illegal on the face of it because it proceeded on the erroneous view of law that, though plff was not born blind he was not entitled to his full rights in the family, *held*, that the arbitrators having acted honestly and to the best of their judgment their award was not invalid under S. 14, cl. (c) of Sch. II of the Code.

Scope of S. 14 cl. (c) of the Code and the English Law on the subject considered. (*Sesha giri Iyer and Napper, JJ.*) *MADEPALLI VENKATASWAMI v. MADEPALLI SURANNA*.

41 Mad. 1022=34 M. L. J. 323=  
24 M. L. T. 60=(1918) M. W. N. 482=  
8 L. W. 202=45 I. C. 644.

—Sch. II, para. 15—*Arbitration—Refusal of one of arbitrators to act—Appointment of new arbitrator—Power of—Practice.*

The appointment of a new arbitrator, in place of one who refused to act must be made by both the parties and not solely by the party who has been served with a written notice under the concluding portion of para. 5 (1) of Sch. II of the Code (*Shah Din J*) *CHARTA RAM v. SAJAN MAL*, 112 P. R. 1913=48 I. C. 395.

—Sch. II, Paras. 15 and 21—*Arbitration—Reference to, by guardian of a minor—Guardian revoking submission—Nobody to protect the interests of the minor—Award passed, validity of—“Otherwise invalid” in R. 15 meaning of—Whether ejusdem generis—Whether passing an award under such circumstances, misconduct on the part of the arbitrator.*

Where the plff. sued the 1st deft. his brother and the 2nd deft. the minor son of the 1st deft. for filing an award partitioning their family properties and for a decree in terms of the award, and it is found that the next day after the submission the first deft. who was acting as the guardian of the 2nd deft. gave notice to the arbitrator revoking the submission and thereafter he did not appear at all in the proceedings and the arbitrator proceeded to make the partition, no one being there to watch the proceedings on behalf of the minor and to protect his interests, the award is not

## C. P. CODE, (1908) SCH. II, PARA. 15.

binding on the minor, and no decree can be passed on the award and the suit should be totally dismissed.

An award is not *ipso facto* invalid if it cannot be shown to be beneficial or advantageous to the interests of a minor whose claims are referred to arbitration.

*Per Abdur Rahim, J.*—It is open to a minor by a suit instituted either through a guardian or when he attains majority, to impeach an award if he can prove that his guardian was grossly negligent or acted fraudulently in conducting the proceedings before the arbitrator.

The facts set out above bring the award passed under these circumstances under the class of awards "otherwise invalid" within the meaning of cl. (c) of para. 15 of the 2nd schedule to the C. P. Code.

The words "or being otherwise invalid" in clause (c), should not be read as *ejusdem generis* with the other cases mentioned in that clause and are not restricted to cases where an award is bad on grounds like want of jurisdiction; on the other hand they are meant to include all cases of invalidity on grounds other than those mentioned.

*Per Oldfield, J.*—Arbitrators will fail in their clear duty and be guilty of misconduct if they do not secure for each party an opportunity to present his case.

The duty of the arbitrator in the circumstances mentioned above, is to refrain from passing an award so long as they are deprived of the power of passing a just one and either to adjourn the proceedings in case a change in the representation of the minor is probable or if one is not probable within the period specified for the return of the award, to refuse to act. The arbitrator's failure in this duty amounts to misconduct.

Under S. 21 (1) of Schedule II of the Civil Procedure Code the Court must be satisfied that the matter has been referred and must also enquire into the validity of the reference. In such an enquiry, the question of the beneficial nature of the reference to any minor concerned can be raised. (*Abdur Rahim and Oldfield, J.J.*) LAKSHMINARAYANA TANTRI v. RAMCHANDRA TANTRI. 34 M. L. J. 71—23 M. L. T. 89—45 I. C. 763.

—Sch. II, Paras. 15 and 16—Award—Decree in terms of—Appeal if competent.

Where a case has been referred to arbitration no appeal lies from the decision of the Court if it is not in excess of or otherwise than in accordance with the award.

A decree made in accordance with an award cannot be challenged by way of appeal on the ground that there is no valid and legal award. (*Drake Brockman, J. C.*) SHIVA PRASAD SINGHA v. LACHMAN PRASAD.

46 I. C. 785.

## C. P. CODE, (1908) SCH. II, PARA. 17.

—Sch. II, paras. 17, 20 and 21—Scope of—Application to file award made before delivery of award—Order if appealable—Material irregularity in proceedings—Revision.

Para 20 of Sch. II of the C. P. Code prescribes the procedure to be followed in respect of an application for filing an award which has already been made without the intervention of the Court, and does not apply to a case where up to the date of filing of the application the arbitrators have not made the award.

The parties to a dispute entered into an agreement to refer it to arbitration and after the commencement of the proceedings by the arbitrators but before the delivery of an award, plff. made an application under paras 17, 20 and 21 whereupon the Court made an order directing the award to be filed in Court.

*Held*, that the order was not one under paras. 20 and 21 and was not, therefore, appealable.

A revision lies against a decree based upon an arbitration. Award on the ground of material irregularity must have reference to the proceedings of the Lower Court and not to those of the arbitration. 32 P. R. 1903 foll. (*Scott Smith, J.*) ALLAH DIN v. BADSHAH BEGAM. 30 P. W. R. 1913—45 I. C. 647.

—Sch. II, para. 17 (4)—Application to file agreement to refer to arbitration—Death of two arbitrators before application—Rejection of application.

An agreement to refer to arbitration becomes *ipso facto* inoperative by the death of the arbitrator before the agreement is made a rule of the Court. Five arbitrators were named in an agreement to refer to arbitration and two of them had died before an application was made for the filing of the agreement to Court.

*Held*, that the agreement became incapable of performance and could not be filed in Court 8 All. 340, 17 Mad. 498, 21 M. L. J. 1151 dist. 42 I. C. 911 rel. (*Scott Smith and Le Rossignol, J.J.*) MOHAN LAL v. DAMODAR DAS.

71 P. R. 1918—44 I. C. 866.

—Sch. II para. 20—Arbitration—Private reference—Filing of award—Court functus officio thereafter.

The powers of the Court in a proceeding under para. 20 Sch. II of the C. P. Code are exhausted as soon as the Court decides either to file the award or refuses to file it. (*Kanhaiya Lal A. J. C.*) GUR BAKSH SINGH v. CHUTTA SINGH. 5 O. L. J. 471—47 I. C. 960.

—Sch. II para. 20—reference to arbitration out of court—minor plaintiff represented by his mother and guardian applying to court for decree in terms of award—Decree passed without reference to O. 32 R. 7—Validity. See C. P. CODE O. 32, R. 7. 20 Bom. L. R. 970.

## C. P. CODE, (1903) SCH. II, PARA. 20.

—Sch. II Para. 20 (1)—*Arbitration—Award—Application to file award in Court—Award settling out shares of parties in agricultural land but not actual partitioning it—Right to file award in Civil Court.*

An award which does not partition agricultural land but merely settles the shares of the parties therein, may be filed in Court. S. 158 (2) (xvii) of the Punjab Land Revenue Act is no bar to the filing of the award. (*Scot-Smith, J.*) JOVIND HAL v. MUNI LAL.

79 P. L. R. 1918=31 F. W. R. 1918=  
45 I. C. 165.

—Sch. II, Para. 21—Award—Reference to arbitration by guardian of minor's interest—Court's duty to see if reference is beneficial to minor. See C. P. CODE, SCH. II, PARAS. 15 AND 21. 34 M. L. J. 71.

—Sch. III Para. 2—Sale-deed executed but not registered—Grant of Collector's permission before registration—Sale valid.

Plff. sued for possession of property under a sale-deed executed during the pendency of an attachment when the execution proceedings were before the Collector. He accorded his sanction to the sale after the execution but before the registration of the sale-deed.

*Held*, that permission having been granted while the sale was incomplete for want of registration, the sale was not void. (*Batten, A. J. C.*) PARWATRAO v. RAMJI. 45 I. C. 240.

**CO-HEIRS**—Liability of, joint—All heirs to be impleaded in a suit by creditor of deceased. See CONTRACT ACT, S. 43.

22 C. W. N. 289.

—Payment to one—Not a good discharge of liability. See CONTRACT ACT, S. 45. 7 L. W. 221.

—Suit against one for arrears of rent, if maintainable.

A landlord cannot maintain a suit for arrears of rent against one of several heirs of a deceased tenant without joining the others as debtors. S. 43 of the Contract Act has no application to such a case. (*Woodroffe and Smither, J.J.*) SIBA KRISHA SARMA v. JAGAT CHANDRA TALUKDAR. 45 I. C. 732.

**CO-MORTGAGEES**—Payment by mortgagor to one if can give a full discharge of mortgage debt—Other mortgagee if bound by it—Effect on the interest of the mortgagor giving the discharge.

Payment to one of several joint creditors does not necessarily operate as a discharge of the debt in so far as the other creditors are concerned. 20 Mad. 461, doubted. *Powell v. Bradhurst* (1901) 2 Ch. 160 13 C. L. J. 2; 17 C. L. J. 372 5 C. L. J. 888 ref.

## CO-MORTGAGEES.

In the absence of any evidence or circumstances which would justify a contrary inference, it will be presumed notwithstanding the form of the obligation that a debt due to a number of joint creditors is due to them in severally.

Where after relations between co-mortgagees had become strained, one of them acknowledged receipt of the payment from the mortgagor and gave the latter a discharge irrespective of the mortgage-debt:—

*Held*, that the discharge operated as a valid discharge in respect only of the share of the mortgage money due to the co-mortgagee by whom it was given. (*N. R. Chatterjee and Newbould, J.J.*) SHAIKH HAKIM v. ADWAITA CHANDRA DAS DALAL. 22 C. W. N. 1021.

—Right to the mortgage money—Satisfaction of the claim of one of the mortgages—Rest entitled only to his half share of the money.

Where money is advanced by two co-mortgagees without any specification of shares, the presumption is that each of them advances half the money. If one of them accepts satisfaction of his interest as mortgagee from the mortgagor, the result is that the only mortgage interest outstanding is that of the other co-mortgagee which extends to one-half of the mortgage money. (*Lindsay, J. C.*) RAM DATT v. DEOTA DIN. 44 I. C. 621.

**COMPANIES ACT (VI of 1882), S. 169—Companies Act (VII of 1913), S. 284, effect of—Appeal against order directing preferential payment to creditor—Maintainability.**

Every company the winding-up of which commenced before the Companies Act of 1913 came into operation must be wound up in the same manner and with the same incidents as if the new Act had never been passed.

An order directing a preferential payment to be made to a creditor of a Bank in liquidation relates to and is an incident of the winding up and the right of appeal against such an order is also an incident of the winding-up. In the case of a Bank the winding-up of which commenced before the coming into operation of the Act of 1913, an appeal against such an order without complying with the provisions of S. 169 of Act, VI of 1882 is incompetent. (*Richards, C. J. and Banerjee, J.*) THE PEOPLE'S INDUSTRIAL BANK v. HARKISHEN LAL. 16 A. L. J. 70=43 I. C. 642.

—(VII of 1913), Ss. 2 (9) and 87—Manager, meaning of. See (1917) DIG. COL. 313. BASANT LAL v. EMPEROR.

47 P. R. (Cr.) 1917=43 I. C. 791=  
19 Cr. L. J. 215.

—S. 104 (1) (b)—Allotment of share "as fully paid-up otherwise than in cash"—Meaning. See (1917) COL. 813; THODAPRUZA

## COMPANIES ACT, S. 134

RUBBER COMPANY v. THE REGISTRAR OF JOINT STOCK COMPANIES, MADRAS.

41 Mad. 307=35 M. L. J.  
474=(1917) M. W. N. 776=6 L. W. 736=  
42 I. C. 674

—S. 134 (4)—Director—Default in filing balance sheet—No general meeting held—Offence—Jurisdiction to try. See (1917) DIG. COL. 314: DEBENDRA NATH DAS v. REGISTRAR OF JOINT STOCK COMPANIES, BENGAL.  
35 Cal 436=  
22 C. W. N. 36=27 C. L. J. 85=  
41 I. C. 307.

—S. 153—Winding up—Fully paid up shareholder—Contributory. See (1917) DIG. COL. 315: IMPERIAL OIL SOAP AND GENERAL MILLS AND CO. v. RAM CHAND.  
91 P. R. 1917=9 P. L. R. 1918=  
35 I. C. 980

—E. 171—Applicability—Appeal or revision against Company in suit brought by it—Leave of liquidating court—Necessity.

An appeal or an application for revision arising out of an action brought by a Company does not come within the purview of S. 171 of the Indian Companies Act and such appeal or application can be instituted or proceeded with without the leave of the Court. 31 P. R. 1913 diss. 85 Law Times, 141 foll. (Chand. C. J.) *Shadi Lal and Brodway, J.L.* KISHAN SINGH v. INDUSTRIAL BANK OF INDIA LTD.  
62 P. R. 1918=32 P. L. R. 1918=  
47 I. C. 392. (F. B.)

—S. 171—Company—Liquidation—Leave to continue suit against Company if and when to be given.

Under S. 171 of the Companies Act, leave to continue an action should as a general rule be given only where some question arises which cannot satisfactorily be determined in the winding up proceedings. (*Brodway, J.L.*) JAWAHIR SINGH v. SPINNING AND WEAVING MILLS CO. LD.  
93 P. R. 1918=  
170 P. W. R. 1918=47 I. C. 1005.

—Ss 186, 199, 200 and 201—Order of payment under S. 186—Right to enforce right of transferee—Application for recognition—Necessity—In which court must be made—C. P. C., Cr. 21, R. 16—Applicability.

As in the case of decrees so in the case of orders of payment under S. 186 of the Companies Act, the person to apply for the enforcement of an order or decree is the person in whose favour the order or decree has been made or passed.

An assignee or transferee cannot make such an application unless and until his name has been substituted for that of the person in whose favour the decree or order has been passed or made.

## COMPANY

Ss 200 and 201 of the Companies Act, must be read in conjunction with the special provisions of R. 21 of C. P. C. of the C. P. Code and therefore a transferee from order made, S. 186 of the Companies Act, must in the first instance, apply to the Court which made the order. (*Brodway, J.L.*) *TAARVA RANI v. POPAT RAM.*  
32 P. R. 1918=163 P. W. R. 1918=  
47 I. C. 997.

—S. 235—Fund—Position of Secretary—Proceedings under S. 235 See COMPANY. 1318, M. W. N. 1.

—S. 243—Company—Liquidation—Call in contributory—Order for—Application and timely notice—See also.

Before an order can be made for a call on contributories there should be a petition to the Court as required by rule 59 of the rules made by the Chief Court under S. 243 of the Indian Companies Act 1913, and notice in form 31 should be served four clear days before the date of the hearing on each contributory, unless the Judge directs that personal service be dispensed with and advertisement in form 35 should be substituted therefor. In the latter case the advertisement should be published in sufficient time to enable absent contributories to come to the Court in response to the general notice and show cause. If these essential rules are disregarded, the order for a call cannot be maintained. (*Shadi Lal, J.*) *RAS KUMAR GRHA NANDAN SINGH v. NATIONAL INSURANCE AND BANKING COMPANY LTD.*  
1 P. R. 1918=44 I. C. 139.

—S. 234—Effect of—Appeal against order directing preferential payment to creditor—Not maintainable, when winding up commenced before the Act, without complying with the provisions of S. 169 of the old Act. See COMPANIES ACT, S. 169.  
43 I. C. 642.

COMPANY—Application for shares in name of person under disability—Personal liability of applicant—Liquidation—Power to alter list of contributories.

If a person applies for shares in a company in the name of another under disability, the applicant is personally liable.

Held, that a father purchasing shares in the name of his minor son is personally liable and that the list of contributories can be altered by substituting the name of the father for that of the son. (*Shadi Lal, J.*) *BEHARI LAL v. OFFICIAL LIQUIDATOR AMRITSAP BANK.*  
51 P. R. 1918=46 I. C. 432.

—Dividend—Deposit receipt in favour of several depositors—Liquidator not bound to pay dividend to one or more of the joint holders of receipt of fixed deposit without obtaining discharge from all of them. See COMPANY-LIQUIDATOR.  
28 P. R. 1918.

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—Fund—Secretary—Position and status of—Retention of fund money—Liability for interest—Extent of liability of agent compared—Companies Act of 1913, S. 235—Effect.

An agent retaining money which he ought to pay over to his principal but which he has not been called upon to pay is not, in the absence of any other circumstances, liable to pay interest on the money retained by him.

The Secretary of a Fund is not a trustee but is a mere agent of the fund, and his liability for interest on the fund's money retained by him is the same as that of an ordinary agent, except in proceedings taken against him under S. 235 of the Companies Act of 1913. (*Spencer and Seshagiri Aiyar, JJ.*) *VALLIAMMA v. RAMASWAMI SERVAI*.

(1918; M. W. N. 1=42 I. C. 219.

—Libel in newspaper—Liability of directors of Company—Contempt of Court. See (1917) DIG. COL. 318: *AMRITA BAZAAR PATRIKA*. In the matter of. 45 Cal. 169=

21 C. W. N. 1161=26 C. L. J. 459=45 I. C. 338=19 Cr. L. J. 530.

—Liquidation—Agreement to take preference shares on condition that applicant was to get an appointment under the Company—Shares allotted but no appointment given—No calls paid by applicant—Applicant whether to be treated as contributory for the preference shares—Valid allotment of shares.

The applicant agreed with an agent of the deft. company to take up 400 preference shares of the Company on condition that the Company would appoint him as their Cashier in the new branch to be opened at Lucknow. He also paid at the time Rs. 500, being the application deposit for 100 shares only. The shares were duly allotted to the applicant on the 5th December 1910 by the Directors of the Company who were fully aware of the agreement entered into between the applicant and the agent. As the post of the Cashier was not given to the applicant, he did not pay the allotment money, which was Rs. 15 per share. Nor did he pay the further calls which were payable in three monthly instalments of Rs. 10. Later, on the 3rd May 1911, the applicant wrote to the Directors of the Company repudiating all liability for the 100 shares and demanding back his application deposit. The Directors wrote back on the 8th July 1911 informing the applicant that all the arrangements were to be deemed cancelled. On the 7th July 1911 however, the applicant paid in another Rs. 500 to the Company which were to be taken as the application and allotment money for the 100 ordinary shares. The shares were allotted on the 7th August 1911. The Company having gone into liquidation, the applicant was put down as a contributory with respect to the 100 preference shares as well as 100 ordinary shares and was called upon to pay calls on the said shares.

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*Held.* (1) that, as regards the preference shares, the applicant was entitled to be struck off the register of preference share-holders and could not be called upon as a contributory on that account inasmuch as he did not intend to agree to become a member *in praesenti* as from the 5th December 1911:

(2) that in respect of the ordinary shares, the applicant was rightly placed on the list of the ordinary share-holders and was liable to be called upon as a contributory, since the whole transaction was complete and the allotment was made on the 7th August 1911. (*Beaman and Heaton, JJ.*) *RAMANBHAI v. GHASIRAM*. 20 Bom. L. R. 692=46 I. C. 672.

—Liquidation—Payment of call as contributory by pledge of shares—Pledgee not entitled to recover call money from pledgor. See (1917) DIG. COL. 319; *PIRTHI CHAND JIV RAJ v. THE STANDARD BANK, LTD.*

42 Bom. 159=19 Bom. L. R. 341=40 I. C. 167.

—Liquidation—Questions settled by liquidating Court if liable to be re-opened by a regular suit—Review of order after appeal rejected.

Questions decided by the liquidating Court cannot be re-opened by a regular suit.

A liquidating Court cannot review its order after an appeal from that order has been rejected by the Chief Court as barred by limitation. (*Chevis and Shadi Lal, JJ.*) *KISHEN DAS v. OFFICIAL LIQUIDATOR, DOABA BANK*. 40 P. R. 1913=

60 P. W. R. 1918=45 I. C. 84.

—Liquidator—Deposit receipt in favour of several persons—Payment of dividend to one or more.

A liquidator is not bound to pay a dividend to anyone or more of the joint holders of a fixed deposit receipt in favour of several persons not payable to "either or survivor" without obtaining a discharge. 65 P. R. 1917 ref. (*Broadway, J.*) *GOKAL CHAND v. THE LIQUIDATORS, DOABA BANK, LTD.* 28 P. R. 1918=47 P. W. R. 1918=44 I. C. 848.

—Right to sue in *forma pauperis*—C. P. CODE, O. 33, R. 1 Expl 3 and 5—Person—Meaning of. See C. P. Code, O. 33, R. 1.

34 M. L. J. 421.

—Shareholder—Contributories—Fraud or misrepresentation—Ratification—Contract Act, S. 19, exception—Shareholder, if can repudiate shares after commencement of liquidation.

One K. S. applied for 10 shares and 90 shares in a company in May and August 1911, respectively, the shares were duly allotted to him and he also acted as a director and was re-appointed after resigning the office once

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attended the meetings of the Board of Directors and also the general meeting of the shareholders signed the report issued by the directors in June 1918 to the effect that the company was a profitable concern. He also acted for a short period as the manager of the company.

*Held*, that upon these facts even if the contract to take shares was voidable upon the ground of fraud or misrepresentation, K. S. ratified the contract and was consequently precluded from denying liability as a contributor.

As regards the purchase of 90 shares, K. S. being already a share holder of the company and having the means of discovering its financial position, even if his consent was caused by alleged misrepresentation or fraud the contract was not voidable under exception to S. 19 of the Contract Act.

After the commencement of the winding-up proceedings a shareholder cannot have his contract to take shares set aside on the ground of fraud or misrepresentation unless he has not only repudiated his shares but has also taken proceedings to have his name removed or asserted his right to repudiate them in an action by the Company to enforce calls upon him before the commencement of liquidation. (*Shadi Lal, J.*) **HAKIM RAJ v. KHARAK SINGH.** 42 P. R. 1918=46 I. C. 21.

Shareholder — Debtor becoming — Charge on shares for debts of Company. See (1917) DIG. COL. 320: CHUNDOORU PUNNAYYA v. SREE VENU GOPALA RICE FACTORY CO., LTD. 22 M. L. T. 520=1918) M. W. N. 51=7 L. W. 114=43 I. C. 505.

Share-holders—Sale of shares through company — shares remaining unsold through misconduct of Managing Director who represented that shares had been sold shareholder placed on list A of contributories—Payments of calls in liquidation—Suit by shareholder to recover back call money. See (1917) DIG. COL. 320: NAROTTAM MORARJI v. INDIAN SPECIE BANK. 42 Bom. 264=19 Bom L. R. 615=41 I. C. 251.

COMPLAINT—What is—Petition of objection to dismissal of counter, case if a complaint. See CR. P. CODE, Ss. 200, 203, 435, 437, 523. 3 Pat. L. J. 346.

COMPOUNDING—Offences out of Court—Complainant resiling from agreement before hearing, effect—Composition before complaint is laid or proceedings are taken—Validity of. See CR. P. CODE, S. 345. 35 M. L. J. 217.

COMPROMISE—Appeal against—When lies—Valuatur containing power to compromise—Construction. See (1917) DIG. COL. 323: THENALAMMAL v. SOKKAMMAL. 41 Mad. 233=22 M. L. T. 149=41 I. C. 429.

## COMPROMISE.

Assignment—Stronger when on question. See ASSIGNMENT. 43 I. C. 74.

Consideration—Proof of—Claim must be bona fide—Claim patently false—*Mimanshapatra* obtained from guardian of infant by selling up a false will.

A died in 1902 leaving an adopted son Band a daughter P who was married to one G. B. died in 1906, leaving as his heir P's son K, then an infant only two or three months old. About the time certain agnates of A, set up a will by A under which they claimed A's estate as from the death of B, and G and they purported to settle the dispute by a *Mimanshapatra* whereby G, on his son's behalf, gave up certain portions of the estate left by B to the other party. On the validity of the *Mimanshapatra* being challenged by B on behalf of her son K in a suit for partition brought by her against the other party to the deed.

*Held*, that though the latter could not be expected and were not obliged to prove the will in solemn form in the present litigation it was necessary for them to show that there was a will and that upon that will they had a claim which was made honestly and in good faith. 32 Ch. D. 266 Ref.

*Held*, on the evidence, that there was no will, and the claim put forward on its basis was not honest or bona fide but merely a sham claim with a view to inducing G to give up some of the infant's property in their favour.

That upon the question of the validity of the *Mimanshapatra* the position of the infant was different from what would have been G's position had he executed the deed for himself. (*Chitty and Brooker, JJ.*) **KRISHNA CHANDRA DATTA ROY v. HEMAJA SANKAR NANDI.** 22 C. W. N. 453=45 I. C. 47.

Construction—Execution up plff. condition on payment or deposit of sum of money—Money deposited on money order—Mortgage by debt as preliminary to sale of property provided in compromise—Decree if executable.

In a suit for dower a decree was made in terms of the compromise entered into in the suit. The terms were (1) that the debt, would sell to the plff. property worth Rs. 14,000, (2) that the plff. was to pay a deposit in court the price of the stamp paper the registration fee and another sum of Rs. 15, and if he did not do so, his claim would stand dismissed with costs except for the sum of Rs. 700 due to a creditor; and (3) that an agreement was to be executed within three months from its date containing the terms of the compromise. The agreement was in fact executed and it contained hypothecation of the very property which was to be sold to the plff. by the debt. The plff. however, remitted the price of the stamp paper, the registration fee and the sum of Rs. 15 by money order to the debt, which was refused by the latter. The plff. then applied for the execution

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of the decree and he asked for the sale of the property

*Held*, that the mortgage was a collateral security and the pft. should sell the property to realise his claim as a money decree and that the remittance by money order was not a 'payment' under the compromise (*Richards, C. J. and Banerji, J.*) **INAYAT ULLAH KHAN v HASHMAT-ULLAH KHAN.**

16 A. L. J. 472=46 I. C. 193.

—Construction—Landlord and tenant—Consent decree empowering landlord to eject tenant on refusal to cultivate—Right to sue for rent if land is left waste.

Under a consent decree between a landlord and a tenant, it was agreed that if the tenant refused to cultivate the land and deliver to the landlord his share of the produce the landlord could eject the tenant.

*Held*, that the clause relating to the ejectment was in the nature of a clause for re-entry and had not the effect of depriving the landlord of his ordinary right to sue for the arrears of rent due by the tenant. (*Richardson and Beachcroft, JJ.*) **PROBODH CHANDRA MITRA v INDRA CHANDRA CHAULE.**

44 I. C. 925.

—Decree, embodying matters not relating to suit—Admissibility in evidence—Registration if necessary—Effect of decree. See (1915) DIG. COL. 579: **MAHABIR MISSER v. NANDA KISSORE MISSER.**

27 C. L. J. 583=27 I. C. 640.

**COMPROMISE DECREE**—Appeal—Application under O. 9, R. 13, C. P. C. to set aside decree at the instance of person not a party to the decree—Order refusing—Appealable. See C. P. CODE, O. 43 R. 1 (d).

22 C. W. N. 575

—Default—Waiver of by parties—Penal clause not enforceable. See **CONTRACT ACT, S. 55**

4 Pat. L. W. 57.

—Disputed claim—Parties not entitled to resile from—Right only on one side—Relinquishment of—Effect of

A settlement of a disputed or doubtful claim is a valid and binding arrangement which the parties thereto are not permitted to deny, ignore, or repudiate. This principle is inapplicable to a case where there was no dispute to put an end to when the compromise was effected and the consideration of the compromise was not the sacrifice of a right but the abandonment of a claim. (*Sanderson, C. J. Woodroffe and Mookerjee J. J.*) **MARIAM BIBBE v. SHAIKH MUHAMMAD IBRAHIM.**

28 C. L. J. 306=48 I. C. 561.

—Effect of—Different from a simple contract. See **CONTRACT ACT, S. 55.**

4 Pat. L. W. 57.

**COMPROMISE DECREE.**

—Effect of—Persons not parties to it, not affected—Appeal by such persons—Revision.

No one can be bound by a compromise to which he is not a party. Where after a sale in execution of a decree, a mortgage of the property applied to set aside the sale but compromised claim with the auction purchaser and the order of the Court on the compromise was as follows.

"The application for setting aside the sale is granted in terms of the *salenamah* and the sale is set aside. The judgment-debtors will deposit the surplus sale proceeds taken by them at once for payment to the petitioner."

*Held*, that the order relating to the refund of the surplus sale proceeds was not binding on the judgment-debtors who were no party to the compromise and was not capable of execution as against them, that there was no jurisdiction to make the order in the first instance and there was no jurisdiction to enforce it.

*Held*, also, that no appeal lay to the High Court on behalf of the judgment-debtors but the matter was one for revision by the High Court. (*Richardson and Beachcroft, JJ.*) **ABDUL KARIM v MEHERUNNISA.**

45 I. C. 33.

—Hindu widow—*Bona fide* compromise of litigations—Binding on reversioners—Collusion—Onus of proof on reversioners. See **HINDU LAW, WIDOW.**

47 I. C. 697.

—Hindu Widow—Compromise decree against—Reversioners not bound when reversionary estate not properly protected. See **HINDU LAW, WIDOW.**

22 C. W. N. 409.

—Hindu widow—Reversioner taking benefit of—Bar of reversionary claim. See **HINDU LAW, WIDOW.**

45 I. A. 113 (P. C.)

—Mutation proceedings in Revenue Courts—Compromise on behalf of minor without leave of court—Validity. See C. P. CODE, **APPLICABILITY OF.**

21 O. C. 220.

—Pleader and client—Authority of pleader to compromise must be express—Special provision in *vakalatnamah* necessary. See **PLEADER AND CLIENT.**

45 I. C. 321.

—Registration of Adjustment of matters beyond the scope of the suit—Duty of Court recording the compromise—Registration unnecessary. See **REGISTRATION ACT, S. 17 (2) (vi).**

3 Pat. L. J. 255.

—Registration—Compromise of suit including property not forming subject matter of suit—Admissibility in evidence without registration. See **REGN. ACT, S. 17 (2) (vi).**

3 Pat. L. J. 48.

**COMPROMISE DECREE.**

Registration—Necessity for Compromise creating hypothecation in suit on a money claim. See REGISTRATION ACT, S. 17 (2) (vi). 46 I C 243.

Registration—Record of Compromise in proceedings of court—Admissibility without registration against. See REGISTRATION ACT, S. 17 (2) (vi). 45 I. C. 331.

Tarwad—Decree on compromise against Karnavan—Omission to implead Karnavan as such—Decree binding on the tarwad nevertheless. See MALABAR LAW, TARWAD. 45 I. C. 489.

Validity of—Compromise beyond the scope of the suit—Provision for interest in the compromise though not claimed in the plaint.

A suit for recovery of a sum of money with interest at 9 per cent per annum was compromised on the term that if a specified amount was paid on a particular day, interest should be calculated at 12 per cent, while if it was paid after that date interest should run at 24 per cent. In a suit on the compromise decree. Held that interest was recoverable at 12 per cent only. The agreement to pay after a specified date, a rate of interest not claimed in the suit was outside the scope of the suit, and that portion of the compromise was therefore invalid. (*Sharfuddin and Rce, J.*) GAURI DUTT v. DOHAN THAKUR. 2 Pat L. J. 673=4 Pat. L. W. 209=43 I. C. 459

CONFESSION—Co-accused—Retracted confession—Conviction based on, unsustainable. See EVIDENCE ACT, S. 30 (1913) Pat 175

Retraction of—Ill treatment and inducement by police—Onus of proof on accused. See BURDEN OF PROOF. 22 C. W. N. 809

CONSIDERATION—Presumption of—Endorsement of satisfaction on a mortgage deed.

An endorsement of satisfaction on a mortgage deed need not necessarily import receipt of consideration, since the English method of procedure by deed, on the principle that a deed imported consideration, had no application in India. (*Scott, J. J. and Batchelor, J.*) BAI JAYAGAVRI v. PURSHOTAMDAS SUNDER LAL. 20 Bom. L. R. 177=44 I. C. 926

CONSOLIDATION—Inherent power—O 45 R. 4 G. P. Code, effect of. See C. P. CODE, S. 151 AND O. 45, R. 4. 45 I. C. 551.

CONTEMPT—High Court—Jurisdiction contempt not committed in court—Contempt pending suit—What constitutes—Advertisement for demonstration against Judge—False statements sent to Press—Liability for—Tender of apology—Effect—Penal Code, S. 499, expl. 2

**CONTRACT.**

Opinions in good faith—Meaning (1917) DIG. COL. 325. BANKS AND FETTERICK IN THE MATTER OF 26 C. L. J. 494=45 I. C. 113=19 Cr. L. J. 439.

Proceedings by way of—Maintenance against corporations. See (1917) DIG. COL. 325. In the matter of AMRITA BAZAAR PATRIKA. 45 Cal. 169=21 C. W. N. 1161=26 C. L. J. 459=45 I. C. 333=19 Cr. L. J. 530.

Civil and Criminal—Distinction—Attack upon Court—High Court—Jurisdiction to commit guilty party for contempt—Nature and extent—Condition of exercise of—Circumstances to be considered. See (1917) DIG. COL. 325. In the matter of AMRITA BAZAAR PATRIKA. 45 Cal. 169=21 C. W. N. 1161=26 C. L. J. 459=45 I. C. 333=19 Cr. L. J. 530.

CONTEMPT OF COURT—What constitutes—Duty of Court in cases of contempt of Court of Record—Power to commit for contempt—Procedure libel published while Court is not sitting—Liability of author and of printer and publisher—Proceedings for commitment for contempt—Jurisdiction. See (1917) DIG. COL. 327. WILLIAM TAYLOR, IN THE MATTER OF. 26 C. L. J. 345=44 I. C. 236=19 Cr. L. J. 402.

CONTRACT—Construction—Contract to sell rice milled by certain firms—Rights of parties.

A contract to sell rice milled by one of certain firms gives the seller a right to select the rice to be supplied under the contract. Once he selected and his selection has been accepted by the buyer, the seller is bound to supply rice of the same milling, and the buyer cannot demand rice of another milling.

When the contract provided that the seller is to be absolved in case of accidents to machinery and the mill is destroyed by fire, the seller is not bound to supply rice of another of the mills named in the contract (*Thomson, C. J. and Ormond, J.*) ABBACAN COMPANY v. H. HAMADANNE. 11 Bur L. T. 63=47 I. C. 541.

Construction—Implied term of contract—Compensation, assessment of

Pls. contracted to supply labour for reclamation work undertaken by the deft. trust. The agreement *inter alia* provided that the pls. were to find the necessary labour for filling and emptying the wagons of sand and were to be paid by the measurement of the area reclaimed, having before commencing work, satisfied themselves as to the correctness of the depths shown on the sections of the ground. It resided that the deft. Trust were at the time engaged in putting rubble protection to enclose the area to be reclaimed and this would be in progress probably

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when works would be commenced and it was stipulated that the plffs. were not to make any claim for alleged or actual loss of material being washed away during the progress of the work and when quoting their rate for the labour in filling and emptying, it must include all and every such contingency as loss in bulk through washing or spreading by the sea, sinking and settlement or leaking or blowing out of the wagons during their transit from the sand hills to the site of the reclamation and that the plffs. would be paid strictly in accordance with the work when actually done on the sections of the ground, at the completion of the work and no allowance whatever as stated in the previous clause would be entertained for sinking, washing away, etc. The trial Judge held that the plans and sections added an implied term to this contract that the deft. trust was to supply the protection actually shown on the plans and sections, whilst the Appeal Court was of opinion that the implied covenant was to supply an "adequate protection," the inadequacy being proved by the mere fact of the discrepancy between what they considered the proved wagon-loads deposited and proved the amount measured.

*Held*, by the Judicial Committee, that assuming without deciding that the contract had an implied condition, that condition was only to execute the protection as shown on the plans. (*Lord Dundee*.) *THE KARACHI PORT TRUST v J. MACKENZIE DAVIDSON*.

22 C. W. N. 961=(1918) M. W. N. 611=  
8 L. W. 324=48 I. C. 319. (P. C.)

Construction—Offer kept open, 'up to' and 'until' a certain date, meaning of—Offer open till midnight of day specified—Extrinsic evidence inadmissible. See EVIDENCE ACT, S. 91. 22 C. W. N. 416.

C. I. F. terms—Sale of goods—Breach—Measure of damages. See CONTRACT ACT, S. 73. 23 M. L. T. 320.

Terms—Rights of vendees under ordinary c. i. f. contracts See Sale of goods 35 M. L. J. 184.

Implied—Enhanced rate of rent—Presumption of implied contract from payment for a series of years. See MADRAS ESTATES LAND ACT, S. 13 (3). 23 M. L. T. 137.

Implied—Inference from long payment and purpose of payment—Inference of legitimate origin. See B. T. ACT, S. 74. 44 I. C. 497.

Implied contract—Long continued payment from time immemorial—Contract supported by consideration—Legality of payment—Right and title of recipient—Presumption as to. See ABWAB. 22 C. W. N. 523.

## CONTRACT ACT, S. 11.

Public Policy—Agreement opposed to—Agreement to serve till payment of principal sum—Validity—Consideration paid—Suit for refund of—Maintainability. See CONTRACT ACT, S. 23. 27 C. L. J. 459.

Sale of goods—C. I. F. Terms—Rights of parties See SALE OF GOODS. 35 M. L. J. 184.

Stranger to—Right to take advantage of terms.

Where the appellants contracted with the Government to maintain the rights of all tenure-holders entered in the record of rights prepared prior to the giving of the *Kabuliyat* by the appellants, *held*, that a suit by all the tenants for a declaration that one of the tenure-holders covered by the record of rights has obtained a fraudulent entry therein and had no such rights as thus recorded, was not maintainable. 17 C. L. J. 70, 32 Cal. 463, 11 C. L. J. 364, 5 C. L. J. 67, 11 C. L. J. 63 ref. (*Chapman and Rec. J.J.*) MAHARAJAH KUNWAR MANMATH NATH ROY v SHEIKH AMBER KHAN. 5 Pat. L. J. 394=45 I. C. 98.

CONTRACT ACT (IX of 1872). S. 2—Consideration—Benefit to third party but not to promisor, if enough—Co-mortgagor if liable though not benefited. See (1917) DIG. COL. 330. FANINDRA NARAIN ROY v KACHCHEMAN BIBI. 45 Cal. 774=22 C. W. N. 188=28 G. L. J. 152=41 I. C. 673.

Ss. 2 and 45—Promises, meaning of—Co-heirs of original promisees—Payment to one not a good discharge. See CONTRACT ACT, S. 45. 7 L. W. 221.

S. 2 (d)—Consideration—Lawyer giving up practice on promise of pension—Contract. See (1917) DIG. COL. 331 BALU SHIV SARAN DAL v MAHARAJA KESHO PRASAD SINGH. (1918) Pat. 86=3 Pat. L. W. 302.=42 I. C. 122.

S. 2 (d)—'Consideration,' Meaning of—English and Indian Law.

Any detriment suffered by deft. on the faith of the promise of the plff. will be sufficient consideration to make the plff's. promise enforceable. 14 Cal. 64 and 36 All. 268 foll. English and Indian law on the subject compared. (*Seshagiri Iyer and Napier. J.J.*) MAHARAJA PERUMAL MUDALIAR v. SENDANATHA MUDALIAR. (1918) M. W. N. 173=44 I. C. 479.

S. 11—Minor—Contract by—Mortgage on attaining majority in respect of sums advanced during minority—Fresh consideration.

## CONTRACT ACT. S. 11.

An agreement by a minor in India is void and not merely voidable and as such it does not admit of ratification by the minor on attaining majority.

A minor on attaining majority executed a mortgage bond in favour of a creditor from whom he had borrowed various sums during his minority, for a consideration which represented the debts incurred during his minority and also a fresh advance made at the time of the mortgage.

*Held*, that the mortgage was enforceable only to the extent of the fresh advance, notwithstanding the fact that the whole consideration stated in the mortgage was handed over to the mortgagor who then returned the portion which covered the old minority debts. (*N. R. Chatterjee and Wainstay, J.J.*) NAREN-DRA LAL KHAN v. BRISHIKESH MUKHERJEE. 46 I. C. 765.

———S. 11—Minor—Contract for sale in favour of—Not specifically enforceable for want of mutuality. See MINOR 44 I. C. 164.

———S. 11—Minor—Lease in favour of, void. See MINOR. (1918) Pat. 241.

———S. 11—Minor—Sale by—Suit to set aside—Misrepresentation as to age—Silence if amounts to—Right to avoid sale on payment of binding portion of consideration. See MINOR. 7 L. W. 124.

———Ss. 11 and 65—Mortgage by minor—Void—Money received under mortgage—Minor not liable to refund. See CONTRACT ACT, S. 65. 16 A. L. J. 592.

———S. 15—Coercion—Contract entered into by a Hindu wife under threat by her husband that he would commit suicide—Whether voidable. See (1917) DIG (OL. 324) CHIKKAN AMIRAJU v. CHIKKAN SESHAMMA. 44 Mad. 33=32 M. L. J. 494=(1917) M. W. N. 423=5 L. W. 735=40 I. C. 352.

———S. 15—Coercion—Detention of property—Refusal of redemption except on certain terms.

A refusal to convey the equity of redemption except on certain terms, is not an unlawful detaining or threatening to detain property to the prejudice of a person, within the meaning of S. 15 of the Contract Act. (*Sanderson, C. J. and Mookerjee, J.*) THE BENGAL STONE CO. LTD. v. JOSEPH HYAM. 27 C. I. J. 78=45 I. C. 738.

———Ss. 16 and 74—Contract or mortgage—High rate of interest—Relief when will be given.

However improvident a transaction may be it is difficult for a court of Justice to give relief on grounds of simple hardship in the

## CONTRACT ACT. S. 16.

absence of any evidence to show that the money-lender had unduly taken advantage of his position. (*Mr. Anwarul*) AZIZ KHAN v. DUNICHAND. 101 P. R. 1918=25 C. W. N. 130=165 P. W. R. 1918 (P. C.)

———S. 16—Undue influence—Fiduciary relationship—Gift—Donee acting as agent of donor.

A Buddhist lady made a gift of some land to her nephew who was also acting as her agent.

*Held*, that although there was what may be called a fiduciary relationship between the parties, it was not such as would by itself lead the Court to infer undue influence. (*Thorneycroft and Ormerod, J.J.*) KO SAN v. MA THAUNG ME. 46 I. C. 735.

———Ss. 16 and 74—Undue influence—High rate of interest—Not sufficient proof of undue influence. See CONTRACT ACT, Ss. 74 AND 16. 45 I. C. 778.

———S. 16—Undue influence—Proof—Excessive rate of interest

The court should not presume undue influence from the mere fact that the rate of interest stipulated for is heavy and there is a proviso in the bond for capitalising the interest in arrears. (*Fletcher and Smith, J.J.*) KACHHIRANNESSA CPOWDHURANI v. HEM CHARAN KASYA. 47 I. C. 11.

———S. 16—Undue influence—Proof of—Terms of deed prejudicial to donor.

A deed cannot be treated as void for undue influence merely because it is unreasonable or its terms are prejudicial to the donor. Undue influence is not a matter always capable of direct proof, and must depend in its very nature, on the conclusions to be drawn from the entire circumstances in which the transaction had its origin. Reference must be had to the opportunities for and disposition to the exercise of influence on the one side and the result of its exercise, as indicated by the merits of the transactions. (*Abdur Rahim and Oldfield, J.J.*) PADMAVATI v. SHREINIVASA KAMATHI. 7 L. W. 339=44 I. C. 483.

———S. 16—Undue influence—Threat of punishment.

A mere fear of punishment in a criminal case does not constitute undue influence, and the law as to the obtaining a refund of money or a return of security given under an agreement not to prosecute is that the transaction cannot be set aside unless the circumstances disclose pressure or undue influence. (*Drake Brockman, J. C.*) WARIS ALI v. MAHOMED AZIMULLA KHAN. 46 I. C. 424.

———S. 16—Undue influence—Unconscionable bargain—Expectant heir—English rules

## CONTRACT ACT, S. 19

*of Equity—Applicability of to India—Ultimate result of dealings not conclusive that they are unconscionable—Compounding of interest not necessarily oppressive—Illustrations to Indian statutes, their legal effect*

Questions as to undue influence, unconscionable bargains and dealings with expectant heirs, must be decided on the provisions of the Indian Contract Act, 1872, as amended by the Indian Contract Amendment Act, 1899, and these alone. The principles on which English Courts of Equity deal with similar questions are entirely inapplicable.

In money lending transactions the mere fact that the sum ultimately claimed exceed enormously the amount originally advanced is no ground for holding the transaction unconscionable. It must also appear that there is something unconscionable, either in the original dealings, or in the subsequent stages of the transaction.

By making short term loans and insisting on capitalising the interest immediately it falls due, a money lender may pile up compound interest at an oppressive and unconscionable rate. But there is nothing inherently wrong or oppressive in securing interest upon interest after the interest has been due and unpaid for a considerable time.

Their Lordships in this case agreed with the Lower Courts that the Indian Contract Act throws upon the person dealing with an expectant heir and in a position to dominate the latter's will the burden of showing that he has not used his position to obtain an unfair advantage, but held it unnecessary to decide whether such a situation in fact arose here.

The illustrations to an Indian statute are to be taken as part of the statute (*Lord Atkinson*) LALA BALA MAL v. AHAD SHAH.

35 M. L. J. 614—25 M. L. T. 35=

16 A. L. J. 905—23 C. W. N. 233=

43 I. C. 1 (P. C.)

—Ss. 19, 19 A and 64—*Undue influence—Advantage gained by fiduciary—Transaction null and void against transferor and his representative. See TRUSTS ACT, S. 88.*

20 Bom. L. R. 911.

—Ss. 23 and 24—*Agreement opposed to public policy—slavery bond—Validity—S. 24—Contract partly for illegal consideration—Validity.*

A contract whereby a labourer engages to work without any payment whatever under conditions that make it practically impossible for him to discharge the debt until some other capitalist redeems him is wholly void 19 C. W. N. 1118 Ref.

Where two labourers executed a bond for a consideration of Rs. 10 repayable at the end of two years with interest, and the second of the two executants undertook to labour for the promisee for the period of two years without

## CONTRACT ACT, S. 23.

remuneration and agreed, that in the event of his absenting himself from work at any time during that period, the promisee should be entitled to recover the principal with interest. *held*, (1) that the bond was a slavery bond and was therefore illegal and void and (2) that the provision for the payment of interest being inseparable from that part of the contract which was illegal was not enforceable. (*Mullick and Thornhill, JJ.*) SATISH CHANDRA GHOSH v. KASHI SAHU. 3 Pat. L. J. 412= 46 I. C. 418.

—S 23—*Applicability of—Voidable contract—C. P. Tenancy Act (XI of 1898) S. 70—Tenancy land sale as khudkhast—Registration contrary to law—Dispossession of vendee by landlord.*

Plffs. purchased under a registered sale deed from the deft 4 pies share in a village and 34.66 acres of land, which was described as his *khudkhast*. The land being the tenancy land of the deft's predecessor-in-interest the landlord dispossessed the plff by an order of the Revenue Officer under S. 71 of the C. P. Tenancy Act. The plff. filed the present suit for compensation for breach of the covenant in the sale deed which described the land as *khudkhast*.

*Held*, that a transfer of the occupancy and ordinary tenant rights being voidable and not absolutely void, it could not be held to be unlawful within the meaning of S. 23 of the Contract Act and that the suit was maintainable. (*Mitra, A. J. C.*) SHALIGRAM SADA. SHEO PANDE v. NARAIN. 45 I. C. 669.

—S 23—*Champerious agreement—Public policy—Validity.*

An agreement to finance a litigation and to share the fruits thereof ought to be carefully watched and when found to be extortionate and unconscionable or made not with the bona fide object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for improper objects so as to be contrary to public policy, effect ought not to be given to it. 2 Cal. 238 foll. (*Know, J.*) MANGAL PRASAD v. NABI BAKSH.

43 I. C. 74.

—Ss. 23 and 65—*Champerious—Agreement to finance litigation in view of sharing the fruits thereof—Right to refund of moneys actually spent.*

Where the agreement is to finance a litigation against a person in possession of certain property and in favour of persons who are themselves unable to find the necessary funds, and the person financing is to get a share in the property in the event of the success of the litigation as if the full amount was paid and no provision is provided for the refund of the amount in the event of failure, the transaction cannot be treated as a loan.

## CONTRACT ACT, S. 23.

Such a document is champertous, but the promisee is entitled to recover what he has advanced in the event of the litigation ending successfully in favour of the promisor. (*Adling and Seshagiri Ambar. JJ.*) PUSAPATI VENKATA-PATHIRAJU v. VENKATASUBHADRAYANMA. 47 I. C. 553.

—S. 23—Illegality—Agreement by a client to pay a sum of money to pleader's clerk for special attention to his case—Agreement opposed to public policy—Effect. See (1917) DIG. COL. 336; SURYANARAYANA v. SUBBAYYA. 41 M. 471=35 M. L. J. 724=22 M. L. T. 552=(1918) M. W. N. 54=7 L. W. 53=42 I. C. 911 (F. B.)

—S. 23—Illegality—Public policy—Stifening criminal prosecution. What is—Application for sanction under S. 195, Cr. P. Code withdrawn of.

A trial for an offence need not actually be in progress to make an agreement for stifling a prosecution in respect of that offence improper for the purposes of S. 23 of the Contract Act. The section applies if the object of the agreement is to cause the withdrawal of an application to sanction the prosecution under S. 195 of the Cr. P. Code. (*Drake Brockman, J. C.*) WASIRALI v. MAHOMED AZIMULLA KHAN. 46 I. C. 424.

—S. 23—Money paid under illegal agreement—Agreement to withdraw application for sanction under S. 195 Cr. P. Code—Illegal object, accomplishment of—*Par delicto*—No right to refund of money paid. (*Drake Brockman, J. C.*) WARISALI v. MOHAMED AZMULLA KHAN. 46 I. C. 424.

—S. 23—Payment for procuring exercise of private influence with Government—Agreement not opposed to public policy. See (1917) DIG. COL. 336; BABU SHIV SARAN v. MAHARAJ KESHO LAL PRASAD SINGH. (1918) Pat. 86=3 Pat. L. W. 302=42 I. C. 122.

—S. 23—Public office—Mutawalli—mortgage of rights of—Opposed to public policy. See MAHOMEDAN LAW, MUTAWALLI 22 C. W. N. 996.

—S. 23—Public Policy—Agreement not to bid at auction, if valid.

An agreement to abstain from bidding at an excise auction is not void under S. 23 of the Contract Act as being against public policy. 18 Bom. 342, 16 Cal. 194, 6 C. L. J. 111 rel. (*Batten, A. J. C.*) MAHADEO v. KEWALIRAM. 44 I. C. 223.

—Ss. 23 and 30—Public policy—Agreement not to bid at auction—Agreement contrary to—Money paid under when can be recovered back—Deposit with stake holder, effect of.

## CONTRACT ACT, S. 23.

An agreement between two persons not to bid against each other at an auction is not necessarily illegal or against the public policy.

If two parties enter into an illegal contract and money is paid upon it by one to the other it may be recovered back before the execution of the contract but not afterwards. In the case of persons entering into such a contract and paying money to a stake holder, if the event happened and the money is paid over without dispute, that is considered as a complete execution of the contract and the money cannot be reclaimed, but if the event has not happened, the money may be recovered.

Authority given to a stakeholder to pay over money in respect of an unlawful transaction may be revoked at any time before it has been actually paid, even if it has been credited in account to the other party. (*Young, J.*) AH FOKE v. P. M. A. NAGAPPA CHETTY. 46 I. C. 755.

—S. 23—Public policy—Agreement opposed to—Validity—Consideration paid under—Suit for refund of—Maintainability—Agreement to serve till payment of principal sum—Validity.

A suit is maintainable for the recovery of the sum actually paid pursuant to an agreement which was opposed to public policy. I. C. L. J. 261 foll., 30 Cal. 529 rel.

*Quere.*—Whether an agreement by which the debt, in consideration of a sum advanced by the plf. till the payment of the principal sum, and interest on that sum was not to be paid in cash but was to be liquidated by the services of one or other of them whom the plf. undertook to feed but not to clothe, was a slavery bond and not enforceable as being opposed to public policy. (*Teunon and Newbould, JJ.*) ANANDIRAM MANDAL v. GOZA KACHORI. 27 C. L. J. 459=45 I. C. 965.

—S. 23—Public policy—Contract contrary to—Contract to engage dancing boy for a certain price, if valid.

Plf. engaged the services of a dancing and singing boy for a certain period. He next contracted with the debt that for monthly payment of a certain sum the boy should give exhibitions in accordance with arrangements made by the debt. The debt. employed the boy for a period of one month and 24 days, but refused to make any payment to the plf.

*Held*, that the contract was not contrary to public policy and that the debt. was bound to pay to the plf. at the contract rate. (*Teunon and Newbould, JJ.*) SHEIKH SAMIR v. SYED ALI. 47 I. C. 138.

—S. 23—Public Policy—Non-compoundable case—Agreement to arbitration—Award if can be enforced.

## CONTRACT ACT, S. 23.

Plff. complained that the defts. had cheated him and the Magistrate referred the case to a gentleman for enquiry with a suggestion that he would be able to effect a settlement between the parties. The parties then agreed to refer their difference to arbitrators and the Magistrate on being informed of this dismissed the complaint. The arbitrators made an award in favour of the plff. and the latter applied to have it filed.

*Held*, that the award was not enforceable as the agreement to refer to arbitration being invalid as tending to stifle a prosecution. (*Walmesley and Panton, J.J.*) **THANDAMOYEE DAS v. GOONAMANEE DAS.** 47 I. C. 503.

—S. 23—Public policy—Purchase of property by Government servant in contravention of departmental orders—Transfer void.

A purchase made benami by a Government servant in contravention of Government orders in respect of it is void on the ground of public policy, and the real purchaser acquires no title under such a purchase. (*Lindsay, J. C.*) **SAJJAD MIRZA v. NANHI KHANOM.** 47 I. C. 694.

—Ss. 23 and 24—Void contract—Unlawful consideration—Stifling criminal prosecution—Whole contract void.

The deff.'s husband agreed to convey to the plff. certain lands for a consideration of Rs. 150, the contract being subject to the condition that it was to be enforced if the plff. did not withdraw a prosecution for criminal breach of trust which she had launched against the deff.'s husband. The plff. having sued for specific performance of the contract.

*Held*, dismissing the suit, that if the concluding term had been complied with, part of the consideration was void on the ground of being opposed to public policy; and if it had not been complied with, the whole contract became equally unenforceable for failure of an essential condition. (*Beaman and Heaton, J.J.*) **BANI RAMACHANDRA SALVI v. JAYAWANTI GOVIND PANDIT.** 42 Bom. 389=

20 Bom. L. R. 331=45 I. C. 566.

—S. 24—Unlawful consideration—Stifling criminal prosecution, one of the terms of consideration for a contract of sale—Contract wholly void. See CONTRACT ACT, SS. 23 AND 24. 20 Bom. L. R. 331.

—S. 25—Agreement to pay an annuity in consideration of future services—Enforceability of.

In order that a promise to grant any annuity to a person for future services be enforceable in law, it is incumbent upon the promisee to show that there was some contract for future services on his part which might have been enforced by the maker of the promise. (*Richardson and Beachcroft, J.J.*) **BASANTA**

## CONTRACT ACT, S. 30.

**KUMAR CHOWDHURY v. MADAN MOHUN CHOWDHURY.** 46 I. C. 282.

—S. 25—Loan—Contract of—Subsequent agreement by debtor to repay at different place—Validity. See C. P. CODE, S. 20. 11 Bur. L. T. 67.

—S. 25 and Expl. (2)—Bond executed by person under control of Court of Wards—Subsequent bond in renewal by son—Consideration, if valid.

Plff. sued to recover money due on a bond executed by R. and his son on 13-8-06 when R's estate was under the management of the Court of Wards. It appeared that a part of the consideration was a previous bond executed by R., alone and it was contended that as R could not then incur any liability, his estate being under the management of the Court of Wards, there was no liability that the son could take over:—

*Held*, that when R borrowed money from the plff. the debts came into existence even though R was not liable and that the son rendered himself liable for the debts when he signed the bond which was the basis of the suit and that the bond amounted to a fresh contract and not merely to a ratification of a former void contract.

There was consideration for the fresh contract and the question whether it was sufficiently adequate or not was material. (*Chevis and Jones, J.J.*) **RAJMAL SHAH v. COURT OF WARDS OF TIKA, BALDEV SINGH.** 142 P. W. R. 1918=43 I. C. 974.

—S. 30—Wagering contracts—Common intention to wager essential—Speculation not equivalent to wagering—Bombay Ac., III of 1865 Ss. 1 and 2—Palka Adatias their position.

Speculation does not necessarily involve a contract by way of wager: to constitute such a contract a common intention to wager is essential. The mere fact that one party to a contract for sale of goods did not intend to deliver, even if known to the other party, does not vitiate the contract, unless there is a bargain or understanding between the parties that delivery is not to be called for. (*Sir Lawrence Jenkins*) **BHAGWANDAS PARASRAM v. BURJORJI RUTTONJI BOMANJI.** 42 Bom. 373=

34 M. L. J. 305=23 M. L. T. 203=

(1919) M. W. N. 315=13 A. L. J. 241=

4 Pat. L. W. 229=20 Bom. L. R. 561=

44 I. C. 234=45 I. A. 29=

22 C. W. N. 625=27 C. L. J. 358=

7 L. W. 577 (P. C.)

—S. 30—Wagering contract—Money deposited with stake holder—Right to revoke before money is actually paid to winner. See CONTRACT ACT, Ss. 23 AND 30.

46 I. C. 755.

## CONTRACT ACT, S. 30.

—Ss. 30 and 65—*Wagering contract*—*Money paid as security for performance of*—*Suit for recovery of maintainance.*

Money deposited by the plaintiff with the defendant as security for the performance of his part of a contract is recoverable, though the contract is a wagering one provided there is no fraud or moral delinquency on the part of the plaintiff. 33 Bom. 411 and 38 Bom. 149 foll.

But S. 65 of the Contract Act has no application to such a case. 42 Cal. 115 and 21 Bom. 545 foll. (*Seshagiri Iyer and Napier, JJ.*)  
VENKATARAMAN v. RAMANUJAM

34 M. L. J. 561=23 M. L. T. 34=  
(1918) M. W. N. 230=7 L. W. 513=44  
I. C. 349.

—S. 35—*Co-mortgagees*—*Payment to one gives a valid discharge*—*English and Indian Law.* See CONTRACT ACT, SS. 43 AND 44. I. C. 627.

—S. 38.—*Contract for sale of goods*—*Place of performance fixed*—*Duty of contractor*—*statute*—*Interpretation*—*Illustration to action*—*Admissibility and effect of.*

To be binding on the promisee an offer of performance of a contract by the promisor must be at the proper time and place, and when the contract specifically provides a place of performance, the offer must be to perform at the place named in the contract.

Under the illustration to S. 38 of the Contract Act the vendor of goods must bring the goods at the place named in the contract and give the purchaser an opportunity of satisfying himself that the goods offered are of the quality contracted for. An information that the goods are at the vendor's place and will be forwarded to the place agreed for performance after examination and approval by the purchaser is not a proper offer.

Illustrations appended to sections of statute should be accepted as being relevant and of value in the construction of the text. (*Young, J.*) E. K. JAINCO & CO v. JOSEPH HEAH AND SONS, LTD. 11 Bur. L. T. 9=46 I. C. 497.

—Ss. 43 and 45—*Co-mortgagees*—*Payment to one of them of the mortgage amount*—*Not a valid discharge.* See CO-MORTGAGEES. 22 C. W. N. 1021.

—S. 43—*Co-tenants*—*Suit for rent against*—*Liability, if joint or joint and several*—*Right of co-tenants to insist on all co-tenants being impleaded*—*Non-substitution of heirs of deceased co-tenant*—*Effect of.*

Where in a suit for rent the landlord purported to make all the persons who had entered into the contract of tenancy parties defendants and obtained an *ex parte* decree, but some of the tenants having died before the suit, those surviving opposed execution on the ground that the decree was not validly obtained:

## CONTRACT ACT, S. 45.

*Held* that the decree passed in such circumstances was a good and valid money decree enforceable against the tenants who were alive at the date of the decree or their representatives.

If the landlord desires to obtain a decree good against the land, under the B. T. Act, he must ordinarily (apart from any question of representation) implead all the co-tenants including the heirs of legal representatives of a deceased co-tenant. But for the purpose of a money-decree (in the absence of express agreement to the contrary) he is free, under S. 43 of the Contract Act, to sue any or all of the tenants.

*Per N. R. Chatterjee, J.*—(*Richardson, J.* reserving his opinion). When the contract is with a single person a tenant and he dies, the liability of his heirs is a joint liability, for co-heirs form a single person.

*Per Richardson, J.*—Liability is joint, if on the death one of the joint promisors the liability becomes the liability of the surviving promisors and no liability devolves upon the heirs or legal representatives of the deceased promisor.

There being no survivorship amongst co-tenants in India and co-tenants not having under S. 43 the right to be sued together, *prima facie* the liability is joint and several. 3 C. 343; 32 A. 307; 33 C. 580; 12 C. L. J. 591; 12 C. L. J. 642; 25 M. 26; 27 C. 545; 6 C. W. N. 111; 23 C. 530. *Kendall v. Hamilton*, (1819) 4 A. C. 564 Ref. (*N. R. Chatterjee and Richardson, JJ.*) KRISHNA DAS ROY v. KALI TARACHOUDECRANI. 22 C. W. N. 289.  
=44 I. C. 80.

—Ss. 43 and 45—*Joint promisees*—*Payment to one*—*Good discharge.*

One joint creditor can, in equity, give a valid receipt to a debtor in full discharge of the claims of himself and of the other joint creditors. 22 Q. B. D. 537 (1901) 2 Ch. 160 ref. (*Mullick and Atkinson, JJ.*) PRABHU RAM PANDEY v. RAGHUBAR SAH.

4 Pat. L. W. 57=42 I. C. 408.

—Ss. 45 and 38—*Co-mortgagees*—*Payment to one, if gives a valid discharge*—*English and Indian law.*

Co-mortgagees are joint promisees and the payment of the mortgage debt to one of them discharges the whole debt.

In view of the difference in the conditions of social life in India and in England, it is doubtful whether and to what extent the presumption that when a claim is on a money bond to two or more obligees they are tenants-in-common and not joint tenants of the debt with the consequence that the discharge by one obligee cannot be set up as a defence against the other obligee suing for his share of the debt, which in England prevails only in

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cases in which equitable relief is claimed, should have been given effect to it in India. (Saunders, J. C.) *MAUNG KIAN MO v. MA LO*. 44 I. C. 627.

—S. 45—Joint creditors—Payment to one operates as a good discharge. See *CONTRACT ACT, SS 45 AND 46*. 4 Pat. L. W. 57.

—Ss. 45 and 2—*Promisee, meaning of—Bonds in the name of manager of joint Hindu family—Money advanced out of family funds—Other co-parceners if co-promisees—Payment to one of several co-heirs of promisee if a discharge of liability.*

*Prima facie*, the word "promisee" under a document means the person in whose name it has been executed and every person who has an interest in bonds or securities standing in the name of another person is *not* a co-promisee even though that other may be the manager of a Hindu family of which he is a co-parcener and though the amounts secured by the bond have been advanced by the manager from family funds. Such a co-parcener is in the position of a co-heir along with the other persons likewise interested in the said bonds.

Payments to one of the co-heirs of the promisee under a bond would not discharge the promisor from his liability thereunder and similarly a payment made to a junior member of a Hindu family during the life time of its manager in whose favour a bond is executed would not constitute an effective discharge of the bond. 29 I. C. 586 foll. (*Seshagiri Iyer and Nagier, JJ*) *ANKALAMMA v. BELLAM CHENCHAYYA* 41 Mad. 537=34 M. L. J. 315=23 M. L. T. 215=7 L. W. 221=48 I. C. 419.

—S. 55—*Compromise decree—Provision for payment of money within time fixed—Default—Acceptance of money paid after time effect of.*

When under a compromise decree the plaintiffs agreed to receive a certain sum in full satisfaction of their entire claim by a certain date but one of the joint creditors accepted a part-payment after the expiry of the fixed date and gave a receipt.

*Held*, that one joint creditor can in equity give a valid receipt to a debtor in full discharge of the claims of himself and of the other joint creditors.

*Held further* that the plaintiffs, by accepting the money paid by the debtors must be taken in law to have waived their rights under the compromise decree, having elected to adopt it after the time of its performance had expired.

*Obiter dictum*.—A compromise which is embodied in the form of a decree may stand on a different footing to an ordinary simple contract. (*Mullick and Atkinson, JJ.*) *PRABHU RAM PANDEY v. RAGHUBAR SAH*. 4 Pat. L. W. 57=42 I. C. 408.

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—S. 55—Contract—Impossibility of performance—Contract for sale of goods by agent of German Firm—Declaration of war—Seizure of cargo—Commercial intercourse with Enemies Ordinance (VI of 1914)—Subsequent release, effect of—Breach of Contract—Damages. See (1917) DIG. COL. 343. *BANGHY ABDUL RAZAK SAHIB v. KHANDI RAO*. 41 Mad. 225=40 I. C. 851.

—S. 56—Contract—Performance—Impossibility—What constitutes—C. I. F. contract for sale of goods—Payment against delivery of goods—Outbreak of war while contract still executory—Effect See (1917) DIG. COL. 344 *MAHORAM HURDRO DAS v. G. C. SETHI*. 45 Cal. 23=21 C. W. N. 370=25 C. L. J. 62=40 I. C. 383.

—S. 62—Debt due to partnership—Subsequent promise by debtor orally to pay at a different place—If a novation—Fresh consideration, whether necessary—Jurisdiction C. P. Code, S. 21, Objection to place of suing whether taken in objections to Jurisdiction—Interest if awardable as damages in the absence of a contract for the same. See (1917) DIG. COL. 346: *VASUDEVA MUDALIAR v. VELLAPPA N. DAB*. 22 M. L. T. 312=(1917) M. W. N. 779=6 L. W. 717=45 I. C. 401.

—S. 64—*Agreement to finance litigation—Money advanced in part—Repudiation of agreement—Right to recover moneys advanced.*

Where a person agrees to advance moneys to another from time to time up to a certain limit with the object of financing a litigation by the latter, but fails or refuses to pay the full amount, he is nevertheless, entitled under S. 64 of the Contract Act, to a refund of the amount actually advanced by him. (*Ap. ling and Seshagiri Aiyar, JJ.*) *PUSAPATI VENKATAPATHIRAJU v. VENKATASUBHA-DRAYAMMA*. 47 I. C. 563.

—S. 64—Sale of minor's property by guardian—Sale whether binding on minor—Sale amount utilized for purchase of other property for the minor—Whether vendee from the guardian entitled to claim the property brought by the minor—Suit by vendee from guardian for possession—Plea of invalidity of sale by ward since attained majority—Whether competent—Limitation, Lim. Act. Art. 41—Proper decree.

Where a guardian sells his ward's property for purposes not binding on the ward and the sale price is utilised for the purchase of lands, for the ward, not contemplated at the time of the sale, the lands so purchased for the ward do not constitute "the benefit" within the meaning of S. 64 of the Contract Act and need not be conveyed to the vendee to the guardian when the ward avoids the sale by the guardian.

*Per Kumaraswami Sastri, J.*—Ordinarily the benefit which a party receives when he sell

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property is the money which the vendee pays. Any profits which the vendor might make with the moneys would be too remote in estimating what he has to return in case he is entitled to avoid the sale and elects to do so. Where however for the protection of a purchaser contracting with a guardian or a qualified owner a particular dealing with the money was in the direct contemplation of the parties such as the purchase of other lands with the consideration and the money is so applied, the benefit which the other party obtains will be the land or other property acquired with the consideration.

Where the vendee from the guardian under a voidable sale sues to recover possession of the property three years after the ward attained majority it is open to the defendant to set up the plea of the invalidity of the sale in defence though a suit by him as pff. to avoid the sale would be barred under Art. 14 of the Lim. Act.

In this case their Lordships directed that on payment of the value of the property by the defendant within a specified time the pff's suit should be dismissed and that in default a decree for possession should be passed as prayed for by the pff. (*Phyllis and Ramkrishna Sastri, JJ.*) CHINNASWAMI REDDI v. KRISHNASWAMI REDDI.  
42 Mad. 36=  
35 M. L. J. 652.

—S. 65—Applicability of contract—Void—Non compliance with statute.

A contract which is not in accordance with statutory requirements is no contract at all, and does not become void and is not discovered to be void in the sense of S. 65 of the Contract Act. (*Bates, A. J. J.*) ANANDRAO v. TUKA-  
RAM.  
48 I. C. 326.

—S. 65—Applicability—Mortgage deed not properly attested—Money decreed in a suit on the mortgage—T. P. Act, S. 68 Sec. (1917) DIG. COL. 347; GANGA PRASAD v. RAM SAMUJAH.  
20 O. C. 336=43 I. C. 236.

—S. 65—Minor—Money received by, under a mortgage—No liability to refund—Fraud—Misrepresentation, effect of.

A minor cannot be made to repay money which he has spent merely because he received it under a contract induced by his fraud.

The pff. brought a suit for sale on two mortgage bonds. The deft. pleaded that at the time of execution of the bond she was a minor. There was no allegation nor proof that the deft. had made any fraudulent misrepresentation as to his age whereby he had induced the pff. to advance the money. Held, that the pff. was not entitled to recover. (*Piggott and Walsh, JJ.*) RADHEY SHAM v. BIHARI LAL.  
40 All. 558=16 A. L. J. 592=  
48 I. C. 473.

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—S. 65—Sale of—Contract to induce sale—Suit for recovery of—Money.

S. 65 of the Contract Act has no application to contracts which are void ab initio and does not authorise recovery of moneys paid under such a contract. (*B. S. 440*) A. C. 115. T. P. A. 283 of 1916 foll. On facts the general law a plaintiff whose land have not been tainted with corruption and who has not been a party to a fraud, is entitled to get back the money which he left with another. (*Shankara Aiyer and Nopier, JJ.*) VENKATAPADU v. RAMANUJAM.  
34 T. L. J. 531=23 M. L. J. 24=  
7 L. W. 316=(1913) M. W. R. 230=  
34 I. C. 315.

—Ss. 65 and 28—Suit for recovery of money advanced under a contract known to be void ab initio. Applicability of S. 65. See (1917) DIG. COL. 345. SRINIVASA AYYER v. SESHA AYYER.  
11 Mad. 137=31 M. L. J. 232=  
6 L. W. 42=41 I. C. 233.

—S. 69—Applicability of—Bond to, how to pay—Meaning of—Sale of land subject to mortgage—Money left with vendor to pay off—Pre-emptor directed to pay full price under decree—Withdrawal by vendee of decree amount—Subsequent payment by pre-emptor of mortgage amount—Right to mortg.

A vendor left money in the hands of the vendee sufficient to discharge a mortgage subject to which the property was sold. A suit was brought to pre-empt the sale but the decree made the pre-emptors liable to the vendees for the entire money and not for the amount actually paid by the latter. The pre-emptors paid the whole of the sale consideration as directed in the decree and got possession. The vendees did not pay off the mortgage but withdrew from the court the money deposited by the pre-emptor. The mortgagee brought a suit for sale which was decreed and the pre-emptors in order to save the property from the sale paid off the amount due to the mortgagee. They then brought a suit to recover from the vendees the money so paid by him.

Held, that the pffs. were not entitled to recover inasmuch as there was no contractual liability between the pffs. and the defts. nor was there that liability which the law implies under circumstances where one man is compelled to pay money for which another is legally liable. (*Richards, J. J. and Sankar, J. J.*) RAM RICHCHA PRASAD TEWARI v. RAGHUNATH PRASAD TEWARI.  
16 A. L. J. 531=  
43 I. C. 33.

—Ss. 69 and 70—Contribution—Satisfaction of decree by one of several judgment debtors—Liability of others—Right to contribution.

A decree for maintenance provided that certain defts. in the suit should pay off the decretal amount within four months from

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the date of the decree, and that on their failure to do so the money should be realised by sale of the properties hypothecated. One of the debts, who had since the decree acquired four fifths of the properties charged, paid off the decree amount and then sued the other debts for contribution :

*Held*, that as it was quite unnecessary for the plaintiff to pay off the decretal debt or any part of it, the claim for contribution could not succeed. (*Chitty and Walmsley, JJ*) KANAILAL KUNDU v. NITYA SARAN MUKHERJEE.

47 I. C. 533.

—Ss. 69 and 70—Person interested in the payment of money—Calcutta Municipal Act, S. 228—Payment of consolidated rate by owner of premises—Liability of occupier.

Having regard to S. 228 of the Calcutta Municipal Act, which makes the consolidated rate a first charge upon the building or land in respect of which it is payable, the owner of such building or land is a person interested in the payment of the rate within the meaning of S. 69 of the Contract Act. If the owner pays the share of the occupier he is entitled to recover it from the latter under S. 69 or 70 of the Contract Act. (*Teynon and Newbould, JJ.*) FIRM OF BHUDAR MAL RAM CHANDRA MARWARI v. SEW NARAYAN MARWARI

44 I. C. 669.

—S. 69—Reimbursement of person paying money due by another in payment of which he is interested—Payment of jodi—Obligation undertaken by donor of lands. See (1917) DIG. COL. 350; SOMOSHASTRI v. SWAMI RAO. 42 Bom. 93=19 Bom. L. R. 939

=43 I. C. 482.

—Ss. 69 and 70—Suit by person satisfying decree passed against him jointly with others on the ground that he is not liable to pay. See (1917) DIG. COL. 351; SERAFAT ALI v. SHEIKH ISRAR ALI. 45 Cal. 691=

22 C. W. N. 347=27 C. L. J. 607=

42 I. C. 30.

—S. 70—Gratuitous payment—Sale—Money left with vendees for payment to mortgagees—Property mortgaged to secure sum due different from property sold—Vendee paying interest to mortgagees owing to delay on the part of the vendors to get sale deed registered

Certain immoveable property was sold and the vendors left a portion of the consideration in the hands of the vendees for payment to certain of their (vendors') creditors who held a mortgage over property other than that sold. Owing to delay in the registration of the sale deed which was due to the vendors, the vendees did not pay the money to the creditors. When, however, the sale deed was registered and the vendees tendered the money left with them to the creditors, the latter refused to accept it without the interest which had accrued in the

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meantime. The vendees paid the interest also. In a suit brought by the vendors for the recovery of the unpaid portion of the purchase money the vendees claimed a set-off in respect of the money they had to pay the vendors' creditors as interest :—*Held* that the vendees were not entitled to recover the amount claimed inasmuch as the money paid as interest was a gratuitous payment, the property mortgaged to secure the sum due to the creditors being no part of the property sold and the fact that the vendors benefited by the payment was immaterial. (*Richards, C. J. and Bannerji, J.*) SURAJ BHAN v. HASHIM BEGAM. 40 All. 553=13 A. L. J. 351=47 I. C. 903.

—Ss. 73 and 72—Payment under pressure of legal proceedings—No right to recover money paid See BENG. REGN. VIII OF 1919, S. 14. 45 I. A. 103. (P. C.)

—S. 70—Steps of—act done for the benefit of claimant, benefiting another—Repair of irrigation channel—Right to compensation.

S. 70 of the Contract Act does not apply to cases where a person does an Act for his own benefit and that act incidentally benefits his neighbour or any other person. In such cases the latter need not pay for the extent of the benefit derived by him from the act.

A person claiming contribution from another under S. 70 of the Contract Act must prove that he did some act for the latter. An act cannot be described as done by one person for another, unless it can be shown that, but for the existence of the other's interest, it would not have been done. (*Abdur Rahim and Oldfield, JJ.*) VISVANADHA VIJAYA KUMARA BANGAROO v. ORE. 45 I. C. 786.

—S. 72—Applicability—Agent—Payment to, under mistake—Liability to refund—Conditions—Alteration of agent's relation with his principal before notice of mistake—Effect. See (1917) DIG. COL. 352; SOLOMON JACOB v. THE NATIONAL BANK OF INDIA. LTD. 42 Bom. 16=19 Bom. L. R. 789=

42 I. C. 869.

—S. 73 III. (a)—Sale of goods—Breach of contract of—Buyer's suit for damages—Onus of proof—Measure of damages—Basis of where there is a market at which plaintiff can obtain goods, and case where is none—Distinction—Measure of damages in latter case.

On a breach of contract of sale of goods by non-delivery it is not necessary in order to entitle the buyer to damages that he should prove actual pecuniary loss as a consequence of the non-delivery. Illustration (a) to S. 73 of the Contract Act contains an authoritative interpretation of the section for such a case and it shows that the buyer is entitled as damages to the difference between the contract price and the price for which he might have obtained like goods at the time when they ought to have been delivered.

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The same rules apply to goods for which there is no market at the place of delivery. In computing the price for which such goods could have been obtained it is not the nearest market that always governs, but the place where, having regard to all the facts of a particular case, the plff. would, without any material inconvenience to himself procure the goods in a manner that would throw the least amount of hardship on the other party. (1911) A. C. 301 at 316 ref.

Wherefore the debt, failed to ship under a c i f., contract Java Molasses for delivery at Madras where the goods could not be bought in the market and it appeared that Molasses were produced at and exported from Java to Calcutta or Madras, and the time for transport to both those places was practically the same.

*Held*, the mode of computing the price for which the plff. might have obtained Molasses in Madras was not the price for which it could be obtained at Calcutta plus the cost of carriage to Madras but the amount for which an exporter would have shipped the goods from Java so as to reach Madras on the date when they ought to have been delivered under the contract.

*Sadasiva Iyer, J.*—Where there are absolutely no materials put forward by the plff. to indicate what it could have cost him to obtain similar goods in the cheapest manner only nominal damages would be allowed. But where there are some materials the Court should with a jury try to arrive at the cost at which the plff. could have got other similar goods and give him the difference, if any between that and the contracted price.

*Held*, also, the buyer in a c i f., contract entered into before the war is not bound to pay the increased amount paid by the seller for war risk insurance. S. 76 of the Contract Act does not apply to such a payment. 40 Bom. 11 foll. (*Wells, C. J. and Sadasiva Aiyar, J.J.*) *HAJEE ISMAIL SAIT AND SONS v. WILSON & CO.* 41 Mad. 709=

23 M. L. T. 320=(1918) M. W. N. 399= 45 I. C. 942.

—S. 74—Applicability of—Deposit under a contract of lease—Forfeiture of, on breach of stipulation.

Under a rental agreement for five years, the lessee deposited Rs. 150 being one-half year's rent with the lessor and agreed that the deposit should be forfeited in case of a breach of the contract by him.

*Held*, that the sum of Rs. 150 must be held to be a deposit under the lease to which S. 74 of the Indian Contract Act was not applicable. A stipulation for its forfeiture in case of breach is therefore not a penalty. 38 Mad. 178 foll.

In determining whether a particular sum of money agreed to be forfeited was a deposit or

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not, the Court must be guided by the reasonableness or unreasonableness of the amount. (*Aditya and P. L. J.*) *VENKATACHARI v. RAMALINGA THEVAN.*

(1913) M. W. N. 197=7 L. W. 404= 45 I. C. 417

—Ss. 74 and 13—Interest—High rate of—Relief against penalty.

The rate of interest though excessive, not being exorbitant, the court will interfere to reduce it. The fact that the rate of interest is excessive is no ground for reducing the stipulated rate. (*Shadi Lal, J.*) *ALLAH DIN v. FATEH DIN.* 31 E. R. 1913=

27 P. L. R. 1918=54 P. W. R. 1918= 45 I. C. 101.

—Ss. 74 and 16—Interest—Penalty—High rate of interest—Undue influence, no allegation as to—Relief against.

Without any evidence of undue influence exercised or unfair means adopted by the lender, a rate of interest agreed to by the borrower cannot be disallowed as being penal unless it is so high as to shock the conscience of the Court. (*Fletcher and Hurd, J.J.*) *KASI NATH MITTRA v. BRIHAN CHARAN MAITY.* 45 I. C. 778.

—S. 74—Landlord and Tenant—Agreement to pay enhanced rent in case of holding over—Not a penalty.

An agreement by a tenant that if he holds over after the expiry of the term he would pay rent at a higher rate than that which he paid during the term, is valid and enforceable. (*Thornhill, J.*) *RAMADHIN CHOUDHURY v. KUMODINI DASSI.* 45 I. C. 901.

—S. 74—Penal and Penalty, scope of the words—Agreement to pay a larger sum in return for a loan of a smaller sum if illegal.

The word 'penal' or 'penalty' has any bearing only when there is a main contract and a subsidiary contract providing for some more drastic consequences in the event of the breach of the original and main contract. Nothing can be brought under the operation of S. 74 of the Contract Act which is a term and stipulation of the main contract between the parties. The term 'penalty' is totally inapplicable to a term of the original contract or consequence of the original contract not owing to breach but owing to fulfilment. The consequences of the fulfilment of a contract may be oppressive but they are not penal within the meaning of the Contract Act.

In the absence of a Money-Lenders Act an agreement in return for a loan of a smaller sum to repay a larger one on a given day representing the original principal and interest is not contrary to law.

The debt, executed a promissory note for Rs. 10,000 in favour of plff. promising to re-

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pay the same on demand with interest at 24 per cent. per annum and deposited the title deeds of one of his properties as security for the re-payment thereof. For its re-payment he executed 20 hundis of Rs. 500 each and authorised pfti to cash each hundi every month on the due date and credit the sum so realised towards the promissory note and agreed that if the amount of the said hundi was not paid, the pfti. was to be at liberty to proceed against him for the recovery of the said hundis and credit the same on footing of the said promissory note. On the date of the promissory note only Rs. 4,500 was paid in cash and a balance of Rs. 1,500 outstanding on an old promissory note of 1914 was wiped out and Rs. 4,000 was treated as payment of interest for 20 months in respect of the promissory note of Rs. 10,000.

*Held*, the transaction was a re-payment of Rs. 10,000 spread over a certain period in return for a loan of Rs. 6,000 and there is no illegality in such a contract according to the law of this country and that the pfti. was entitled to a decree for the amount claimed by him. (*Coutts Trotter, J.*) SUREKULAL SOWKAR v. TIRUMALA RAO SARIB.

24 M. L. T. 420.

## —S. 74—Penalty—Compound interest at enhanced rate.

Where a mortgage provided for simple interest at 6 % but for 12 % compound interest on default, *held* that the provision as to compound interest at an enhanced rate was penal and that simple interest at the enhanced rate would be reasonable compensation (*Sadasiva Iyer and Napier JJs.*) ZAMINDAR OF KARVETINAGAR v. SUBBARAYA PILLAI.

(1918) M. W. N. 146=  
7 L. W. 36=43 I. C. 871

## —S. 74—Penalty—Compound interest—Revision for, not a penalty.

A covenant to pay compound interest, in case of default, at the rate originally fixed is neither penal nor hard and unconscionable. (*Stuart and Kanhaiya Lal, A. J. C.*) RAM SEWAK v. BALDEO BAKSH SINGH.

47 I. C. 649.

## —S. 74—Penalty—High rate of interest—Mortgage.

A penal rate of interest on a mortgage bond may be reduced, but should not be wholly disallowed. (*Fletcher and Smither, JJs.*) BHISHIKESH SINGH v. LAKHI NARAIN SINGH.

46 I. C. 384.

—S. 74—Penalty—Interest—Stipulation for enhanced rate on default when penal—Practice—Appeal—Right of respondent to support decree of court below without filing memo. of objections.

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An enhanced rate of interest in case of default in payment either of principal or of interest on due date is not penal if it is reasonable and normal one, though it is good deal higher than the original rate.

So where a bond debt payable by two instalments on which interest was charged in advance at the rate of about two per cent per annum and it was chargeable at the rate of 12 per cent. per annum in addition to *chikama* at one anna per rupee, the enhanced rate was not considered unreasonable.

A party who is content to accept the Lower Court's decision, can without filing a cross appeal or cross objections resist an appeal from that decision on the ground that the decree errs in favour of the appellant and should therefore not be disturbed.

On the above principle the Chief Court refused to reduce the amount of interest allowed by the Lower Appellate Court at the rate of 5 per cent. per annum from the date of the bond as it was far less than the amount which could legally be decreed against the debt. by calculating the interest at the rate of 12 per cent. per annum from the date of default. (*Chevis and Leslie Jones, JJs.*) MAHOMED ALI v. PARMA NAND.

48 P. W. R. 1918=45 I. C. 232.

## —S. 74—Penalty—Relief against—Im-provident transaction, not a ground for.

However improvident a transaction may be, it is difficult for a court of justice to give relief on grounds of simple hardship in the absence of any evidence to show that the money-lender had unduly taken advantage of his position. (*Ameer Ali.*) AZIZ KHAN v. DUNICHAND.

121 P. R. 1918=  
165 P. W. R. 1918=23 C. W. N. 130. (P. C.)

## —S. 108—Hire-purchase agreement—Possession under—Qualified possession only—Exception not applicable. See HIRE-PURCHASE AGREEMENT.

46 I. C. 886.

—S. 108—Shares—Transfer by person in possession for a particular purpose—Bona fide purchaser for value—Share certificate with blank transfer deeds—Negotiability—Usage.

The defendant Bank bought 25 jute shares for one of their constituents which consisted of a share certificate and a blank transfer deed signed by the registered holder which were made over by the officer in charge of their safe custody department to the Head Clerk of that department in the usual course. The clerk fraudulently disposed of them to Sham Das Sil, who again sold them to other persons. The pfti. firm bought them from the deft. firm of Bajinath Champalal. Both the pfti. firm and the deft. firm were bona fide purchasers for value:

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*Held*, that the Head Clerk was not in possession of the shares within the meaning of S. 108 of the Contract Act and that the plff. acquired no title in them.

*Held*, also that the share-certificate with blank transfer-deeds signed by the registered holder were not negotiable instruments. (*Chaudhury, J.*) ROOP CHAND JANNIDAS v. THE NATIONAL BANK OF INDIA LTD.

22 C. W. N. 1042.

—S. 108—Shares—Transfer by person in possession—Possession obtained fraudulently—Transferee bona fide purchaser for value—Negotiability by custom—Share certificate with negotiable transfers—Negotiability—Negotiability by Effect—“Goods”—Meaning of—Remedy of bona fide purchaser for value.

Share certificates accompanied by transfer-deeds endorsed in blank by the registered holder are not negotiable.

The right principle to adopt with reference to such blank transfers duly signed by the registered holder of the shares is to hold that each prior holder confers upon the bona fide holder for value of the certificate for the time being an authority to fill in the name of the transferee and is estopped from denying such authority; and to this extent, and in this manner, but no further, he is estopped from denying the title of such holder for the time being.

The plff. firm claimed to be the owners of 25 jute shares which they purchased from the deft. L. on 7-5-1917 and got their names registered in the books of the Company. At the time of the sale the plff. obtained possession of the certificate for the said shares and a blank transfer deed signed by the registered holder. The deft. L. bought the said shares from one U who fraudulently obtained possession of them from the deft. S who was the owner of the said shares. It was not clear what was the nature of the transaction between the defts. L and U. The purchase by the plff. was bona fide and for value.

*Held*, that the plff. did not acquire any title to the said shares and were entitled to the value they paid for them from the deft. L with interest.

The expression ‘goods’ in S. 103 of the Contract Act includes all moveable property. (*Chakrabarti, J.*) HAZARIMAL SHORANLAL v. SATISH CHANDRA GHOSH.

22 C. W. N. 1035.

—S. 113—Sale of goods by description—Merchantable quality—Warranty—Inspection of goods before purchase—Effect—English and Indian Law.

Under S. 113 of the Contract Act, as under the English Law, where goods are sold by description, there is no implied warranty that the goods shall be of merchantable quality. This is so even when the purchase is after in-

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spection, provided that if the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed. (*Wells, C. J. and Spencer, J.*) BEER MAHOMED ROWTHER v. DALLORAM JAYANARAYAN. 35 M. L. J. 130 =24 M. L. T. 227=1918 M. W. N. 658=3 L. W. 192=47 I. C. 555.

—Ss. 124, 126 and 132—Suretyship and indemnity, Distinction between—English and Indian Law—Hindu Law.

The conditions required by the English law and the Contract Act for a contract of suretyship are also required for such a contract under the Hindu Law. There must be a creditor, a principal debtor and a guarantor or surety, who makes himself liable for the liability of the principal debtor. The relationship may be established by an agreement between the principal debtor and the surety to which the creditor is a party. This is the contract coming under S. 126. It may also be established by an agreement to which the creditor is not a party where there is a collateral contract between the surety and the principal debtor that one of them shall be liable on the default of the other. This is the contract under S. 132 of the Contract Act. But where the contract between the surety and the creditor is not a collateral undertaking but creates an original liability as between these two parties then the contract is not one of surety but one of indemnity within S. 124 of the Contract Act. (1902) 1 K. B. 778, (1874) 2 Q. B. 885 Rel. (*Mullick and Thorburn, JJ.*) MAHABIR PRASAD v. SRI NARAYAN. 3 Pat L. J. 396=

4 Pat L. W. 437=(1818) Pat. 323=46 I. C. 27.

—S. 125—Contract of indemnity—Enforcement of future claim—Right to be indemnified. See (1917) DIG. COL. 361: RAMASWAMI SASTRI v. KALI RAGHAVA IYENGAR. (1917) M. W. N. 568=43 I. C. 124.

—Ss. 126 and 128—Contract of guarantee—Guarantee given at a time when claim against principal time barred—Surety not liable to pay.

The trustees of a temple deposited, in 1882, a sum of money with MM. The trustees demanded, but MM refused, payment of the money once in 1889 and again in 1897, but on the second occasion MB orally consented to stand as a surety for the payment. In 1900, the trustees sued both MM and MB for the money. The first Court passed a decree against both, MM alone appealed with the result that the appellate court held that the claim to demand payment had become barred in 1895 and dismissed the suit as against MM. The decree against MB, who had not appealed, remained in force. The trustees executed the decree against MB and recovered payment of

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the amount on the 20th May 1912. MB having died, his sons sued MM, on the 20th May 1915, to recover the amount from him.

*Held*, dismissing the suit that there was no consideration for the alleged contract of suretyship, inasmuch as the foundation for the contract was wanting, there not having been any enforceable liability in the third person.

Per *Batchelor, A. C. J.*—The word 'liability' in Ss. 126 and 129 of the Contract Act, means a liability which is enforceable at law, and if that liability does not exist, there cannot be a contract of guarantee (*Batchelor A. C. J. and Kemp J.*) *MANJU v. SHIVAPPA.*

42 Bom. 444=20 Bom. L. R. 447=  
46 I. C. 122.

———S. 130—Applicability of, to administration bond See (1917) DIG. COL. 382. *MAUNG SA CH v. NA PWA.*

10 Bur. L. T. 237=36 I. C. 1000.

———Ss. 134 and 137—Principal and surety—Suit dismissed as against principal under O. 9, R. 5—Surety if discharged.

Plff. sued a principal debtor and the surety for the price of goods sold. Service of Summons could not be effected upon the principal debtor and the plff. applied that he should be dismissed from the suit. The suit proceeded against the surety only.

*Held*, that the legal consequence of the act of the plff. was to discharge the principal debtor within S. 134 of the Contract Act, so that he had no further right of suit against the surety. (*Scandlers, J. C.*) *MAUNG PO U v. MAUNG KYAW.*

44 I. C. 693.

———Ss. 151 and 152—Bailment—Suit against bailee for damages—Negligence, proof of—Onus on plff.—Duty of debt—Evidence Act, S. 106.

In a suit against an ordinary bailee the limits of whose responsibility are defined in Ss. 151 and 152 of the Contract Act, for not taking care of the goods and saving them from loss, e. g., loss of fire, the bailee should, in accordance with the provisions of S. 106 of the Contract Act, call all the material witnesses who were on the spot at the time of the loss but that section of the Evidence Act does not discharge the plff. from proving want of due diligence, or (expressing it otherwise) negligence on the part of the bailee or his servants.

Good sense and policy of the law impose some limit upon the amount of care, skill, and nerve which are required of a person in a position of duty who has to encounter a sudden emergency. In a moment of peril and difficulty the Court should not expect perfect presence of mind, accurate judgment, and promptitude. If a man is suddenly put in an extremely difficult position and a wrong order is given by him; it ought not in the circumstances to be attributed to him as a

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thing done with such want of nerve and skill as to amount to negligence. If in a sudden emergency a man does something which he might as he knew the circumstances reasonably think proper, he is not to be held guilty of negligence, because, upon review of the facts, it can be seen that the course he had adopted was not in fact the best. (*Sir Walter Phillimore.*) *DWARKANATH v. THE RIVER STEAM NAVIGATION CO. LTD.*

20 Bom. L. R. 735=27 C. L. J. 615=  
8 L. W. 4=23 M. L. T. 376=  
(1913) M. W. N. 435=46 I. C. 319 (P. 3.)

———S. 151—Common Carrier—Steamship Company—Liability for goods delivered for carriage—Right of consignee to have goods weighed before taking delivery—Demurrage, liability for. See (1917) DIG. COL. 382. *RAMJASH AGARWALLA v. INDIA GENERAL NAVIGATION AND RAILWAY CO. LTD.*

22 C. W. N. 310=41 I. C. 387.

———Ss. 151 and 152—Liability of as carrier of goods—Loss or destruction—Burden of proof—Negligence—Extraordinary cause See (1917) DIG. COL. 384: *SURENDRA LAL CHOWDHRY v. SECY. OF STATE*

21 C. W. N. 1125=25 C. L. J. 37=  
38 I. C. 702=43 I. C. 263.

———Ss. 161, 152 and 151—Railway Carriage of goods—Risk Note B—Loss of goods—Liability of Railway—Onus of proof of negligence on the part of railway of theft, on the consignee—Contract Act, not applicable See RAILWAYS ACT, SS. 72 (2) and 73.

22 C. W. N. 622.

———S. 172—Hypothecation of chattels without possession.

The method provided by S. 172 of the Contract Act for the hypothecation of loose chattels is not the only method for creating security thereon. They may be hypothecated without transferring their possession. In such cases the only question that arises is whether there was an intention to create a security, and if there was an intention to create a security, equity gives effect to it. (*Fletcher and Shamsul Huda, JJ.*) *HARIPADA SADHUKHAN v. ANATH NATH DEY.*

22 C. W. N. 753=  
42 I. C. 211.

———S. 176—Pledge—Money advanced on pledge of ornaments—Sale by pawnee—Reasonable notice to pawnor, essential.

S. 176 of the Contract Act does not contemplate that the pawnee should give the pawnor information of the actual date and place of sale. The expression 'reasonable notice of the sale' means an intimation of an intention to sell and it does not necessarily mean that a sale should be arranged beforehand and that due notice of all details should be given to the pawnor; all that the law

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intends is that the pawnee should give the pawnor a reasonable time within which to exercise his right of redemption and proceed to sell if the property be not redeemed. His right is analogous to that of a seller's right to re-sell the goods sold and the two rights must be exercised in more or less the same method.

A pawnee gave to the pawnor a notice that unless the articles pledged were redeemed within a fortnight, he would sell without further reference, but omitted to specify the actual date, time and place of the sale. He then sold the articles but the debt was not fully paid off. In a suit for the balance the pawnor contended that the notice was not reasonable because of the omission to specify the actual date, time and place of the sale. *Held*, that the notice was reasonable. (*Tinaball and Abadi Hoof, JJ.*) **KUNJ BEHARI LAL v. BHARGAVA COMMERCIAL BANK.** 40 All. 522=16 A. L. J. 396=45 I. C. 482.

## S. 178—Document of title—Delivery order.

A delivery order directing delivery of ascertained goods which are in existence to a specified person or bearer is a document of title to the goods represented by it. (*Crane and Turvey, JJ.*) **N. N. K. E. ROWTHER v. S. S. A. S. CHETTY.** 10 Bur. L. T. 243=36 I. C. 593.

—Ss. 178 and 179—Pledge by a person in possession—The pawnor having limited interest in the goods pledged—The principal of the pawnor knowing of the pledge and receiving money raised by the pledge entitled to claim payment. *See* (1917) DIG. COL. 265 **LAKHAMSEY LADHA & CO. v. LAKHMI CHAND PARAMSEY.** 42 Bom. 295=19 Bom. L. R. 335=40 I. C. 148.

—Ss. 184 and 248—Agent—Minor if can be—Contract by minor on behalf of firm of which he is member—Liability of firm—Non-repudiation by minor of his own liability on contract after attaining majority—Effect.

Where a minor, who was a member of a firm consisting of himself and his father applied for shares in a Bank and paid an advance with the application whereupon shares were duly allotted to the firm by the Bank, *held* that under S. 184 of the Contract Act the minor was competent to act on behalf of the firm and that it accordingly became liable on the shares. *Held* further that as the minor himself had attained age long prior to the date of suit and had not publicly repudiated his liability on the shares, he was under S. 248 of the Contract Act, equally liable on the shares. (*Scott Smith and Shadi Lal, JJ.*) **FIRM OF GOPI MAL v. JAIN BANK OF INDIA** 17 P. L. R. 1918=38 P. W. R. 1918=45 I. C. 17.

## CONTRACT ACT, S. 247

—S. 184—Minor—Liability of, for negligence—Tort arising out of contract.

A minor agent is not responsible for loss caused by the negligence of his guardian. An infant cannot be made liable for a tort arising out of a contract where the contract is not binding upon him and where the so-called tort consists merely in negligence on the part of his guardian. (*Mulla, J.*) **GOPIAL RAO WAMAN RAO v. DINAKARRAO** 43 I. C. 525.

—S. 202—Equitable—Mortgagee put into possession with power to appropriate profits towards interest—Power to take back possession.

Where in a mortgage by deposit of title, deeds, the mortgagor puts the mortgagee in possession authorising the latter to appropriate the profits in lieu of interest, the mortgagee might be regarded as having received authority from the mortgagor to manage the lands and to receive the rents and profits in lieu of interest. Such authority being given to the mortgagee in consideration of the loan to the mortgagor the authority could not be terminated under S. 202 of the Indian Contract Act until the loan was repaid. (*Thomson, C. J. and Ormrod, J.*) **SHWE LON v. HLA GYAL.** 9 L. E. R. 172=27 I. C. 153.

—S. 222—Commission agent—Suit against his principal—Limitation. *See* **PUNJAB COURTS ACT, S. 14.** 59 P. L. R. 1918.

—S. 222—Sale of goods—C. I. F. terms—Purchase under indent to commission agent to purchase and ship goods on account and risk of defendant—Outbreak of war while goods in transit—Right of agent to recover under the contract. *See* **SALE OF GOODS.** 35 M. L. J. 184.

—S. 242—Partnership—Partner—Bills—Gumasta sharing in losses and profits.

Gumasta sharing in losses as well as in profits is a partner. (*Chowdhury and Shadi Lal, JJ.*) **FIRM OF CHELA RAM v. KISHEN CHAND.** 3 P. W. R. 1918=44 I. C. 233.

—Ss. 247 and 248—Applicability of—Hindu joint family—Trade started by father on behalf of himself and minor son—Trade debts contracted by father during son's minority—Son not personally liable on attaining majority. *See* **HINDU LAW, JOINT FAMILY, TRADE.** 35 M. L. J. 478.

—S. 247—Joint Hindu family—Trade by manager in partnership with stranger for the benefit of the joint family—Liability of minor's interest in joint family property for debts of manager. *See* **HINDU LAW, JOINT FAMILY.** 43 I. C. 76.

—S. 247—Minor—Liability of, when ancestral trade carried on his behalf—No personal liability.

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A minor on whose behalf an ancestral trade is carried on is not personally liable for debts incurred in such business.

The liability of such a minor is not greater than that of a minor admitted to a partnership as laid down by S. 247 of the Contract Act. (N. R. Chatterjee and Smithy, JJ.) KHETRA MOHAN PODDAR v. NISHI KUMAR SANA. 22 C. W. N. 433=45 I. C. 357.

—Ss. 249, 251, 261 and 265—*Partnership—Goods ordered for—Death of partner—Surviving partner subsequently borrowing amounts to pay for goods—Suit by creditor against surviving partner and legal representatives of deceased partner—Partnership assets in the hands of surviving partners liable.*

The 1st debt and another were carrying on business in partnership and as such ordered goods for the partnership and before they could be paid for, the other partner died and the 1st debt, to enable him to take up the bills of lading and obtain delivery of goods borrowed money from the plaintiff. In a suit by plaintiff to recover the amount against the 1st debt and debts 2 and 3, the representatives of the deceased partner, held, that the 1st debt was personally liable and the assets of the partnership in the hands of the 1st debt were alone liable for the debt.

The suit debt being one binding on the partnership assets, the surviving partner has power to pledge the partnership assets in discharge of it and therefore as regards the amount a personal decree against the 1st debt, and a decree against the partnership assets in his hands can be passed. (Wallis, C. J. and Seshagiri Aiyar, J.) SETHI ANIMAL v. VAIRAVAN CHETTIAR. 42 Mad 15=

35 M. L. J. 669=24 M. L. T. 392=  
(1913) M. W. N. 806=8 L. W. 503=  
47 I. C. 953.

—Ss. 252 and 254 (6)—*Contract of partnership for a fixed term—Suit for dissolution before the expiry of the term—Discretion of Court to grant a decree on the ground that business cannot be carried on except at a loss* See CONTRACT ACT, SS. 254 (6) AND 252.

22 C. W. N. 601 (P. C.)

—S. 253 (10)—*Partnership—Joint family members—Power of attorney by—Death of one, if puts an end to the power.*

A power of attorney executed by two members of a Hindu joint family is not terminated by the death of one of them when the interest of the deceased member passes to the surviving member. 21 C. W. N. 620 foll. (Spencer and Kumaraswamy Sastri, JJ.) PONNUSWAMI PILLAI v. CHIDAMBARAM CHETTIAR.

35 M. L. J. 294=23 M. L. T. 213=  
(1913) M. W. N. 154=7 L. W. 566=  
44 I. C. 849.

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—Ss. 254 (6) and 252—*Contract of partnership for a fixed term—Suit for dissolution on the ground that business cannot be carried on except at a loss—Discretion of Court to grant decree—Appellate Court if can interfere.*

A partner's claim to a decree for dissolution rests in its origin, not on contract, but on his inherent right to invoke the Court's protection on equitable grounds, in spite of the terms in which the rights and obligations of the partners may have been regulated and defined by the partnership contract.

When it is established that the partnership business cannot be continued without a loss, the Court has jurisdiction, in the exercise of its sound discretion, to order its dissolution, though the partnership is not terminable at will. It is opposed to sound practice for an appellate Court to substitute its discretion for that of the Court, from which an appeal has been preferred. (Sir Lawrence Jenkins) REHMATUN NISSA BEGUM v. PRICE

42 Bom. 380=20 Bom. L. R. 714=  
22 C. W. N. 601=15 A. L. J. 513=  
27 C. L. J. 623=35 M. L. J. 262=  
23 M. L. T. 400=8 L. W. 53=  
5 Pat. L. W. 25=45 I. C. 563=  
45 I. A. 61 (P. C.)

CONTRIBUTION—Costs—Joint decree for suit to recover—Defts. claiming under separate titles—Wrong doers—Maintainability. See COSTS, JOINT DECREE. 16 A. L. J. 689.

—Joint decree for costs against defts claiming under separate titles—Defts. wrong doers—Suit for contribution, suit not maintainable

N got a half share in certain property under a deed of gift executed by J. R. got a half share in the same property under a separate deed of gift also executed by J. B and Z alleging themselves to be owners brought a suit against N and R to recover their shares in the property. R did not defend the suit and N contended that the suit had been brought in collusion with R. The suit, was decreed (it being found that N and R each had separately in his possession a share to which B and Z were entitled) and costs were jointly awarded against them. The whole of the costs was realised from N alone. In a suit for contribution by N against R, held that the suit would not lie, N and R being independent wrong doers whose interest were in conflict. (Tudball and A. Rao, JJ.) NANDLAL SINGH v. BENI MADHO SINGH. 16 A. L. J. 689=47 I. C. 980.

CO-OPERATIVE SOCIETIES ACT (II of 1912), Ss. 42 (2) and (6) Civil Court—Jurisdiction—Suit for declaration that order for payment by liquidator is ultra vires—Not maintainable.

A Civil Court cannot in view of S. 42 (6) of the Co-operative Societies Act, entertain a

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suit for a declaration that an order of the liquidator passed under S. 42 (2) of the Act is *ultra vires* and without jurisdiction and cannot be executed. (*Stuart and Kousheipal v. I. J. C.*) BENI MADHO SINGH v. LIQUIDATOR DEWARA BANK. 40 L. J. 583=44 I. C. 353

—S. 42 (5)—Order of liquidator declaring each member as jointly and severally liable—Application for attachment of property hypothecated and others—Whether Court could examine the legality of order—Appeal. See (1917) DIG. COL. 371; MATHURA PRASAD v. SHEO BALAN RAM. 40 All. 89=13 A. L. J. 383=42 I. C. 963

CO-OWNERS—*Building on common land—Mandatory injunction, when granted—Rights adjustable at partition—Refusal on relief.*

Certain of the proprietors mortgaged 4 kanals 4 Marlas out of the abadi shamilat and the mortgagees erected a walled enclosure in which to keep their cattle. The other proprietors first sought to get the mortgage set aside, but failed. They then brought the present suit for a mandatory injunction directing the removal of the enclosure.

Held, that the suit was not maintainable in the absence of proof that the erection of the walled enclosure had actually caused such material and substantial injury as could not be remedied on a partition of the joint land. 54 P. R. 1888 and 54 P. R. 1892 ref. (*Broadway, J.*) MAJU v. TEJA SINGH. 29 P. R. 1918=44 I. C. 344.

—*Building on common land—No objection raised by other co-owners at the time—Subsequent suit for joint possession if maintainable—Grant of declaratory relief.*

Deft. owned a plot of land jointly with the plff. and certain other co-sharers. On a portion of this land he erected a corrugated iron shed and let it out to shopkeepers. Plff. brought a suit for joint possession of the piece of land built upon by the deft. though at the time of the construction of the shed neither plff. or any other co-sharer raised any objection.

Held, that the plff. was not entitled to a decree for joint possession, but could get a declaration of his title as a co-sharer in the suit. (*Touren and Richardson, JJ.*) HARI DAS BASACK v. RADHA CHARAN PODDAR. 46 I. C. 496.

—Collections by—Payment to one co-sharer of his share, if and when enures for the benefit of. See CO SHARERS, COLLECTIONS BY. 45 I. C. 463.

—*Enjoyment of common property—Separate enjoyment by one co-owner of part of property—Suit for joint possession by other owner—Maintainability—Condition.*

Each joint or common owner of property has a proprietary right in the whole estate, and no co-owner can set up a claim in law to say any specific parcel is his exclusive property.

But it is the practice of co-owners of an undivided property, who are not living in a state of absolute jointness as one family, to take up exclusive physical possession without any such definition or severance of interest as would amount to partition.

Where this has been done, the Courts will not interfere with the arrangement at the instance of any one co-owner during the tenure in common and will only do so on partition so far as may be necessary to make an equitable division of the property. 18 Cal. 1021; 28 Cal. 223; 27 All. 85; 11 C. W. N. 149; 1 N. L. R. 120 discussed.

A purchaser of an undivided share is bound by all such arrangements which his vendor may have made with his co-owners for the common enjoyment of the undivided estates. (*Staugon, J. J. C.*) JAGANNATH v. RAM PRASAD. 14 N. L. R. 131=46 I. C. 272

—*Fishery—Right of owner—Infringement of, by exercise of similar rights by other co-owners.*

Where the lessees of a 'bil' from some of its co-owners catch fish in it and make a profit by sale thereof, the other co-owners cannot recover by way of damages a portion of the value realised by the sale, unless it is shown that when they went for fishing, they were prevented by those lessees or that they could not get ample fish in the 'bil' to satisfy their right of fishery. (*Fletcher and Huda, JJ.*) RUDRA NATH ROY v. JOY CHAND KALBARTA. 46 I. C. 280.

—*Ship—Freight and other earnings—Partnership relation of—Suit for dissolution and accounts. See PARTNERSHIP.*

25 M. L. J. 87.

CO SHARER—*Account—Right to, when arises—Mines—Working of, by one co-sharer—Money spent on mine—Partition—Equities.*

In the absence of proof of actual ouster or destruction of property one co-sharer cannot demand accounts from another co-sharer for minerals taken by him out of the joint property unless it is shown that he had worked more than his fair share.

No claim for account is maintainable where the co-sharer knowing that the other co-sharer had been spending large sums of money to develop the mines acquiesced. His remedy is by a suit for partition in which the other co-sharer should, if possible, be maintained in possession of the portion of the property upon which he has spent money. (*Fletcher and Huda, JJ.*) ELIAS MEYER v. MANORAN JAN BAGCHI. 22 C. W. N. 441=44 I. C. 297

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—*Collections on fractional owner*—*Payment of Government revenue*—*Suit for contribution in respect of proportionate share of revenue payable*—*Set-off*—*defendant's share collections.*

Piffs. owned  $\frac{3}{4}$ ths share in a *mittal*, and the defts. owned the remaining  $\frac{1}{4}$ th share. Piffs. paid the *peishkush* and sued deft. for the share of the *peishkush* paid by them which he was bound to pay. The defts. pleaded that piffs. were bound to give him a fourth of the amount of rent collected and he claimed a set-off of such amount as against his share of the *peishkush*. The piffs. contended that the total amount collected by them did not exceed their share of the rent and that deft. was bound to meet the common charge, viz., the Government revenue :—

*Held*, that the piffs. should be deemed to have made the collections on behalf of all owners, each co-owner being entitled to his fraction in that amount in proportion to his share and that deft. was, therefore, entitled to a set off claimed.

Per *Sadasiva Iyer, J.*—Where a co-sharer expressly intends to collect rents for his own share alone and is paid by the tenants expressly for that share, he must be deemed to have collected his own share and not for all the co-owners. (*Oldfield and Sadasiva Iyer, JJ.*) *SIVANARASA REDDI v. DORAISAMI REDDI.* 41 Mad. 881=35 M. L. J. 272=24 M. L. T. 247=(1915) M. W. N. 614=8 L. W. 31=45 I. C. 463

—*Ejectment*—No right to one co sharer. to eject tenant—*Distinction between tenant and trespasser.* See EJECTMENT.

45 I. C. 496

—*Ejectment*—*Suit for*—*Surrender of lands by tenant to one co sharer*—*Notice by other co sharers to vacate their shares*—*Long delay.* *Effect*—*Rectified by partition*

The tenancy lands in suit were at first held by the 1st deft. as sub tenant. Subsequently having acquired a share in the village he got a surrender from the tenants and the fields were held by him as *khudkust*. The piffs. were co sharers in the village, and they gave a notice to the 1st deft. to vacate their shares in the land without offering to contribute the piff's share of the cost of acquisition. The piffs. brought the present suit for joint or exclusive possession of their share of the fields about 2 years after the notice and nearly 4 years after the entry in the *khassra* about the surrender.

*Held*, that there had been unreasonable delay in bringing the suit, and that as the notice was of a threatening nature describing the possession of the deft. as wrongful and making no offer to contribute towards the cost of the acquisition and as the deft. had been in occupation of the field as sub-tenant for many

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years piffs. could not be given a decree for joint physical possession, but should be asked to have a partition effected. (*Batten, A. J. C.*) *BAPU v. SITTI.* 45 I. C. 902.

—*Ejectment*—*Suit to be brought by all landlords or by landlord as tenant of the whole body.*

A suit for ejectment can be brought only by the entire body of co sharer landlords. If a *lambardar* co-sharer landlord seeks to maintain such suit, he can do so only as the agent of the whole body. The institution of a suit for ejectment against a purchaser is not one of the duties which a *lambardar* has to perform as the representative of the landlords.

A *lambardar* has no power to eject trespassers or tenants. 31 Cal. 684 ref. (*Mullick and Atkinson, JJ.*) *TRILOCHAN PANDA v. DINABANDHU PANDA.* 3 Pat. L. J. 83=44 I. C. 347.

—*Joint possession.*—*Right*—*Co sharer in exclusive possession.*

A co-sharer can claim joint possession with another co-sharer where the latter is not only in exclusive possession of the lands but asserts in his written statement exclusive possession in denial of the title of the piff. (*Richardson and Benchcroft, JJ.*) *SASHISHEE KHARESWAR REY v. HEMANGINI DEBI.* 44 I. C. 659.

—*Joint property*—*Rule of enjoyment*—*Exclusive possession by one for long time*—*Effect.*

The general rule as regards the enjoyment of joint property by the co sharers is that one co-sharer has no right to appropriate himself a specific portion of the common land and to exclude his co-shares from all use and enjoyment of the same without a lawful partition. But where a person has been in possession of a piece of joint land for long time without any let or hindrance by the other co-sharers the latter have no right to eject him or his transferee or to disturb his possession or enjoyment or otherwise than by seeking partition and he is entitled to continue in such possession so long as such user does not interfere with the use by other co-sharer of what was in their possession. (*Lindsay, J. C.*) *RAM PIARE LAL v. NAGESHWAR.* 21 O. C. 214=5 O. L. J. 613=48 I. C. 81.

—*Landlords*—*Purchase of holding of tenant in execution of a decree for his share of the rent by one co-sharer*—*Settlement with defaulter*—*Tenant not put in possession of holding by purchaser*—*Liability of tenant to all the co-sharers for rent.* See LANDLORD AND TENANT, RENT. 43 I. C. 47.

—*Landlord*—*Right of one, to recover his share of the rent.* See L. T. Act, S. 148 A. 27 C. L. J. 101.

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———Partition—Improvements on portion of property by one co-sharer—Allotment of that property to his share—Equities. See CO SHARER, ACCOUNTS.

22 C. W. N. 441.

———Permanent lease by majority—When binding on the whole body—Suit to set aside lease by minority—Form of the decree.

In the absence of a special custom, it is not competent to a majority of co-sharers to grant a permanent lease of common land so as to bind the minority, except in cases of unavoidable necessity or obvious benefit to the whole body of co-sharers. Where a permanent lease so granted by the majority is sought to be set aside by the minority of the co-sharers and it is found that the transaction is not binding on the latter, the proper decree to be passed is one for possession in favour of the ples. for themselves and on behalf of the other co-sharers. (*Wallis, C. J. and Seshagiri Jigar, J.*) RAGHAVACHARLU v. GOVINDASARI.

41 Mad. 1058=35 M. L.J. 402=43 I. C. 193.

**COSTS**—Appeal as to—Erroneous exercise of discretion by Lower Court—Interference in second appeal.

Where a Lower Appellate Court exercises its discretion as to the award of costs in an arbitrary manner and not according to judicial principles a second appeal lies from its decree. (*Shah Din.*) FAZAL NUR v. MUHAMMAD HUSSAIN. 97 F. W. R. 1918=45 I. C. 948.

———Appellate Court—Interference by, only when question of principle involved.

In matters relating to costs, unless there is some matter of principle on which the Lower Court has gone wrong, it is an established rule that the High Court will not interfere in appeal. (*Fletcher and Smither, J.*) MIDNAPORE ZEMINDARY CO., LTD. v. KRISTO PRASAD SUNKUL. 46 I. C. 544.

———Appellate Court—Not to interfere with discretion of lower court except for manifest error of principle.

Where costs are in the discretion of a Judge the Court of Appeal will assume that the judge in the lower court exercised his discretion unless it is satisfied that he has not exercised it.

Also the Appellate Court will not interfere with an exercise of the discretion of the lower Court unless it has proceeded on a manifestly wrong ground. 2 Bom. L. R. 254 foll. (*Fletcher and Smither, J.*) SARADINDU MUKHERJEE v. CHARU CHANDRA DUTTA.

22 C. W. N. 372=44 A.C. 870.

———Arbitration—Power of arbitrators to decide question of costs. See ARBITRATION, REFERENCE.

46 I. C. 182.

## COSTS.

———Case remanded to lower court with direction that costs to abide and follow the result—Withdrawal after remand—Whether an event within S. 35 C. P. C.—Costs not given—Revision S. 3 C P C., s. 93. 8 L.W. 219.

———Contribution—Joint decree for costs against several wrong doers—No right to contribution See CONTRIBUTION.

19 A. L. J. 586.

———Criminal trial—Adjournment costs of, when to be granted. See CR P. CODE, S. 344. 20 Bom. L. R. 124.

———Discretion of court—Several issues—Solicitor bringing or defending an action himself.

The discretion of a Court upon the question of costs has to be exercised judicially, and the ordinary rule is that a party who succeeds on a particular issue gets the cost of that issue, unless there is a good cause for depriving him of the costs of that issue and unless the issues in the case are so closely connected that they cannot be separated one from the other.

A solicitor bringing or defending an action in person is entitled to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly rendered unnecessary 13 Q.B.D. 572 ref. (*Sanderson, C. J. and Moulton J.*) THE BENGAL STONE CO., LTD. v. JOSEPH ISAAC JOSEPH HYAM. 27 C. L. J. 78=45 I. C. 788.

———Fraud—Allegations of, unfounded—Party guilty of, not to be deprived of his legal remedy but might be mulcted in costs. See FRAUD. 22 C. W. N. 661 (P. C.)

———Higher scale—When allowed—High Court Fees Rules—Rule 40. See (1917) DIG. COL. 575. RUPPIAH CHETTI v. GUNAVATHAMMA. 22 M. L. T. 441=44 I. C. 995.

———Order as to—Appeal—Incompetency of when main order is not open to appeal. See C. P. CODE, S. 2 (-). 44 I. C. 696.

———Order as to—Interference by appellate court, when—Error of discretion.

The Court below had deprived the successful deft. of his costs because in its opinion he was responsible for the litigation. There was also no proof of any wrongful conduct on the part of the deft. *Held*, that there being no evidence of this fact, the successful deft. ought to have been awarded costs.

Where the Judge have given his reasons and all the circumstances are before the Court of Appeal the latter can, if satisfied that the discretion has not been judicially exercised, interfere with it and make the order which the court below ought to have made. (*Piggott*

## COSTS.

and *Wadhwa, J. J.*) RADHEY SHAM v. BIHARI LAL 40 All. 553=16 A. L. J. 592=43 I. C. 478.

—Security for—In suit by undischarged insolvent—Cause of action—Award—Adjudication—Nominal debt.—C. P. CODE, S. 151 See INSOLVENT. 22 C. W. N. 101

—Withdrawal of suit—Refusal of Costs without reason to debt—Revision. See C. P. CODE, S. 35 (2). (1918) M. W. N. 561=8 L. W. 219.

CO-TENANTS—Liability of, joint and several. See CONTRACT ACT, S. 43. 22 C. W. N. 289.

COURT-FEE—Appeal—Suit for possession and mesne profits—Dismissal of, by first court—Reversal of decree by lower appellate court—Grant of decree for possession and remand of suit for ascertainment of mesne profits—Second Appeal—*Ad valorem* fee. See COURT-FEES ACT, SCH. II, ART. 11. 3 Pat. L. J. 39.

—Appellate Court—Power of, to allow valuation in court below to be reduced to relieve party from liability to pay proper court-fee. See COURT-FEES ACT, SCH. II, ART. 11 3 Pat. L. J. 101.

—Claim suit—C. P. Code, O. 21, R. 63—Valuation of the decree and not of the subject-matter of the suit. See C. P. CODE, O. 21, R. 63. 16 A. L. J. 374.

—Costs—Appeal in respect of—Court-fee when separately payable. See COURT-FEES ACT, S. 17. 44 I. C. 50.

—Cross-objections—Payment of—Necessity—Payment of more than adequate Court-fee by appellant—Effect.

A respondent who has presented a memorandum of cross objections is not excused from the payment of court-fees thereon merely because the appellant may have paid more than adequate court fees on the memorandum of appeal. It is incumbent on the respondent to value the relief claimed by way of cross-objection and to pay court-fees accordingly. (*Mockerjee and Becheroff, J. J.*) SECRETARY OF STATE FOR INDIA v. DIGAMBAR NANDA. 27 C. L. J. 443=45 I. C. 939.

—Decree in suit against several defendants—Separate appeals by several defendants against decree—Full Court-fee on each appeal—Practice. (*Patilgan, C. J. and Shah, J.*) PANNA LAL v. MARWAR BANK LD. 91 P. R. 1918=48 I. C. 424.

—Deficiency in—Appeal or Memorandum of objections—Court-fee paid in Court below insufficient—Procedure. See COURT-FEES ACT, S. 12 (2). 44 I. C. 50.

## COURT-FEE.

—High Court—Duty of, to see proper fees are paid—Revision of valuation in first Court.

It is the duty of the High Court to see that the Court-fees are paid to the High Court and in the Courts below from which the case has come.

Quære.—Whether the High Court has power to allow a valuation of a claim in the Court below to be reduced in order to relieve a party from liability to pay Court fees. (*Chamier, C. J., and Jwala Prasad, J.*) BABCO NARAIN PRASAD v. KAMESHWAR PERSHAD SINGH. 43 I. C. 489.

—Mortgage—Redemption suit by one of the co-mortgagors.

Where a co-mortgagor who is entitled to redeem a share of the mortgaged property sues for redemption, the Court-fee payable is to be calculated on the amount of the mortgage debt which is chargeable on the share which the plff. is entitled to redeem. (*Lindsay, J. C.*) BHAIKARON BAKSH SINGH v. RAGHUBANSA KUNWAR. 50 C. L. J. 43=45 I. C. 300.

—Mortgage—Suit to set aside decree on mortgage to the extent of the plff's. share of the property—Valuation.

A decree was obtained, on the basis of a mortgage by way of compromise against the father who was a member of a Mitakshara family for Rs. 12,200. The sons instituted a suit for setting aside the compromise decree, that is, for a declaration coupled with consequential reliefs. The value of the entire property was Rs. 2,000 and that of the plff's. share was two thirds.

Held, that the plffs. were not bound to pay Court-fee on the whole amount of the decree but only on the value of their share of the property in suit. (*Chapman and Atkinson, J. J.*) BANKEY BEHARY v. MR. RAM BAHADUR (1918) Pat. 223=4 Pat. L. W. 291=44 I. C. 891.

—Mortgage suit—Appeal or memorandum of objections—Valuation—Interest, past and future—Court-fee on, if payable. See COURT-FEES ACT, SCH. 1 ART. 1. 44 I. C. 50.

—Partition suit—Suit for partition by person in possession and by one out of possession—Difference between. See PARTITION-SUIT. 44 I. C. 216.

—Refund of—Inherent power See C. P. CODE, S. 151. 3 Pat. L. J. 462.

—Scheme suit—Suit for removal of *de facto* but not *de jure* trustees, to appointment of trustees and for vesting trust property in him. Court-fee on plaint. See C. P. C. S. 92. 97 P. R. 1918.

## COURT FEES ACT, S. 4.

**COURT FEES ACT, (VII OF 1870) Ss. 4 and 5**—Memo of appeal with improper Court fee—Court not bound to receive. *See* (1917) DIO. COL. 378, RAM SAHAY RAM PANDEY v. KUMAR LACHMI NARAIN SINGH 3 Pat. L. J. 73=5 Pat. L.W. 13=12 I.C. 675.

—Ss. 5 and 12—Dispute as to amount of court-fee payable—Decision of taxing officer without reference to judge, if final.

Whenever there is a difference of opinion between the appellant and the Stamp Reporter and the matter is referred to the Taxing Officer, whatever may be the decision of the Taxing Officer, with or without reference to the Taxing Judge, it is an absolutely final decision and is not open to review by the Court. 12 A. 129, 32 A. 59, 21 M. 263, 27 C. 914 ref. (*Sharfuddin and Roe, JJ.*) MUSSAMMAT LAGAN BHARAT KOER v. KHANNA SINGH. 3 Pat. L. J. 92=43 I. C. 521=43 I. C. 952.

—Ss. 7, and 11 Sch. (ii) Art. 176—Partition—Suit for partition and accounts—Court fee.

In a suit for partition of moveables and immoveables and for accounts, the plaint should be stamped under Sch. ii art. 17 (C) of the Court-Fees Act with a court fee of Rs. 10 for partition. The claim for accounts can be valued by plff. approximately and if the accounts prove on investigation to exceed the approximate value given in the plaint, the course to be pursued is that under S. 11 of the Court Fees Act. (*Teunon and Chauhan, JJ.*) BENI MADEAB SARKAR v. GOBIND CHANDRA SARKAR. 22 C. W. N. 669=45 I. C. 165.

—S. 7. (1) and Sch. 1, Art. 1—Applicability of—Suit for recovery of money due on adjustment of accounts—Under S. 7 (1) Ad valorem court-fee.

Of the Court Fees Act the fee payable in a suit for money must be according to the amount claimed. Art. 1 of Sch. 1 of the Act applies only to those cases which are not otherwise provided for under the Act.

In a suit for recovery of Rs. 1,125-4-0 alleged to be due to plff. after deducting a sum of Rs. 2,000 as due to the deft. (being the price of certain goods) from Rs. 3,625-4-0 which plff. assessed as damages suffered by him by reason of deft's breach of contract.

*Held*, that the Court-fee paid *ad valorem* payable on the amount actually claimed was sufficient. (*Shadi Lal and Le Rossignol, JJ.*) QYAM-UD-DIN v. THE DELEI FLOUR MILLS CO. 47 I. C. 992.

—S. 7 (1) and (6)—Suit for pre-emption—Consideration appearing in sale-deed as Rs. 44,000—Plff. alleging a smaller sum—Suit decreed in respect of some property on payment

## COURT FEES ACT, S. 7 (4) (c).

of Rs. 11,000—Appeal Court-fee payable—Appeal divisible into two parts.

A suit for pre-emption was brought in respect of five villages, on payment of Rs. 2,500 as consideration. The consideration stated in the sale deed was Rs. 41,000. The suit was dismissed in regard to three of the villages and it was decreed in respect of the other two on payment of Rs. 21,000. It was held that the consideration was Rs. 41,000. The plff. preferred an appeal against that decree and paid a court-fee on five times the Govt. revenue of all the five villages on his memorandum of appeal:—

*Held*, that the appeal was divisible into two parts, that in respect of that part in which the question related only to the sale consideration the plff. must pay *ad valorem* court-fee on the difference between the amount alleged as the sale price on the one side and decreed on the other, and that in regard to the other part in which the right of pre-emption was in dispute he need only pay court-fee on five times the Government revenue. (*Talbot, J.*) ABINASH CHANDRA v. SHERKHAR CHAND. 40 All. 353=16 A. L. J. 174=44 I. C. 666.

—S. 7 (2)—Suit for declaration that plff. is an occupancy tenant—Memo of appeal—Valuation under Sch II Art. 5 and not under S. 7 (ii). *See* COURT FEES ACT, SCH. II, ART. 5. 16 A. L. J. 197.

—S. 7, Sub-Sec 4, cl. (c)—Declaratory suit to invalidate decree—Suit—Valuation—Jurisdiction of Court.

Where the plff. brought these suits in the Dt. Munsif's Court for a declaration that the decrees passed in two previous suits by a Subordinate Judge were not binding on them, and for a permanent injunction restraining the decree-holders from executing those decrees.

*Held*, that the suits come under S. 7 sub-sec. 4 cl. (c) of the Court Fees Act and the fee payable thereon depends on the value fixed for the relief in the plaint 38 M. 922 foll.

Where a party is allowed under S. 7 Sub-Sec. 4 to value a relief as he chooses, that valuation is also good for the purpose of determining the jurisdiction of the court in which the suit is to be filed 13 M. L. J. 128 F. B. foll. (*Abdur Rahim and Bakerwell, JJ.*) PILLA KAKKADU v. CHANDRAYYA CHANDARI 24 M. L. T. 254=(1918) M. W. N. 562.

—S. 7, cl. 4 (c)—Ad valorem—fee—Suit for sale on mortgage—Deft. setting up prior charge—Court disallowing defts. claim—Appeal by deft.—Court-fee on memo. of appeal.

A suit for sale was brought on foot of a mortgage. One of the defts. claimed priority on the ground that she held a decree for dower against the mortgagor for the payment of which the property had been

## COURT FEES ACT, S. 7 (3) (c).

made a security. The plff. paid *ad valorem* court-fees on the amount of his claim. The Court decided that the plff's. mortgage was prior in date. The deft. appealed and in her appeal sought that her security should have priority. She paid the same Court-fees on her memorandum of appeal as the plff. had paid on his plaint:—*Held*, that the deft must pay *ad valorem* court fees on the amount of her mortgage inasmuch as she was seeking a declaration with a consequential relief. (*Tadball, J.*)  
**NOTI BEGAM v. HAR PRASAD.**  
 16 A. L. J. 31=47 I. C. 311.

—S. 7, cl. (3) (c)—Consequential relief—Injunction—Additional reliefs, prayer for—Valuation of.

Where there is a prayer for an injunction the injunction relief can be valued arbitrarily and such valuation is conclusive. If along with the injunction relief, additional consequential reliefs are prayed for they should be valued according to law. The proper Court-fee for the presentation of the plaint would then depend upon the total value of the consequential reliefs. (1913) M. W. N. 105 and (1914) M. W. N. 707 ref. (*Sadasiva Iyer and Balasweli, JJ.*)  
**AYUMUDDIN SAHIB v. KADIRSA ROWTHER.** (1913) M. W. N. 46=43 I. C. 955.

—S. 7 cl. (3) (c)—Suit for avoidance of registered gift deed—Consequential relief—Sp. Rel. S. 89—Duty of court to send copy of decree to registrar.

In a suit for avoidance of a registered deed of gift the court is bound, if the suit is decided in plff's. favour, to send a copy of its decree to the officer in whose office the instrument has been registered. The forwarding of the decree is a consequential relief upon which the plff. must pay an *ad valorem* court-fee. (*Roe, J.*)  
**MUSSAMAT NOOWOOGAR OJAIN v. SHIDAR JHA.**  
 3 Pat. L. J. 191=45 I. C. 233.

—S. 7 (4) (c)—Suit for declaration of invalidity of revenue sale and for possession of property sold—Court fee.

Where the holder of an eight-anna mokurrari interest in an estate which was sold for arrears of Government revenue sued for a declaration that the sale was invalid by reason of fraud and irregularity in its conduct, and prayed for confirmation or restoration of possession, *held* that the plff. must pay an *ad valorem* fee on ten times the amount of the Government revenue. 6 C. W. N. 157, 28 Mad. 922 ref. (*Roe and Jwala Prasad, JJ.*)  
**RAJA DHAKESHWAR PRASAD SINGH v. JIVO CHOUDHURY.**  
 3 Pat. L. J. 448=46 I. C. 385.

—S. 7, cl. (4) (c)—Suit for declaratory decree and injunction—Court fee payable.

The plaintiff in a case in which the plff. not only asks for a declaration of rights but also

## COURT FEES ACT, S. 7 (4) (d).

prays for perpetual injunction restraining the deft. from putting in execution of a particular decree is chargeable with *ad valorem* court-fee under S. 7 (iv) (c) of the Courts Fees Act. (*Fletcher and Hader, JJ.*)  
**SAIDUNNESSA v. TEJENDRA CHANDRA DEAR.**  
 44 I. C. 398.

—S. 7 cl. (4) c and (v)—Suit for possession—Incidental declaration that document is void or inoperative—Valuation—*Ad valorem* fee.

Where, in order to succeed in a suit for possession, it is necessary for the plff. to obtain a declaration that a document or a decree is void or inoperative the court fee to be paid must be calculated on the actual value of the property. 12 Ail. 129, 21 Mad. 262, 37 Cal. 914, 32 Ail. 59 ref. (*Sharfuddin and Roe, JJ.*)  
**MUSSAMMAT LAGAN BARAT KUER v. KHAKHAN SINGH.**  
 3 Pat. L. J. 32=43 I. C. 321=43 I. C. 962.

—S. 7, (4) (c) and Sch. ii Art. 17 (i)—Suit for declaration and consequential relief—Attachment by creditor of ostensible owner of property—Prayer for releasing property from attachment and possession against ostensible owner—Appeal—Court fee.

Where the plff's property is attached at the instance of a creditor of its ostensible owner and plff asks only for the release of his property from attachment, the court-fee payable would be Rs. 10 under Sec. ii, Art. 17 (1) of the Court Fees Act. If the ostensible owner is also joined as a party to the suit and a prayer is made against him for recovery of possession, the court-fee payable would be calculated upon the value of the property in accordance with S. 7 (4) (c) of the Act. If in such a suit the plff. is defeated and he prefers an appeal he must pay Court-fees on the value of the property plus Rs. 10 for declaration. If the plff. succeeds and an appeal is preferred by the defts., the Court-fee to be paid must be regulated by a consideration of the relief sought in appeal.

If the attaching creditor appeals the Court-fee payable would be Rs. 10 only.

If the ostensible owner appeals, the Court-fee payable would be the Court-fee calculated upon the value of the property. (*Roe, J.*)  
**CHANDRADHARI SINGH v. TIPAN PRASAD SINGH.**  
 43 I. C. 971.

—S. 7, cl. 4 (c)—Suit to set aside mortgage decree as regards plff's. share of the property—Valuation. See COURT-FEE, MORTGAGE.  
 4 Pat. L. W. 281.

—S. 7 (4) (d)—Suit for injunction—Valuation of.

The proper valuation of a suit for a permanent injunction restraining the deft. from cutting timber and undergrowth from a jungle belonging to the plff. is the amount at

## COURT-FEES ACT, S. 7 (4) (F).

which the plff. values the relief sought. (*Fletcher and Huda, JJ.*) RAI CHARAN PANDA v. KUNJA BEHARI DAS. 46 I. C. 884.

———S. 7, cl. (4) (f)—Valuation—Court fee—Suit for administration and accounts—Suit for account. See (1917) DIG. COL. 379: SARAJU BALA DASSI v. JOGMOYA DASI. 45 Cal 634=22 C. W. N. 115=26 C. L. J. 265=41 I. C. 693.

———S. 7, (5)—Partition, suit for—Plff. out of possession—Court-fee payable on his share of the lands. See PARTITION SUIT. 44 I. C. 216.

———S. 7, (5)—Suit for declaration that adoption is valid and that plff. is therefore legally entitled to the properties in his possession—Appeal—Court fee

A suit for a declaration that plff. was the adopted son of the last male owner and therefore entitled to his property of which he was in possession was dismissed by the court of first instance.

Held, that the court-fee payable on the memorandum of appeal was an *avalorem* fee on the value of the property held by the appellant as the adopted son of the last male owner. (*Batten, Pridemore and Mittra, A. J. C.*) GANPATRAO v. LAXMI BAI. 43 I. C. 64.

———S. 7, (5)—Suit for recovery of portion of a survey number—Ryotwari land—Market value.

The Court-fee payable in respect of a suit for recovery of land forming part of an entire area, but neither sub-divided nor separately assessed to land revenue, must be computed on the market value of the land sued for under S. 7 (v) of the Court-Fees Act. (*Ayling and Seshagiri Aiyar, JJ.*) GODAVARTHY SUNDARAMMA v. GODAVARTHY MANGAMMA.

34 M. L. J. 553=3 L. W. 83=47 I. C. 543. [On appeal from 33 I. C. 683=19 M. L. T. 286=(1916) 1 M. W. N. 325]

———S. 7, cl. (5)—Suit for specific performance of agreement to sell and for possession—Court-fee.

In a suit for specific performance of a contract of sale by execution of a sold deed and for possession of the land sold, Court-fee is payable under clause (v) of S. 7 of the Court Fees Act, namely, on ten times the land revenue. (*Wilberforce, J.*) NATHE KHAN v. MUHAMMAD KHAN. 45 I. C. 534.

———S. 7 (5) (a)—Suit for possession on basis of *mokurrari* lease—Court-fee payable—*Mokurrari* leasehold interest, if land within the meaning of.

A suit for possession of immovable property on the basis of a *mokurrari* lease is purely one for the possession of immovable property within S. 7, clause (v) of the Court-Fees Act.

## COURT-FEES ACT, S. 12.

A *mokurrari* lease of a definite share in a revenue-paying estate is 'land' within S. 7, cl. 5 of the Court-Fees Act. (*Roe, J.*) BIBI KHULSUM v. SYED MAHOMED HAMID.

45 I. C. 923.

———Ss. 7 (5) and (6)—Valuation of suit—Suit to enforce right of pre-emption—Suits Valuation Act, Ss. 3 (1) and (3)—*Madras Civil Courts Act*, S. 14.

A suit to enforce a right of pre-emption of land is a suit the subject matter of which is land within the meaning of S. 14 of the *Madras Civil Courts Act* and should be valued for the purpose of jurisdiction in the manner provided for by the Court-Fees Act, S. 7 (5). (*Oldfield and Sadasiva Iyer, JJ.*) NARAYAN NAIR v. CHERIA KATHIRI KUTTY.

41 Mad. 721=34 M. L. J. 337=45 I. C. 89.

———S. 12—Court-fee—Decision on, as incidental to decision on question of value for purposes of jurisdiction—Appealability of.

Plff. sued for possession of land which he valued for the purposes of court-fee and jurisdiction at Rs. 764-7-0. On an objection by the deft. on the ground of under valuation, the Munsif appointed a Commissioner who valued it at Rs. 948, but the Munsif found that the land was worth considerably over Rs. 1,000 and returned the plaint for presentation to the proper Court.

Held, that in arriving at a valuation of the land the Munsif only looked at the question from the point of view of his own jurisdiction and although he decided the value for purposes of Court-fee, this decision was merely incidental to his decision on the question of the value for purposes of jurisdiction and S. 12 of the Court-Fees Act was not, therefore, a bar to an appeal from his decision to the Dist. Judge. (*Broadway, J.*) SIKANDAR SHAH v. GHULAM NABI SHAH. 151 F. W. R. 1913=47 I. C. 7.

———S. 12—Dispute as to amount of rent—Decision of taxing officer final whether based or not upon opinion of Taxing Judge. See COURT-FEES ACT, SS. 5 AND 12.

43 I. C. 521.

———S. 12—High Court—Power of, to see proper Court-fees are paid in the High Court and in Lower Courts—Revision of valuation of the first Court. See COURT FEE.

43 I. C. 439

———S. 12—Taxing officer, decision of, final.

The decision of the taxing officer in the matter of court-fees is final. The Court fee fixed by him must be paid. (*Roe, J.*) T. K. ROWLINS v. LACHMI NARAIN JHA.

3 Pat. L. J. 443=5 Pat. L. W. 223=(1918) Pat. 264=44 I. C. 50.

## COURT-FEES ACT, S. 12

— S. 12 (2)—*Appeal or memo of objections insufficiently stamped—Power of the appellate court.*

Where it is the appellant who failed to pay sufficient court fees in the court below, his appeal will not be heard till the deficiency has been made good. Where it was the respondent who was in default, no decree shall be executed in his favour till the deficiency has been made good. (*Roe J.*) ROWLINS v. LACHMI NARAIN JHA. 3 Pat. L. J. 443=5 Pat. L. W. 223=(1918) Pat. 264=44 I. C. 50.

— S. 12 (2)—and Sch. I: art I—*Appellate Court, when can order payment of additional court-fee.*

An appellate court cannot under S. 12 (2) make an order for payment of additional court-fee stamps unless the question of valuation has been considered and decided by the court of first instance (*Ecc, C. J. and Twomey, J.*) M. E. PILLAY v. MAISTRY. 10 Bur L. T. 242.

— S. 13—*Refund of Court Fee when appeal remanded on grounds other than those covered by O 41, R. 23, C. P. Code. See (1917) DIG. COL. 380* NAND KUMAR SINGH v. BILAS RAM MARWARI. 3 Pat. L. J. 67=3 Pat. L. J. 116=(1917) Pat. 377=4 Pat. L. W. 160=43 I. C. 856.

— S. 17—*Alternative reliefs from more than one cause of action.*

S. 17 of the Court-Fees Act applies to alternative reliefs claimed with reference to more causes of action than one. The operation of the section is not necessarily confined to cases whose cumulative reliefs are claimed. (*Drake Brokeman, J.C.*) DHARAMCHAND v. GORELAL. 47 I. C. 886

— S. 17—*Applicability of — Alternative reliefs—Court-fee.*

S. 17 of the Court-Fees Act applies to cases in which different reliefs may be applied simultaneously to the wrong done to the plff. It does not apply to cases where alternative reliefs are asked for. Where alternative reliefs are sought Court-fee must be paid on the relief which appears to be of the higher value. (*Roe, J.*) MOHDLAL GIR v. RAMDHETAN RAI. 44 I. C. 143.

— S. 17—*Costs—Appeal in amount of court fee if and when payable in respect of costs.*

Where in an appeal, relief is sought with regard to costs independently of the result of the main contest between the parties, Court-Fees must be paid *ad valorem* on the cost decreed. (*Roe, J.*) ROWLINS v. LACHMI NARAIN JHA. 3 Pat. L. J. 443=5 Pat. L. W. 223=(1918) Pat. 264=44 I. C. 50.

## COURT-FEES ACT, SCH. I, ART. 1.

— Ss. 19, (viii) 19 I. Sch. 1, No 11, Sch. III, Annexures A and B—*Probate duty—Valuation of estate—Duty of payable on value of gross estate.*

No duty is payable in respect of a grant of Letters of administration where the value of the estate, after making the deductions specified in Annexure B of schedule III to the Court-Fees Act is less than Rs. 1,000. (*Richards, C.J. and Bannerjee, J.*) F. E. W. MEIK IN THE GOODS OF.

40 All. 279=46 I. C. 865.

— S. 19, Cl. (17) —*Criminal—Appeal, filed by pleader on behalf of prisoner in gaol—No Court-fee.*

Under clause (17) of S. 19 of the Court-Fees Act a petition of appeal presented by a legal practitioner on behalf of a prisoner in gaol need not bear a Court-fee stamp. (*Batten, A J. C.*) EMPEROR v. MAROTI. 14 N. L. R. 77=43 I. C. 158=19 Cr. L. J. 494.

— Sch. I art. I—*Appeal—Court-fee—Order refusing to make a decree under O. 34, R. 6, C. P. Code—Ad valorem fee payable on appeal.*

An order refusing to make a decree under O. 34 R. 6 of the C. P. Code must be regarded as a 'decree' within the meaning of S. 2 (2) of the C. P. Code, and *ad valorem* court-fees must be paid on the memorandum of appeal presented to the lower appellate Court and that presented to High court. (*Richards, C. J.*) ILTIFAT HUSAIN v. ALIMUN NISSA.

16 A. L. J. 438=47 I. C. 562.

— Sch. I, Art. 1—*Cross-objection in appeal—Ad valorem fee payable on. See (1917) DIG. COL. 381.* LAKHAN SINGH v. RAM KISHEN DAS. 40 All. 93=15 A. L. J. 886=43 I. C. 179.

— Sch. I, Art I—*Mortgage suit—Appeal or cross objection—Valuation of — Future interest—Court-fee on if need be paid.*

In the case of appeals or cross objections in suits for redemption or for foreclosure, in all cases whether a decree for interest has been made in them or not in which the Court-fee declared by the Court due at the date of the decree can be ascertained by reference to the judgment and the decree, it is that amount at which the appeal or cross objection should be valued and future interest should not be taken into account. The effect of this is that in all original appeals the Court-fee should be levied on the sum due at the date of original decree and in all second appeals it should be levied on the sum due at the date of the decree of the lower appellate court. 36 A. 40; 17 B. 41 29 M. 367 Ref. The Court fee fixed by him must be paid. (*Ecc, J.*) ROWLINS v. LACHMI NARAIN JHA. 3 Pat. L. J. 443=5 Pat. L. W. 223=(1918) Pat. 264=44 I. C. 50.

## COURT-FEES ACT, SCH. I, ART. 1.

—Sch I Art. I and Sch II Art 17—*Memo of cross objections—Court-fee, ad valorem.*

Under Sch. I Art. 1 of the Court-Fees Act 1870, a cross objection must bear an ad valorem fee on the value of the subject-matter in dispute. (*Roe J.*) *DABOGA RAUT v MUS-SAMMAT PABEMA KUER* 3 Pat. L. J. 197=4 Pat. L. W. 368=45 I. C. 558.

—Sch. 1 Art. 3—General power of attorney, whether its copy produced in court requires Court-fee of annas eight—Stamp. Act, Art. 48. (d)—C. P. Code, O. 19, R. 9—Strict construction. See (1917) DIG. COL. 381, *RUSTOMJI v. KALA SINGH* 9 P. R. 1918=136 P. W. R. 1917=43 I. C. 333.

—Sch. II Art. 5—*Suit for declaration that plff. is an occupancy tenant—Memo of appeal—Court fee-payable on—Court-fees Act, S. 7 (11).*

In a suit to establish or disprove a right of occupancy the plaint or memorandum of appeal should bear a Court-fee of eight annas as provided in Art. 5 of Sch. II to the Court-Fees Act, and S. 7, clause 2 of the Act does not apply to such a suit. (*Tudball, J.*) *RATAN SINGH v. KHEM KARAN* 40 All. 353=16 A. L. J. 167=44 I. C. 603.

—Sch. II, Art. 6—Stay of execution security bond for, how stamped—Court fee or, non-judicial stamp—Stamp Act, Sch. I Art. 15 See (1917) DIG. COL. 381, *DWARAKANATH DEY v. SAILAJA KANTA MALLIK*. 21 C. W. N. 1150=43 I. C. 376.

—Sch. II Art. 11—*Appeal from order rejecting application for ascertaining mesne profits—Ad valorem fee.*

A memorandum of appeal from an order dismissing an application for the ascertainment of mesne profits must be stamped with an ad valorem stamp on the amount claimed.

*Quere.*—Whether an appellate court has power to allow a valuation of a claim in the court below to be reduced in order to relieve a party from liability to pay the proper court fee. (*Chamier, C.J. and Jwala Prasad, J.*) *NARAIN PRASAD v. SHEO KAMESWAR PRASAD SINGH*. 3 Pat. L. J. 101=43 I. C. 489.

—Sch II, Art. 11—*Court fee appeal—Dismissal of suit for possession by first court—Decree reversed by appellate court and suit remanded for ascertainment of mesne profits—Second appeal—Court-fee, payable on.*

A suit for possession was dismissed by the first court, and the appellate court, holding that the plff. was entitled to possession, sent the case back to the first court for the ascertainment of mesne profits. *Held*, that the appellate court's order amounted to a reversal of the decision of the first court and the plff. should have been given a decree for possession.

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*Held*, further, that an appeal presented by the defts against the order of the appellate court was in fact an appeal from an appellate decree and should, therefore, have been made on an advolorem Court fee. (*Chamier, C. J. and Roe, J.*) *RAGHUNATH DAS v JHARI SINGH*. 3 Pat. L. J. 99=45 I. C. 100.

—Sch. II Art. 17 (1)—Court fee—Suit for declaration that property is not liable to attachment by creditor of ostensible owner—Court fee—Appeal—Valuation and Court fee. See—COURT FEES ACT, S. 7 (4) (c) AND SCH. II, ART. (17) (1). 43 I. C. 971.

—Sch II, Art. 17, cl. (3)—*B. T. Act, S. 106—Suit under transferred to civil Court for trial—Court fee payable as on a declaratory suit.*

A suit instituted under S. 106 of the B. T. Act before the Settlement Officer, although transferred to the ordinary civil Court for the purpose of trial, is a suit for a declaratory decree within the meaning of Art. 17 cl. (3) of Sch. II of the Court Fees Act and is not chargeable with an ad valorem fee.

The mere fact that a plaint has been inartificially drawn up does not alter the nature of the suit. (*Fletcher and Hudq, J.J.*) *SAILAJA NATH ROY CHAUDHURY v. CHANDICHARAN LAHA*. 28 C. L. J. 301=43 I. C. 552.

—Sch. II, Art. 17 cl. (iii)—*Suit for declaration that adoption is valid—No consequential relief—Valuation.*

A suit for a declaration, without consequential relief, that an adoption is valid is a suit which does not on the face of it admit of being satisfactorily valued and as such it falls under the category of the suits mentioned in Sch. II Art. 17 (iii) of the Court Fees Act. (*Batten, Prideaux and Mitra, J. J. C.*) *GANPATRAO v LAXMI BAI*. 43 I. C. 64.

—Sch III, Annexure (A) and (19), (4)—Probate duty—Trust created by testator's will, if liable to. See (1917) DIG. COL. 332; *CHANDRABATI KUAR v. THE COLLECTOR OF DARBHANGA*.

2. Pat. L. J. 611=45 I. C. 579.

COURT OF WARDS—Manager, power of, to institute suit without sanction of Court—Maintainability of suit. See BENGAL COURT OF WARDS ACT (B. C. IX of 1879), S. 55.

27 C. L. J. 125.

CRIMINAL LAW—Master and servant—master not liable for the Criminal acts of the servant. See PENAL CODE, S. 290.

47 I. C. 287.

CRIMINAL PROCEDURE CODE (V OF 1882), S. 4—*Complaint—Meaning of—Letter written by Assistant Collector to Dt. Magistrate.*

## CRIMINAL PROCEDURE CODE, S. 4.

S. obtained a decree for Rs. 5-3-0 against B from the Revenue Court on May 2, 1917. He applied for the execution of the decree on May 19, 1917, and in the application he stated the date of the decree as June 20, 1917, and the amount due as Rs. 16-11. Attachment was levied for Rs. 15-5-6 which was paid by B and S granted a receipt in full to B. Subsequently S filed the application in the Court which had executed the decree stating that he had made a mistake and that amount due to him was Rs. 8-3-0 and no more. Three days prior to that B had applied for sanction to prosecute S. No proceedings under S. 476 of the Cr. P. Code were taken nor was any sanction granted but the Assistant Collector, 2nd class, wrote a letter to the District Magistrate in which he stated all the facts and concluded by saying, "I beg to solicit orders." The Sub-Divisional officer though the letter was intended to be submitted to the District Magistrate, instead of doing so, himself ordered the prosecution of S and issued process. The case was tried by him and S, was convicted of offences under Ss. 198 and 210 respectively of the I. P. C. The conviction and sentence were affirmed by the Sessions Judge. *Held*, that the letter written by the Assistant Collector to the District Magistrate in which the former did not ask that any action should be taken by the Magistrate should proceed according to law against S, did not come within the meaning of a complaint under S 4 of the Cr. P. Code, and there being no complaint, the trial was illegal. *Banerji, J.* SHEOSAMPAT PANDE v. EMPEROR. 40 All. 641=

16 A. L. J. 662=47 I. C. 815=  
19 Cr. L. J. 963.

—— S. 4 (M)—Judicial proceeding—Execution proceeding.

The definition of a judicial proceeding given in S. 4 (M) of the Cr. P. Code is wide enough to cover execution proceedings. (*Jwala Prasad, J.*) BABHAMDEO SINGH v. EMPEROR. 43 I. C. 441=19 Cr. L. J. 153.

—— S. 7 (2)—Notification declaring boundary between two districts, construction of—Transfer of case—Power of Dt. Magistrate, to transfer case outside district.

A notification under S. 7 (2) of the Cr. P. Code declared that for the purposes of criminal jurisdiction the deep stream of a river running between two conterminous districts was to be considered the boundary between these districts.

*Held* that the intention of the notification was not to define the boundary between the two districts as on the date the notification was made the boundary line between the two districts was to be the deep stream of the river as found at any particular time.

It is not competent to one District Magistrate to transfer a case for trial to another Dt.

## CRIMINAL PROCEDURE CODE, S. 17.

Magistrate. (*Lindsay, J. C.*) KAYAMUDDIN v. DWARAKA. 5 O. L. J. 145=45 I. C. 1007=19 Cr. L. J. 671.

—— S. 14—"Any local area"—Meaning.

The words "any local area" in S. 14 of the Code of Criminal Procedure are not restricted to a local area within a specified District or Sessions Division but extend even to a whole province (*Rattigan, C. J. and Scott-Smith, J.*) HIRA LAL v. EMPEROR. 7 P. R. Cr. 1918=43 P. L. R. 1918=4 P. W. R. (Cr.) 1918=44 I. C. 326=19 Cr. L. J. 310.

—— S. 14—Special Magistrate appointed for whole province—Appeal from decision of, jurisdiction.

An appeal from an order of a Special Magistrate appointed under S. 14, Cr. P. C., for the whole Province lies to the Sessions Judge within the local limits of whose jurisdiction the special Magistrate held this court in disposing of the case. (*Rattigan C. J. and Scott-Smith, J.*) HIRA LAL v. EMPEROR. 7 P. R. (Cr.) 1918=43 P. L. R. 1918=4 P. W. R. (Cr.) 1918=44 I. C. 326=19 Cr. L. J. 310.

—— Ss. 15 and 350—Bench Magistrates—Constitution of—Rules framed by Local Govt. fixing strength of Bench and quorum—Judgment pronounced by a Bench, of which one of the members had not heard the evidence.

The Local Government acting under S. 15 of the Cr. P. Code, appointed 3 persons as Honorary Magistrates, and provided for a quorum of two. The accused were tried before a Bench consisting of two of such members for an offence under the Gambling Act. The case was heard by them but the delivery of the judgment was postponed. On the day on which judgment was pronounced one of the members who constituted the Bench on the former occasion was replaced by another of the members appointed and he had not heard the evidence etc., in the case. Judgment was given convicting the accused:—*Held*, that the rule appointing three persons to constitute a Bench of Honorary Magistrates was not *ultra vires*, and that the quorum would be vested with all the powers conferred on the Bench and that as one of the members on the second occasion when judgment was pronounced, did not hear the evidence, etc., it was difficult to say that the accused were not prejudiced and consequently the trial was illegal. (*Piggott, J.*) MATHURA v. EMPEROR. 16 A. L. J. 884. 48 I. C. 443=19 Cr. L. J. 1004.

—— S. 17—Deputy Magistrate—Subordinate to Sub-Divisional Officer.

A Deputy magistrate attached to a sub-division is subordinate to the Sub-Divisional offi-

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cer of that sub-division. (*Jwala Prasad, J.*)  
MUNSHI MAIN v. EMPEROR. 43 I. C. 414=  
19 Cr. L.J. 126.

——— Ss. 35 and 468 — "Aggregate Sentences—  
Concurrent Sentences—Appeal.

The term "aggregate sentences" in S 35(3) of the Cr. P. Code applies only to consecutive and not to concurrent sentences. Therefore no appeal lies to the High Court where the whole sentences to be served do not exceed four years. 15 C. W. N. 781, 17 C. W. N. 72 17 C. W. N. 825 and 35 All. 154 foll. (*Mullick and Jwala Prasad, JJ.*) GUR SAHAY RAM v. EMPEROR. 3 Pat. L. J. 138.

3 Pat. L. W. 249=43 I. C. 250=  
19 Cr. L. J. 90

——— S 35—Concurrent Sentences—Sentence passed in—Separate trials.

An order directing sentences passed in two separate trials against the same accused to run concurrently is illegal. (*Chitty and Smither, JJ.*) JOEENULLIAH BEPARA v. EMPEROR.

22 C. W. N. 597.=46 I. C. 158=  
19 Cr. L. J. 702.

——— S. 35—Separate conviction for several distinct offences—Whether separate sentences should be passed. See (1917) DIG. COL. 384: EMPEROR v. WADRAWA.

46 P. R. (Cr.) 1917=43 I. C. 799=  
19 Cr. L. J. 223.

——— Ss. 75, 77, 79, 80, 537, and 554—Warrant of arrest, whether signature of Magistrate is necessary—Warrant directed to officer by official designation and not by name, validity of—Omission to explain to accused the contents of the warrant—Effect of—Penal Code, Ss. 224, 225 and 553.

Where a magistrate issuing a warrant for the arrest of B signed the indorsement in full directing liberation of the accused if he gave bail but only initialled that part of the warrant which directed the arrest, *held*, it was gross carelessness on the part of the magistrate not to have signed his name in both places but that the omission was only an irregularity covered by S. 537 of the Cr. P. Code.

(2) that the fact that the warrant directed a Sub-Inspector of Police, without mentioning his name to arrest B did not make the warrant invalid. S 77 of the Cr. P. Code merely says that a warrant shall be ordinarily directed to one or more Police Officers; it does not require the name of that Officer to be inserted, although the form in the Schedule no doubt suggests that both name and designation should appear. But under S. 559 of the Cr. P. Code the form is liable to be varied according to the requirements of each case.

Omission on the part of an officer executing warrant to explain to the accused the parti-

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culars of the warrant after showing him the warrant does not vitiate the arrest

S. 96 of the Cr. P. Code requires that the substance of the warrant shall be notified to the accused and that if the accused demands it he shall have an opportunity of reading it himself. All that the section requires is that the accused shall have reasonable opportunity of knowing on what charge he is being arrested and before what Court he is to appear so that he may take steps for arranging for his defence. 23 Cal. 596, 28 Cal. 748 ref.

Where a constable executing a warrant showed the warrant to the accused and informed him that he would take bail if offered and the accused asserted that no warrant had been issued and the constable thereupon took him into custody, *held* that the terms of the section had been complied with. (*Mullick and Thornhill, JJ.*) BANKE BEHARI SINGH v. EMPEROR. (1918) Pat 269=

3 Pat. L. J. 493=5 Pat. L. W. 117=  
46 I. C. 523=19 Cr. L. J. 747.

——— S 75—Warrant not signed by the proper person if can be basis of conviction under S. 255 I. P. C. See 1917 DIG. COL. 385. JAGPAT KOERI v. EMPEROR.

2 Pat. L. J. 437=1 Pat. L. W. 306.  
(1918) Pat. 43=39 I. C. 494.

——— S 80—Arrest—Omission to explain warrant—Arrest not illegal, if accused knew its purport. See CR. P. CODE, Ss. 75, 77 ETC. 3 Pat. L. J. 493.

——— S 94—Summons to produce document—Non-production of, on the ground that it might incriminate.

In a civil suit the deft. filed his account books but the suit was decreed against him by the Munsiff whose judgment was affirmed on appeal and the piff. applied for sanction to prosecute the deft. for forgery and perjury: the Munsiff refused sanction on the ground that there was no positive evidence that the deft. had committed forgery or perjury and an appeal was preferred to the District Judge. During the pendency of the appeal the deft. with leave of the Court withdrew the account books and when required to produce them failed to do so.

*Held*, that defts. were not in the position of accused persons and were therefore bound to produce the book although it might incriminate them. (*Jwala Prasad, J.*) DAMRI RAM v. EMPEROR. 4 Pat. L. W. 65=

43 I. C. 793=19 Cr. L. J. 217.

——— Ss. 96 and 98 — Search-warrant — Issue of, long after application.

Where in a case of criminal trespass and theft the complainant at the time of applying for process prayed for the issue of a search-warrant but the Magistrate after repeated applications made an order for the issue of a warrant more than three weeks after.

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*Held*, that although the procedure was not contrary to the actual letter of Ss. 96 and 98 of the Cr. P. Code it was so dilatory that it could only tend to defeat the object for which such a warrant is issued. (*Chitty and Smither, JJ*) *BILAS ROY CHOWDEURI v RAM GOPAL KHEMKAR*. 22 C. W. N. 719.

=46 I. C. 291=19 Cr. L. J. 707.

—S. 96—Search-warrant, when to be issued—Duty of Magistrate to record reasons *See* (1917) DIG. COL. 386. *ITAVOO CHETTY v. JEHANGIR*. (1917) M. W. N. 454=

6 L. W. 287=41 I. C. 661=10 Cr. L. R. 10.

—S. 96—Search warrant, scope and object of—Practice—Penal Code, Ss. 482 and 486—Trade mark, false using. *See* (1916) DIG. COL. 448; *MOIDEEN BROS v. THAUNG & CO*. 10 Bur. L. T. 216=36 I. C. 391.

—Ss. 100 and 96—Form of warrant—Adaptation of form prescribed under S. 96 with—Necessary modifications—Warrant—Legality of.

There being no prescribed form of warrant under S. 100 of the Cr. P. Code the Magistrate who issued it adopted a form under S. 96 to the provisions of S. 100 by altering the figures and also by drawing up the warrant in terms required by S. 100.

*Held* that the warrant was perfectly legal. It is immaterial what form is used provided that the substance of the warrant complies with the requirements of S. 100. (*Chitty and Smither, JJ*.) *SUPERINTENDENT REMEMBRANCE OF LEGAL AFFAIRS, BENGAL v. MOZAM MOLLA*. 45 Cal. 905=28 C. L. J. 303=48 I. C. 687.

—S. 106—Appellate Court—Power of to take security, when exists.

An order for security under S. 106 of the Cr. P. Code can only be made by an appellate Court when the accused was tried and convicted by a court of the description given in the first para. of the section—i.e. by a Magistrate not inferior to the Magistrate of the first class. (*Shadi Lal, J*) *LAL KHAN v. EMPEROR*. 5 P. R. (Cr.) 1918=44 I. C. 352=19 Cr. L. J. 336.

—S. 106—Scope of—Breach of the peace, meaning of.

A person who enters on another's premises and uses violence to him and deprives him of his property commits a breach of the peace in the wider sense of the expression and an order against him under S. 106 is valid. (*Oldfield, J*) *SAVARAJULU NAIDU Iyre*. 47 I. C. 445=19 Cr. L. J. 929.

—S. 106 (1) and 3—Dt. Magistrate not exercising appellate Jurisdiction—No power to direct security to be furnished

Where a Dt. Magistrate was not trying a case as a court of appeal he had no jurisdiction

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to direct that each of the accused convicted should furnish a bond for a certain amount with one surety of a like amount. (*Encz, J*.) *DOOBAR TEWARI v. EMPEROR*.

16 A. L. J. 536=46 I. C. 412=19 Cr. L. J. 732.

—S. 106 (3)—Appellate Court—Powers of, when original conviction by a Court not specified in Sub-S. (1).

An Appellate Court cannot exercise the powers given by S. 106 (3) of the Cr. P. Code where the conviction has not been by a Court specified in sub-section (1) of the section—35 C. 494 ref. (*Chitty and Smither, JJ*) *KARIM BAKSH v. EMPEROR*. 43 I. C. 796=19 Cr. L. J. 220.

—S. 107—Applicability of apprehension of breach of the peace—Commission of specific offences.

Where the acts committed by an accused person are of such a nature that the continuity of these acts or the commission of similar acts by the accused is apprehended to be tending to a breach of the peace, S. 107 of the Cr. P. Code is applicable notwithstanding that the acts already committed by the accused constitute specific offences under the Penal Code. (*Jwala Prasad, J*.) *KHETRABASI SAHU v. EMPEROR*. 44 I. C. 38=19 Cr. L. J. 246.

—S. 107—Breach of the peace—No act within six months—Proceedings if legal.

Though there were no actual overt acts on the part of the accused during the six months before the commencement of the proceeding, still the proceedings were not bad as there was a likelihood that the accused might commit a breach of the peace, or disturb the public tranquillity or do some wrongful act which might occasion a breach of the peace. (*Chitty and Smither, JJ*.) *OHIUDDIN CHOUDHURY v. EMPEROR*. 44 I. C. 122=19 Cr. L. J. 266.

—S. 107—Case under—Procedure as regards reading over of depositions—Cr. P. C.—S. 360, Applicability. *See* PENAL CODE, S. 193. (1913) Pat. 13.

—Ss. 107 and 145—Conversion of proceedings started under S. 107 into one under S. 145—Order declaring party in possession—Invalidity of.

Proceedings were instituted under S. 107 of the Cr. P. Code, evidence was recorded and a date fixed for orders. The Magistrate also made an order, "proceedings changed to S. 145 of the Cr. P. Code" and on the date fixed without serving any proceedings under S. 145 cl. (1), without taking further evidence or giving the parties opportunity to file written statements passed orders under S. 145 of the Cr. P. Code declaring one of the parties in possession.

*Held*, the order was without jurisdiction. Ss. 107 and 145 of the Cr. P. Code are intended

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by the Legislature to serve two distinct purposes and the proceedings taken under S. 107 of the Cr. P. Code and the evidence recorded thereunder could not be accepted as sufficient ground to dispose of the necessity of taking fresh action under cl. (1) of S. 145 of the Cr. P. Code (*Imam, J.*) **SAHDEB SINGH v. JUMAN JOLAHA.** 4 Pat. L. W. 195=44 I. C. 338=19 Cr. L. J. 320.

—Ss 107 and 144—Magistrate, power of—Breach of peace—Party exercising lawful right whether can be bound down—Revision—High Court, power of interference of. See (1917) DIG. COL. 38: **NGA TI v. MAUNG KYAW YAN** 11 Bur. L. T. 56=(1916) 2 U. B. R. 157=39 I. C. 480.

—Ss 107 and 112—Notice—Issue of—Information received by magistrate, nature of—Sufficiency of notice.

Under S. 107 of the Cr. P. Code there may be cases in which a Magistrate of the first class upon mere information to the effect that a person is likely to disturb the public tranquillity without any information being given of that person's intent to do any wrongful act, may issue a notice in writing to such person giving the substance of the information received without specifying any definite acts which that person intends to commit. (*Knox, J.*) **JAGUJI RAI v. EMPEROR.** 15 A. L. J. 567=47 I. C. 72=19 Cr. L. J. 878.

—Ss. 107, 125 and 439—Order requiring security for good behaviour—Power of Dt. Magistrate to set aside order—Interference by High Court.

An order requiring security for good behaviour under S. 107 of the Cr. P. Code can be cancelled by the Dt. Magistrate under S. 125 of the Code on the ground that there is no proof of any likelihood of a breach of the peace, and the High Court will refuse to interfere with the order on this ground in revision, unless the Dt. Magistrate has been moved under S. 125.

The High Court will on its revisional side interfere only as a Court of last resort under very exceptional circumstances. (*Kotwal, A. J. C.*) **MARTAND RAO v. EMPEROR.** 47 I. C. 96=19 Cr. L. J. 900.

—Ss. 107 and 145—Proceedings under—Nature of and distinction between—Dispute as to immoveable property—Appropriate procedure.

Proceedings under S. 107 of the Cr. P. Code are only intended for the security of the public peace, not for the purpose of enabling one of the two contending parties to help themselves in recovering possession of immoveable property after having their 'adversaries' hands tied down by an order under that section. Where the dispute relates to the possession of immoveable property the proper course is to

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institute proceedings under S. 145 and not under S. 107. 3 C. W. N. 463 foll. (*Shodh Lal, J.*) **JALAL v. EMPEROR.** 144 P. L. R. 1917=44 I. C. 974=19 Cr. L. J. 446.

—S. 107—Proceedings under—Petition filed before Sub-Div. Magistrate for action against several persons including S.—Proceedings drawn up against S. only—Case sent to Deputy Magistrate, who started proceedings against all—Legality of action. See (1917) DIG. COL. 388. **JAI PATTI MARTON v. NAGINA SINGH.** 1 Pat. L. W. 610=(1918) Pat. 12=43 I. C. 256=19 Cr. L. J. 95.

—S. 107—Proceedings under—Facts forming subject of previous enquiry resulting in discharge, not a ground for fresh enquiry. See (1917) DIG. COL. 387. **NAGIREDDY KONDA REDDY v. EMPEROR.** 41 Mad. 246=41 I. C. 990.

—Ss. 107, 144 and 145—Scope and applicability of—Possession of land, dispute as to—Proper procedure.

It is competent for a Magistrate taking cognizance of a case under S. 107 of the Cr. P. Code or holding an enquiry under that section to stop proceedings under that section and to proceed under Ss. 145, 107, 144 and 145 all give summary jurisdiction to Magistrates to take action in order to prevent a breach of the peace when such a breach is imminent. There is a very thin line of demarcation between these sections. When there is a clear dispute regarding the possession of land the proper section to proceed under is S. 145, which not only is more effective in order to prevent a breach of the peace but also is one that causes the least prejudice to the contending parties. (*Jwala Prasad, J.*) **HIMMAT MIAN v. EMPEROR.** 46 I. C. 296=19 Cr. L. J. 712.

—Ss. 107, 144 and 145—Simultaneous proceedings under—Impropriety of—Dispute as to possession—Proper procedure.

It is inconvenient that proceedings under S. 107 of the Cr. P. Code and also under S. 144 or S. 145 should be going on at the same time.

On the application of the petitioners for the assistance of the Magistrate in the matter of possession of a piece of land, an injunction was issued under S. 144 of the Cr. P. Code and proceedings were taken against the petitioners under S. 107.

Held, that the procedure was bad, as in effect it debarred the petitioners from giving evidence of possession, and that if on the expiry of the injunction under S. 144, there was any apprehension of a breach of the peace, the more appropriate procedure would be to take proceedings under S. 145 of the Cr. P. Code, rather than under S. 107. (*Chitty and Smither, JJ.*) **ABINASH CHANDRA MANDAL v. LOKENATH GANI.** 44 I. C. 591=19 Cr. L. J. 367.

## CRIMINAL PROCEDURE CODE, S. 167.

—Ss. 107 and 144—Successive renewals of order under S. 144, Cr. P. Code—Impropriety of—Proper remedy to proceed under S. 107. See CR. P. CODE, SS. 144 and 107.

3 Pat. L. J. 130.

—Ss. 107, 177, 192 and 523—Transfer of case under S. 107 by Dt. Magistrate to Magistrate within whose jurisdiction parties do not reside—Order invalid. See (1917) DIG. COL. 889; NAGIREDDY KONDAREDDY v. EMPEROR. 41 Mad. 246=41 I. C. 990.

—S. 107—Wrongful act—Jurisdiction of magistrate to order security.

Where there was already a cattle market and certain persons intended to open another cattle market upon their own land not from over older cattle market and the magistrate apprehending that there would be a breach of the peace consequent thereupon bound them over under S. 107 of the Cr. P. Code, held, that the order was illegal, the section being confined to cases where the Magistrate was informed that a person was likely to commit a breach of the peace or to do any wrongful act which may occasion a breach of the peace. (Richards, C. J.) MAHU v. EMPEROR.

16 A. L. J. 279=44 I. C. 985=  
19 Cr. L. J. 437

—S. 107 (2)—Accused convicted of rioting by first class magistrate—Confirmation by Dt. magistrate—Direction of Dt. magistrate that particular individual should be surety.

A district Magistrate has no jurisdiction in affirming a conviction for a riot to order the accused to give security for good behaviour nor has he jurisdiction to order that a particular individual should be a surety. (Richards, C. J.) MAHABIR v. EMPEROR.

16 A. L. J. 230=44 I. C. 967=19 Cr. L. J. 439

—S. 107 (2)—Breach of the peace Apprehension of in sub-division—Accused—living in Sudder division—Procedure—Irregularity.

Breach of the peace being apprehended in a sub-division the District Magistrate was moved for the commencement of proceedings, under S. 107, Cr. P. C. as the accused was living in the sudder Division. The Dt. magistrate instead of drawing up the proceedings and sending them up to the Sub-Divisional Magistrate for trial, merely said that he sanctioned the proceedings and sent the case to the Sub-Divisional Magistrate.

Held, that though the District Magistrate did not express his intention strictly in accordance with law, the irregularity in expression did not deprive the trying Magistrate of jurisdiction in the case and could not affect the merits of the trial in any way. (Chitty and Smither, JJ.) NARENDRA SINGH, IN RE.

3 P. W. R. (Cr.) 1918=  
44 I. C. 123=19 Cr. L. J. 287.

## CRIMINAL PROCEDURE CODE, S. 109.

—S. 107 (2)—Initiation of proceedings by Dt. Magistrate against person residing outside the limits of local jurisdiction—Transfer of proceeding to subordinate magistrate, if valid.

Proceedings initiated by the District Magistrate under the special powers conferred upon him by S. 107 (2) of the Cr. P. Code can be transferred by him for disposal to the Court of some subordinate Magistrate otherwise competent to deal with the matter, 31 Cal. 353 and 13 C. W. N. 580 not foll. (Tamen and Huda, JJ.) RAKHAL MANDAL v. EMPEROR.

27 C. L. J. 314=45 I. C. 180.  
=19 Cr. L. J. 496.

—Ss. 108. and 110—Security for good behaviour—Man of desperate and dangerous character—Time for commission of offence—Person in custody at the time of proceedings for offence beyond jurisdiction.

A man of desperate and dangerous character means a man who has a reckless disregard of the safety of the person or the property of his neighbours.

If the preparation and organization were being carried on, the mere fact that the time for the proposed revolution and dacoities has not been proved, does not prevent the danger from being a present one.

The mere fact that S. 108 of the Cr. P. Code may have been applicable, does not necessarily make S. 110 in applicable.

An order may be made under S. 110 of the Cr. P. Code, against a person who is in custody at the time of the proceedings.

If a person has been arrested beyond jurisdiction, for an offence within the jurisdiction and the charge of substantive offence fails, the person can be proceeded against under S. 110 of the Cr. P. Code.

S. 114 of the Cr. P. Code is not limited to arrest within the jurisdiction. (Sanderson, C. J. and Beachcroft, J.) MANINDRA MOHAN SANYAL v. EMPEROR.

28 C. L. J. 25=46 I. C. 152.  
=19 Cr. L. J. 696.

—Ss. 109, 110 and 517—Person against whom proceedings under Ss. 109 and 110 taken—Confiscation of property found with them—If and when justifiable—Whether property should be stolen property or used for the commission of offence—Powers of magistrate.

Under S. 517 (1) of the Cr. P. Code the powers of a Criminal Court to order the disposal of property reduced before it are wider than under the Code of 1884 and a Criminal Court can now confiscate any property produced before it even though there is no proof that an offence has been committed in respect of such property or that such property has been used for the commission of an offence. 31 I. C. 327 dissented from 34 Cal. 34 Cal. 347 foll.

## CRIMINAL PROCEDURE CODE, S. 109.

Unless there are strong grounds for holding that the properties found with a person dealt with under S. 109 alone of the Cr. P. Code are either themselves stolen properties or the product of their conversion, an order by a Criminal Court directing their confiscation would be unjustifiable.

Per *Napier, J.*—Inquiry in S. 517 (1) of the Cr. P. Code is not confined to preliminary enquiry before Magistrate but includes also the proceedings under the preventive sections of the Cr. P. Code. (*Sadastra Aiyar and Napier, J.*) *PYDE RAMANNA In re.*

42 Mad. 9=24 M. L. T. 255=S. L. W. 350.

—Ss. 109 (a) and (b) and 118—Security for good behaviour—Condition necessary for initiation of—Suspicious association. See (1917) DIG. COL. 389 *RASHU KAPIRAN v. EMPEROR.* 22 C. W. N. 163=27 C. L. J. 382. =41 I. C. 649.

—S. 110—Evidence—Court limiting the number of defence witnesses—Impropriety of.

In a proceeding under S. 110 of the Cr. P. Code the trying Magistrate declined to examine on behalf of the defence more than the same number of witnesses as were examined for the prosecution.

Held, that it is not open to the trying Magistrate to put such an arbitrary limit on the witnesses whose evidence the defence desires to adduce. (*Teunon and Newbould, J.*) *AMIRULLA PRAMANIK v. EMPEROR.*

22 C. W. N. 408.

—S. 110—Habitually bringing false cases, if within the section—Evidence of general repute, if admissible.

S. 110 of the Cr. P. Code does not apply to a person who has the reputation of habitually bringing false claims in Civil Courts.

In proceedings against such a person, although evidence of general repute is admissible, it cannot be allowed to override the findings arrived at by the Civil Courts after trial. (*Mitra, A. J. C.*) *BAPUJEE v. EMPEROR.* 47 I. C. 81=19 Cr. L. J. 885.

—Ss. 110 and 234—Joint trial in security proceeding misjoinder—Test of—One member of a joint Hindu family, whether responsible for the misconduct of another member.

Whenever in security proceedings a plea of misjoinder is raised, the test to be applied is whether there has been habitual association between the persons charged in respect of the misconduct alleged in the complaint.

The mere fact that the persons charged are members of an undivided family would not by itself render each member liable for the misconduct of any other member and where they are living separately there is not even the presumption that one member knew and assented to the misdeeds of the other.

## CRIMINAL PROCEDURE CODE, S. 110

Where proceedings under S. 110 of the Code were laid against two undivided brothers who are living in two different villages ten miles apart and the courts have used evidence against one brother as evidence against the other brother as well and did not examine the evidence against each of the accused separately with a view of determining whether security should be demanded against him or not.

Held, (in revision) that the procedure was illegal. (*Kumara-swami Sastri, J.*) *KRIPA SINDHU NAIK v. EMPEROR.* 8 L. W. 461=(1918) M. W. N. 751=47 I. C. 277=19 Cr. L. J. 905.

—S. 110—Notice under—Proper form and contents of.

Notice issued under S. 110 should sufficiently indicate the time and place of the facts charged and should give sufficient details which would enable the accused to know what he is to meet though a list of the witnesses need not be given. They should not merely reproduce the clauses of the section. (*Kumara-swami Sastri, J.*) *KRIPA SINDHU NAIK v. EMPEROR.*

8 L. W. 461=(1918) M. W. N. 751=47 I. C. 277=19 Cr. L. J. 905.

—S. 110—Order for production of sureties—Non-residence in the district—Sureties if proper.

The mere fact that a person ordered to produce sureties under S. 110 of the Cr. P. Code gives as security, two persons who are residents of a different police district and who helped him in his defence will not make them improper as sureties and the Magistrate should not refuse to accept them. (*Lickards, C. J.*) *GOBARDHAN v. EMPEROR.* 18 A. L. J. 263=44 I. C. 969=19 Cr. L. J. 441.

—Ss. 110 and 123—Order for security by District Magistrate furnished—Record not sent to Sessions Judge for order—Legality of. See (1917) DIG. COL. 390 *RAM KISHEN v. EMPEROR.* 40 All. 39=15 A. L. J. 822=19 Cr. L. J. 2=42 I. C. 914.

—S. 110—Proceedings under—Evidence Act S. 30—Provisions of inapplicable—Conversion of one inadmissible against co-accused. See EVIDENCE ACT, S. 30. 22 C. W. N. 408.

—S. 110—Proceedings under—General repute—Evidence of, what is.

Inferences drawn by forest officials as to the persons who committed forest offences are not evidence of repute. The court should test the sources of the information that led the officials to infer that the accused had anything to do with the offences. (*Kumara-swami Sastri, J.*) *KRIPA SINDHU NAIK v. EMPEROR.* 8 L. W. 461=(1918) M. W. N. 751=47 I. C. 277=19 Cr. L. J. 905.

## CRIMINAL PROCEDURE CODE, S. 110.

—S. 110—*Proceedings under—Evidence of general repute insufficient—Offence alleged not to be proved.*

In a proceeding under S. 110 of the Cr. P. Code any particular offence alleged against the person or persons called upon to furnish security must be proved by relevant evidence, and not by general evidence of repute that he or they are habitual offenders (*Piggot, J.*) *INDAR v. EMPEROR.* 46 All. 372=16 A. L. J. 203=44 I. C. 463=19 Cr. L. J. 351.

—Ss. 110 (f) and 117 (3)—*Security proceedings—Evidence of general repute—Admissibility of.*

S. 117 (3) of the Cr. P. Code must be strictly construed and is, therefore, inapplicable, where the charge is under clause (f) of S. 110 of the Code.

Clause (f) of S. 110 of the Cr. P. Code is one of a highly special character; evidence of general repute is not sufficient to bring a case within it, but specific acts showing that the accused recklessly disregards the safety of the persons or the property of his neighbours and actually causes danger thereto must be proved. (*Drake Brokeman, J. C.*) *GANPATI v. EMPEROR.* 47 I. C. 67=19 Cr. L. J. 871.

—S. 110—*Proceeding under—Jurisdiction—Accused living out of the jurisdiction of Magistrate issuing notice—Validity—Issue of notice whether judicial or executive act—Initiation of proceedings, what amounts to.*

The issue of a notice under S. 110 of the Cr. P. Code is not a mere formal matter but is a judicial act to be exercised after a due consideration of the materials placed before the Magistrate. A magistrate has no jurisdiction to issue the notice under S. 110 of the Cr. P. Code unless the person to be bound over resides within the limits of his jurisdiction. 41 Mad 246 foll.

A magistrate to whom the information referred to in S. 110 is given by the Police, cannot be said to have initiated the proceedings until he issues the notice to the person charged to show cause why he should not be proceeded against.

Where a District Magistrate to whom information was given by the Police that certain persons within the limits of his jurisdiction, habitually harbour thieves and aid in the concealment and disposal of stolen property, did not issue notice to those persons to show cause why they should not be ordered to give security for good behaviour but merely passed it on to the Headquarters Deputy Magistrate who had no jurisdiction over the place where the persons informed against resided and the Deputy Magistrate thereupon draw up proceedings against them.

*Held*, (1) that the District Magistrate cannot be said to have initiated proceedings and then transferred the case to the other Magis-

## CRIMINAL PROCEDURE CODE, S. 122.

trate for disposal (2) That the Sub-Divisional Magistrate had no jurisdiction to issue the notice and try the case and that the proceedings were void (*Kumaraswami Sastri, J.*) *KRIPA SINDU NAIK v. EMPEROR.*

8 L. W. 461=(1918) M. W. N. 751=47 I. C. 277=19 Cr. J. T. 905.

—S. 110 and 190 (c)—*Proceedings under S. 110—Local inspection by magistrate.* See CR. P. CODE, SS. 190 (C) AND 110.

47 I. C. 95.

—Ss. 110 and 108—*Security for good behaviour—Man of desperate and dangerous character—Case coming under S. 103—S. 110 not inapplicable—Person arrested without the jurisdiction for an offence within the jurisdiction—Failure of charge as regards the substantive offence—Proceedings under S. 110 propriety of.* See CR. P. CODE, SS. 103 AND 110. 23 C. L. J. 25.

—S. 110—*Security Proceedings—Evidence—Police list of cases in which accused suspected—Admissibility.*

In cases under S. 110 of the Cr. P. Code a list of cases filed by the police in which the accused was suspected of having been concerned is not admissible in evidence.

Value of hearsay evidence in such cases discussed. (*Lindsay, J. C.*) *CHANDI v. EMPEROR.* 21 C. C. 132=46 I. C. 841=19 Cr. L. J. 325.

—S. 110 cl. (b)—*Residence within local limits of magistrate's jurisdiction—If necessary.*

S. 110 of the Cr. P. Code does not require that the person proceeded against should reside within the local limits of the Magistrate empowered to take action under the section. It is sufficient that the person should be within those limits at the time when proceedings are taken. (*Richardson and Huda JJ.*) *LAKSHI NARAIN DAS v. EMPEROR.* 23 C. W. N. 100.

—S. 110 (d) J.—*Security for good behaviour—Bad livelihood—Facts to be proved.*

In order that a man might be held to be a man of desperate and dangerous character, within the meaning of S. 110, it must be shown that he had such a reckless disregard of the safety of the person and the property of his neighbours that his being at large would be detrimental to the community. In this case all that was proved against the accused was that he promoted litigation and that he had considerable influence with patwaris. *Held*, that it was not sufficient to warrant that inference. (*Banerji J.*) *ISHWARI DUTT v. EMPEROR.* 16 A. L. J. 778=46 I. C. 701=19 Cr. L. J. 781.

—Ss. 122 and 514—*Surety—Rejection of, on the ground that surety though respectable had only immovable property—Revision.*

## CRIMINAL PROCEDURE CODE S. 125

A person ordered, under S. 143 of the Cr. P. Code to furnish a bond of Rs. 250 and a respectable surety tendered a surety who offered security in the shape of house property. The surety was reported to be respectable and the house worth Rs. 500. The Magistrate rejected the security purporting to act under S. 514 of the Cr. P. Code. *Held*, that the surety being respectable and the house worth Rs. 500 should have been accepted though it was true that only moveable property could be attached and sold during surety's life-time for recovery of penalty. (*Kher, J.*) **NANHE v. EMPEROR.**

13 A. L. J. 503.

—45 I. C. 293—19 Cr. L. J. 711

—S. 125—*Petition for cancellation of bond—Right of audience.*

A Dt. Magistrate dealing with an application under S. 125 of the Cr. P. Code is exercising neither appellate nor revisional jurisdiction and it is not incumbent upon him to hear the Mukhtar of the petitioner before disposing of the application. (*Jwala Prasad, J.*) **KHETRA-BASI SARU v. EMPEROR.**

44 I. C. 38—19 Cr. L. J. 246.

—Ss. 125, 435, 436 and 439—*Revision—Powers of High Court—Concurrent revisional Jurisdiction of Sessions Judge or Dt. Magistrate—Practice—S. 125, whether controls, Ss. 435 and 438.*

In cases where the High Court has concurrent revisional jurisdiction with a subordinate Court the aggrieved party should, in the first instance seek his remedy before his subordinate Court.

The jurisdiction of the Sessions Judge and Dt. Magistrate is concurrent even where they could not pass formal orders, but only could refer to the High Court under S. 438.

S. 125 does not limit the revisional jurisdiction of the Sessions Judge or the Dt. Magistrate under Ss. 435 and 438. (*Jwala Prasad and Imam, J.*) **BIPIN BIHARI MUKHERJI v. EMPEROR.**

3 Pat. L. J. 302—4 Pat. L. W. 327  
—45 I. C. 397—19 Cr. L. J. 589.

—Ss. 125, 438 and 439—*Security to keep the peace—Power of Dt. Magistrate—Jurisdiction of High Court.*

A Magistrate of the first class ordered certain persons to execute a bond to keep the peace. The persons to be bound over applied to the Sessions Judge to revise the order. The Sessions Judge was of opinion that the applicants should not have been bound over. He made a reference to the High Court with a recommendation that the order should be set aside:—*held*, that the order was passed by a Magistrate subordinate to the Dt. Magistrate, and the record should, under S. 125 of the Cr. P. Code, be laid before the Dt. Magistrate to deal with the matter.

## CRIMINAL PROCEDURE CODE S. 143

Where a Code gives a particular court jurisdiction to act in certain matters, it is that court which should be applied to and not the High Court. (*Emperor v. LALJI v. EMPEROR.*)

46 All. 140—13 A. L. J. 39—

43 I. C. 834—19 Cr. L. J. 138.

—S. 143—*Proceedings under, nature of enquiry—Interim order for remand.*

A Magistrate on a complaint made to the effect that public rights in a channel were interfered with, proceeded to enquire under S. 128 of the Cr. P. Code and came to the conclusion that the channel was a public channel.

*Held*, that the Magistrate was not bound to enquire that the accused had a bona fide claim of right to the channel and refer the matter to the civil Court. (*Farmer and Kannon, JJ.*) **FAIR MULLICH v. EMPEROR.**

23 C. L. J. 211

—47 I. C. 671—15 Cr. L. J. 247.

—Ss. 136 and 137—*Ex parte order—Jurisdiction to set aside—Power to drop up proceedings.*

Where a Magistrate made a conditional order under S. 136 of the Cr. P. Code on 12th July 1917, and the order was made absolute ex parte on 20th July 1917, the date fixed for showing cause, under S. 136 and the opposite party having applied on 4th August 1917 for review of the ex parte order alleging want of notice, and on 11th August 1917 the Magistrate set aside the order of 20th July 1917, in the absence of the complainant who moved the High Court.

*Held*, that the Magistrate acted in contravention of S. 137 of the New Code, which lays down expressly that the Magistrate must take evidence before passing the order absolute or dropping the proceeding. 42 Cal. 702, 31 All. 423, 11 A. L. J. 93 foll. (*Jwala Prasad, J.*) **RAMSARAN KOERI v. RAMLAGAN AHIR.**

4 Pat. L. W. 50—13 I. C. 790—

19 Cr. L. J. 211.

—S. 141—*Unlawful assembly—Unlawful trespass—Resistance to—Excess of private defence—No offence under*

Persons who exercise their right of resisting an unlawful trespass on their property do not become members of an unlawful assembly by repelling attacks made on them or by exceeding their right of private defence 39 C. 806 foll. (*Kumaraswami Sastri, J.*) **PENUMETSA TIRUNALAI RAJU v. EMPEROR.**

44 I. C. 40—19 Cr. L. J. 248.

—Ss. 144, 145 and 438—*Dispute as to possession—Applicability of Sections—Danger of imminent breach of the peace—Revision—Interference by High Court when* See (1917) DIG. COL. 335: **BANSI SINGH v. EMPEROR.**

3 Pat. L. W. 353—43 I. C. 401—

19 Cr. L. J. 143.

## CRIMINAL PROCEDURE CODE S. 144.

—Ss. 144, 145 (1) (4) and 146—Dispute regarding immovable property—Duty of a magistrate—Proceedings under wrong Chapter—Revision.

The use of S. 144 is a suitable method of avoiding a breach of the peace only if it is clear upon a reading of the police report that the claim of the party creating the disturbance is not a claim made in good faith. 11 C. W. N. 27 foll. 45 Cal. 150; 25 All. 527, 28 All. 406 ref.

The practice of issuing notices purporting to be notices under S. 144 of the Cr. P. Code calling upon both parties to attend on a fixed date and submit statements is a mere evasion of the law. The notices are in effect notices under S. 145 (1) and (4) of the Cr. P. Code and where such notices have been issued, the High Court will direct that the procedure prescribed in Chap. XII of the Code be followed. 1 P. L. J. 336 ref. (*Roe and Imam, JJ.*) KANIZ AMINA v. EMPEROR.

3 Pat. L. J. 243=4 Pat. L. W. 354=  
47 I. C. 65=19 Cr. L. J. 869.

—Ss. 144 and 195—Circumstances justifying magistrate exercising jurisdiction—holding of rival hat—Order under S. 144 prohibiting rival hat holding it on same day—disobedience to such order—sanction for prosecution—Penal Code S. 188.

A Magistrate is empowered to pass an order under S. 144 of the Cr. P. Code prohibiting the holding of a rival hat on the same days with the old hat.

Where for the disobedience of such an order the Magistrate granted sanction for prosecution for an offence under S. 188 I. P. C. and the Sessions Judge revoked it on the ground that the order under S. 144 Cr. P. Code was illegal:

Held, that the order under S. 144 of the Cr. P. Code was legal and the order of the Sessions Judge revoking the sanction should be set aside and the sanction restored. (*Fletcher and Walmsley, JJ.*) NAGENDRA NATH BISWAS v. RAKHAL DAS SINHA. 23 C. W. N. 141.

—S. 144—Hindu Temple—Adhyapakam Service—Trustee restrained from interfering with the conduct or order, if definite.

A trustee of a temple was directed by an order under S. 144 to abstain from interfering in any way with the conduct of the adhyapakam service.

Held, that the order was definite as it sufficiently defined the acts from which the trustee was required to abstain, and the acts contemplated were certain within the meaning of the section. 24 Mad. 45 appl. 16 Cal. 80 doubted. (*Bakerwell, J.*) SRINIVASA THATHACHARIAR In re. 47 I. C. 657=19 Cr. L. J. 933.

—Ss. 144 and 145—Initiation of proceedings under S. 144—Conversion into proceedings under S. 145—No prejudice to parties—No irregularity. See CR. P. CODE, SS. 145 (3) AND 144. 4 Pat. L. W. 234.

## CRIMINAL PROCEDURE CODE S. 144.

—Ss. 144 and 439—Jurisdiction of Magistrate—Imminent danger, meaning of—Time-expired order—Revision of.

The jurisdiction of a Magistrate to pass an order under S. 144 of the Cr. P. Code depends on the urgency of the case. A mere statement by the Magistrate that he considers the case to be urgent is not sufficient to give him jurisdiction, if the facts set out by him show that in reality there is no urgent necessity for action.

In a proceeding to set aside an order of a Magistrate under S. 144 of the Cr. P. Code the High Court would not be justified in considering whether the opinion expressed by the Magistrate on the civil rights of the parties is right or wrong; what it has to consider is, whether the Magistrate's order was made with jurisdiction or not.

A Magistrate by an order under S. 144 of the Cr. P. Code, directed the petitioner to remove an obstruction to a culvert through which the drainage of certain Railway quarters used to flow, into a tank and the only fact set out in the Magistrate's judgment indicating any imminent danger was that a rainfall of one inch in an hour would flood the quarters and compel evacuation:

Held, that this was imminent danger of quite a different kind from that contemplated by S. 144 of the Cr. P. Code. It was a danger to the inhabitants of a particular quarter who might be inconvenienced but was not a source of danger to public health:

The order under S. 144 of the Cr. P. Code should be set aside even though more than 2 months had expired since its passing inasmuch as a prosecution of the petitioner under S. 183 of the Penal Code, for disobedience to the order had been instituted. (*Newbold and Huda, JJ.*) CHANDRA NATH MUKHERJEE v. EAST INDIAN RAILWAY CO. 23 C. W. N. 145 =28 C. L. J. 483=47 I. C. 803=19 Cr. L. J. 951.

—S. 144—Magistrate—Ex parte order.—Jurisdiction—Failure to state material facts of case—To record reasons of ex parte order—Effect on validity of order—Irregular order ex parte—Remedy of aggrieved party—Revision to High Court without exhausting remedies in lower Courts—Maintainability—Duty of magistrates to protect lawful acts and to prevent interference with doing thereof—Flying of Home Rule flag—Legality—Magistrates duty to protect flying of such flag—Ex parte order prohibiting flying of such flag what should contain—Affidavit—Allegations against honesty of conduct and intentions of responsible officials when justified. See (1917) DIG. COL. 395, VENKATARAMANA AIYAR v. EMPEROR. 22 M. L. T. 323= (1917) M. N. W. 724=6 L. W. 456=43 I. C. 88=10 Cr. L. R. 86=19 Cr. L. J. 56.

## CRIMINAL PROCEDURE CODE, S. 144.

—Ss. 144 and 155—Nature of order under—Dispute regarding immovable property—Proceeding under S. 144 when proper—Power of Dt. Magistrate to interfere with order of Subordinate Magistrate.

Cl. (4) of S. 144 of the Cr. P. Code contemplates only a change in the nature of the order made, not a change in the party against whom it is made.

Where, therefore, in a proceeding under S. 144, the first Court made an order absolute against the second party and the Dt. Magistrate, acting under Cl. (4) of that section cancelled the first Court's order and substituted an order of his own, forbidding the first party from cutting the crop in dispute, *held*, that the Dt. Magistrate's order was without jurisdiction.

Where it is clear from a perusal from the police report that the claim of the disturber of the peace is a mere pretence, a magistrate is justified in acting under S. 144. In such circumstances the party entitled to possession should not be harassed by proceedings under S. 145 (*Roe and Imam, JJ.*) **GANPAT SINGH v. EMPEROR.**

3 Pat. L. J. 237=  
4 Pat. L. W. 357=47 I. C. 76=  
19 Cr. L. J. 880.

—S. 144—Order under prohibiting disturbance over a certain person's ferry—User of ferry without disturbance—No offence under S. 188, I. P. C. See PENAL CODE, S. 188.

22 C. W. N. 599.

—Ss. 144, 145 and 107—Scope and applicability of—Dispute as to land—Propriety of proceedings under S. 145, Cr. P. Code. See CR. P. CODE, SS. 107, 144 AND 145.

46 I. C. 296.

—Ss. 144, 145 and 107—Simultaneous proceedings under, impropriety of—Dispute as to possession—Proper procedure. See CR. P. CODE, SS. 107, 144 AND 145.

44 I. C. 521.

—Ss. 144 and 107—Successive renewals of time expired order—Impropriety of—Proper course to proceed under S. 107.

Where an order restraining the petitioners from entering certain land expired on the 23th April 1917 and a similar order was passed against the same parties on the 6th June 1917 *held*, that the Magistrate should not have made the second order but should have proceeded under S. 107, if there was a likelihood of the breach of the peace by one clearly in the wrong.

S. 144 should not be used for anything in the nature of a permanent expedient with the sanction of the Local Government. (*Roe and Jyala Prasad, JJ.*) **RASHBEHARI SINGH v. JAGNARAIN RAI.**

3 Pat. L. J. 130=  
44 I. C. 589=19 Cr. L. J. 365.

## CRIMINAL PROCEDURE CODE, S. 145.

—S. 145—Arbitration—Award—Acceptance of, by parties—Order based on award legality of.

Where the parties to a proceeding under S. 145 of the Cr. P. Code agreed that the matter should be referred to arbitration and on the passing of the award both sides accepted it and an order was made in accordance therewith.

*Held*, that the parties having accepted the award and no evidence having been offered by the party aggrieved by the award the Magistrate acted properly in proceeding upon the basis of the award and not insisting on evidence being adduced which the parties had no desire to offer. (*Roe and Jyala Prasad, JJ.*) **HALDAR SINGH v. BULAKHI SINGH.**

3 Pat. L. J. 248=  
4 Pat. L. W. 104=44 I. C. 122=  
19 Cr. L. J. 266.

—Ss. 145 and 107—Applicability of—Dispute as to possession—Propriety of proceedings under S. 145, Cr. P. Code. See CR. P. CODE SS. 107, 144 AND 145.

46 I. C. 296.

—S. 145—Dispute regarding immovable property—Right to tap a tree.

The right to tap a tree is a question which may be the subject of proceedings under S. 145 of the Cr. P. Code.

Where in a proceeding under S. 145 the Magistrate directs the second party to leave an opening in a wall which he was building, for the purposes of allowing the party to tap a tree *held*, that the order was without jurisdiction. (*Roe and Jyala Prasad, JJ.*) **JIB-LAL MAHTO v. EMPEROR.**

3 Pat. L. J. 316=45 I. C. 848=  
19 Cr. L. J. 656.

—S. 145—Evidence, rejection of, when a ground for revision.

Ordinarily the rejection of evidence might not be accepted as a good ground for revision of an order under S. 145 of the Cr. P. Code but the rejection of material evidences offered by a party would amount to a refusal to exercise jurisdiction vested in the Court by S. 145. (*Jyala Prasad, J.*) **PAITALI SINGH v. GANA-PATHI KUER.** 45 I. C. 337=19 Cr. L. J. 529.

—Ss. 145 and 439—Evidence—Omission to accept or consider documentary evidence—Error of law—No interference.

Where the dispute was regarding the mineral rights in a certain area between the lessees under the patnidars and the dar-patnidars and the magistrate declined to accept or consider documentary evidence on their side.

(*Per Chitty and Richardson, JJ. Tension Contra.*) That whether or not it is possible to decide the question of actual possession on the materials before him it is for the Magistrate to decide and where he has found it

## CRIMINAL PROCEDURE CODE, S. 145.

possible to decide that question, there is no material irregularity in procedure in rejecting evidence as to title and the High Court will not interfere even if the Magistrate committed an error of law or of judgment. (*Chitta. J.*) SHAHEH SUJADDI MANDAL v. F. L. CORN

22 C. W. N. 489=27 C. L. J. 465=  
46 I. C. 41=19 Cr. L. J. 631

— S. 145—Factum of possession—Actual possession, to be found—Symbolical possession, delivery of—Effect of. See (1917) DIG. COL. 401. HAZARI KHAN v. NAHER CHANDRA PAL CHOWDHURY.

22 C. W. N. 479=  
40 I. C. 713

— Ss. 145 and 146—Joint possession—Recognition of, improper -- Finding as to actual physical possession essential.

Ss. 145 and 146 of the Cr. P. Code authorise no recognition of joint possession and no order can be passed forbidding one of the parties to interfere with the joint enjoyment by both, 32 I.C. 668; 8 C. W. N. 435; 11 C. W. N. 512 Ref.

Under S. 145 the Court must record a finding as to which party was in possession, at the date of its preliminary order. (*Oldfield, J.*) SANKARA KYLASA MUDALIAR v. KUTHALINGA MUDALIAR.

47 I. C. 877=  
19 Cr. L. J. 977.

— Ss. 145 and 146—Jurisdiction of Magistrate to take proceedings under when no likelihood of breach of the peace—Whether he can review his orders under S. 145 -- High Court's power to interfere. See (1917) DIG. COL. 408. BALLAM SINGH v. LAL BABU.

3 Pat. L. W. 336=43 I. C. 329=19 Cr. L. J. 105.

— S. 145—Order under—Validity — Failure to give notice to party affected—Effect. See (1917) DIG. COL. 410. SHEONANDAN PRASAD SINGH v. WAHIDUL HUQ.

5 Pat. L. W. 254=(1917) Pat. 200=  
43 I. C. 336=19 Cr. L. J. 112.

— S. 145—Order without recording oral evidence on either side. See (1917) DIG. COL. 404: SAKHAYAT ALI v. ALHADI HAZI

21 C. W. N. 928=27 C. L. J. 83=  
43 I. C. 332=19 Cr. L. J. 108.

— Ss. 145, 435 (3) and 503—Proceedings under Ch. XII—Revisional power of the High Court.

An order passed under the provisions of S. 145 and proceedings under Chapter XII of the Cr. P. Code are not subject to revision in view of the terms of S. 435 (3) of the Code. But that section does not deprive the High Court of jurisdiction unless the proceedings are in fact, and not merely in name, proceedings under Chapter XII of the Code. (*Saunders, J.C.*) NGA CHIT v. NGA YA.

44 I. C. 741=19 Cr. L. J. 389.

## CRIMINAL PROCEDURE CODE, S. 146.

— Ss. 145, 435 (3) and 439—Proceedings under Chapter XII—Revision of, under S. 107 Govt. of India Act if proceedings taken without legal foundation. See GOVT. OF INDIA ACT, S. 107.

16 A. L. J. 189.

— S. 145—Proceedings under—Nature of—Acquittal of one of the parties under S. 147, I. P. C.—No bar to proceedings under this section.

Proceedings under S. 145 do not constitute a trial and are not in the nature of a trial. They are in the nature of Police proceedings in order to prevent the commission of offence, and the fact that there have been criminal charges brought by one or the other of the parties against each other so far from being a bar to action under Chap. XII constitutes evidence which may possibly prove the danger of disputes which it is desired to prevent

Where one of the parties to a proceeding under S. 145 of the Code of Criminal Procedure had already been prosecuted and acquitted under S. 147 of the I. P. C. Held, that this was no bar to the proceedings. (*Saunders, J.C.*) NGA CHIT v. NGA YAT.

44 I. C. 741=19 Cr. L. J. 389.

— S. 145—Proceedings under—Order without notice to the other party—Irregularity.

Proceedings under S. 145, Cr. P. Code were drawn up in respect of premises consisting of a *dolan* a hotel and a privy and the Magistrate made his final order with regard to the first two. Subsequently the omission in respect of the privy being brought to his notice by one of the parties the Magistrate declared that party's possession of it without any notice to the other party.

Held, that the order should not have been made without hearing the other party. (*Teunon and Shamsul Huda, J.J.*) NATABAR DUTT v. BIRESWAR RAKHIT.

22 C. W. N. 552=46 I. C. 412=  
19 Cr. L. J. 732.

— Ss. 145 and 144—Proceedings under S. 144 when proper—Impropriety of proceedings under S. 144—When case really falls within S. 145 Cr. P. Code.—Revision. See CR. P. CODE, SS. 144 AND 145, 3 Pat. L. J. 243.

— S. 145 — Question of possession — Decision based on reference to title—Propriety of.

In a proceeding under S. 145 of the Cr. P. Code if there is substantial evidence of possession or a conflict of evidence on that question, the Magistrate is justified in looking to the evidence of title in corroboration of evidence of possession. (*Thornhill, J.*) SUBH NARAYAN KUER v. LAKSHMI NABAIN KUER.

46 I. C. 301=19 Cr. L. J. 717.

## CRIMINAL PROCEDURE CODE, S. 145.

—Ss. 145 and 146—Receiver's appointment when proper. *See* 1977 D. 1001.  
197. *MUWA LAL v. TEMPEROR*  
[1917] Pat. 353=3 Pat. L. J. 147=  
44 I. C. 41=19 Cr. L. J. 249

—Ss. 145 and 335 (3)—*Reversion—Power of High Court—Limits to the extent of interference.*

Orders passed under Chapter XII of the Cr. P. Code are not subject to revision, being expressly excluded from the operation of S. 435 of the Code by clause 3 of that section. But in order to make S. 145 clause (2) applicable, that is to say, to deprive the High Court of the power of interference. In revision, the proceedings must be proceedings under Chapter XII of that Code in fact, and not only in name (*Sardar Lal v. Raja Ram Singh*, *Nawab Ali Khan v. Raja Ram Singh*, *Nawab Ali Khan v. Raja Ram Singh*). 44 I. C. 335=19 Cr. L. J. 351.

—Ss. 145 and 147—*Right to possession—Right to possession—Right to possession—Right to possession.*

The right to lay waste is not a right to the possession of land but a right to the use of it and the Court should deal with the matter under S. 147 of the Cr. P. Code. 100 *Field v. Sanjay Kulkarni*, *Mudaliar v. Nuthal Singh*, *Mudaliar*. 47 I. C. 377=  
19 Cr. L. J. 977.

—S. 145 Ex parte—*proceedings under—Sufficient time for filing written statement—Time granted—Order bad.*

In a proceeding under S. 145 of the Cr. P. Code the land in dispute having been attached, the date of the hearing was fixed for 10th January and the first party who had not been served with notice until the 3rd of January, appeared in court and applied for time to file a written statement, but the Magistrate refused time and tried the case *ex parte* and made an order in favour of the second party.

*Held*, that the proceedings were not conducted quite fairly to the first party, inasmuch as the land being under attachment there was no immediate prospect of a breach of the peace and that the order of the Magistrate must be set aside and the cases sent back to him for further enquiry and trial according to law. (*Field v. Sanjay Kulkarni*, *Mudaliar v. Nuthal Singh*, *Mudaliar*). 46 I. C. 719=19 Cr. L. J. 799.

—S. 145 (1)—*Preliminary order—Condition precedent—Breach of peace essential.*

The condition precedent authorizing a Magistrate to issue an order under S. 145 (1) of the Cr. P. Code, is that he should be satisfied that a dispute likely to cause a breach of the peace exists.

The fact that the complaint shows that the complainant was out of possession of the

## CRIMINAL PROCEDURE CODE, S. 145.

property in dispute for over two months does not violate the proceedings under S. 145 of the Cr. P. Code. (*Field v. Sanjay Kulkarni*, *Mudaliar v. Nuthal Singh*, *Mudaliar*). 44 I. C. 372=19 Cr. L. J. 444.

—Ss. 145 (1) and 167—*Proceedings started under S. 145—No option of evidence—Subsequent admission of proceedings under S. 145 without preliminary notice—Order declaring party in possession—Order without jurisdiction. See Cr. P. Code, ss. 167 and 145.* 4 Pat. L. W. 195.

—Ss. 145 (3) and 141—*Notice—Proceedings under S. 145—Conversion of proceedings under S. 145 into proceedings under S. 141—No preliminary notice—No preliminary notice—No preliminary notice—No preliminary notice.*

Where proceedings were initiated under S. 145 of the Cr. P. Code but subsequently, on the day fixed for hearing, the Magistrate converted them into proceedings under S. 141 in the presence of the parties who thereupon filed their written statements & adduced evidence in support of their case, but no fresh notice of proceedings was served on the parties.

*Held*, that the parties having been cognisant of the case and having filed written statements and hotly contested throughout, the Magistrate's action was not illegal. (*Field v. Sanjay Kulkarni*, *Mudaliar v. Nuthal Singh*, *Mudaliar*). 4 Pat. L. W. 234=44 I. C. 748=  
19 Cr. L. J. 396.

—Ss. 145 (3) and (4) and 139—*Want of service of notice—Defect of jurisdiction—Interference of High Court.*

Want of service of notice under S. 145 (3) of the Cr. P. Code is a grave irregularity which vitiates the proceedings.

The High Court has jurisdiction to set aside an order under S. 145, cl. (4), whether the provision in cl. (3) of that section is not complied with and the parties are prejudiced thereby. *Cr. P. Code* discussed. (*Field v. Sanjay Kulkarni*, *Mudaliar v. Nuthal Singh*, *Mudaliar*). 4 Pat. L. W. 133=  
43 I. C. 103=19 Cr. L. J. 71.

—S. 145 (4)—*Evidence—Procedure—Refusal of documents of title—Material irregularity.*

In a proceeding under S. 145 of the Cr. P. Code documents of title are often of great assistance in arriving at a right conclusion upon the question of possession.

Therefore where a Magistrate refuses to admit documents of title proposed to be filed by a party to proceedings under S. 145 of the Cr. P. Code he commits an error in the exercise of his jurisdiction. (*Field v. Sanjay Kulkarni*, *Mudaliar v. Nuthal Singh*, *Mudaliar*). 46 I. C. 604=19 Cr. L. J. 764.

## CRIMINAL PROCEDURE CODE, S. 145.

—S. 145 (4) and (5)—Initiation of proceedings—Dropping of proceedings when justifiable.

Where proceedings under S. 145 of the Cr. P. Code are started and evidence is recorded, the proceedings can only be terminated by a decision upon the evidence as to the possession of the contending parties under clause (4) of S. 145.

Under clause (5) of S. 145 a Magistrate can stop proceedings upon the only ground mentioned therein, viz., that there no longer exists any imminent danger of the breach of the peace. (*Jwala Prasad, J.*) *HIMMAT MIAN v. EMPEROR.* 45 I. C. 296=19 Cr. L. J. 712.

—S. 145 cl. 4—Order passed without hearing argument—Validity of—Procedure in cases under S. 145, whether that of summons case.

Where a Magistrate in a proceeding under S. 145 of the Cr. P. Code orders in favour of one party without hearing arguments in the case, although the legal representative of the parties wanted to be heard, as he did not consider the hearing of the argument necessary.

Held, that under clause (4) of S. 145 of the Cr. P. Code the Magistrate was bound to hear the parties and his refusal to hear both arguments vitiated the final order passed by him under S. 145 of the Cr. P. Code, 11 Cal. 762 ref.

The procedure to be followed in a case under S. 145 of the Cr. P. Code should be that prescribed for a summons case. (*Jwala Prasad, J.*) *DHABARI MIAN v. GORAKH PRASAD.*

5 Pat. L. W. 103=46 I. C. 517=19 Cr. L. J. 741.

—S. 145 (5) and (6)—Lands not forming subject-matter of proceeding—Order affecting such lands—Order in favour of persons not parties but directed to come in under cl. (5) if valid.

In proceedings under S. 145 of the Cr. P. Code a Magistrate has no jurisdiction to deal with land which is not in dispute between the parties and to declare the same to be in possession of persons who are not parties to the proceedings.

The Magistrate exceeds his jurisdiction if he makes an order under S. 145, cl. (6) in favour of persons who are not parties to the proceedings and who have not filed any written statement or taken any part in the proceedings except to address the Court on being directed by the Magistrate to come in for a limited purpose under S. 145, cl. (5). (*Chitty and Smither, JJ.*) *RADAMOHAN RAI v. NAIMUDDI MOLLA.* 43 I. C. 845=19 Cr. L. J. 653.

—S. 145—Order under ex-parte—Irregularity.

A Magistrate has no jurisdiction to pass an order under S. 146 of the Cr. P. Code behind

## CRIMINAL PROCEDURE CODE, S. 162.

the back of the parties or ex-parte. The proper course is to pass orders in the presence of both the parties. (*Jwala Prasad, J.*) *LACHMI SINGH v. BHUSI SINGH.*

43 I. C. 817=19 Cr. L. J. 225.

—S. 146 (1)—Attachment—Cancellation of, before termination of proceedings under S. 145, improper.

An order for attachment passed under S. 146 (1) of the Cr. P. Code must be kept in force till the adjudication of the rights of the parties by a competent Civil Court.

A Magistrate has no jurisdiction to cancel an attachment as a result of further enquiry and adjudication by him as to the right of possession. 25 Mad. 410 foll. (*Spencer, J.*) *GURVANNA GOWD v. GOVINDAPPA.*

44 I. C. 971=19 Cr. L. J. 443.

—S. 148—Costs—Order as to, to be passed only after notice to opposite side.

No order as to costs can be passed under S. 148 of the Cr. P. Code without notice being given to the opposite party against whom the order is proposed to be made. (*Jwala Prasad, J.*) *DWARKA RAI v. NATHUNI KOERI.*

45 I. C. 604=19 Cr. L. J. 764.

—S. 148 (3)—Order as to costs—Passing of 10 days after order in proceedings under S. 145, Cr. P. C.

Where an order directing payment of costs was passed 10 days after the order declaring the possession under S. 145 of the Cr. P. Code. Held, that the delay was not such a delay as was not permitted by the Cr. P. Code, 15 C. L. J. 267 and 26 Mad. 373 foll. (*Imam, J.*) *CHADHARI AHIR v. RAJA RAM SINGH.* 4 Pat. L. W. 234=44 I. C. 748=

19 Cr. L. J. 396.

—S. 154—First report—Value of.

The first reports made to the police may be and generally are, very valuable corroborative evidence of the testimony of the person who makes them, but that where the maker was not a witness but an accused person his report to the police constituted no corroboration of either the case against himself or that against any other co-accused. (*Scott Smith and Le Rossignol, JJ.*) *HARJI v. EMPEROR.*

4 P. R. (Cr.) 1918=45 I. C. 273=19 Cr. L. J. 513.

—S. 162—Police diaries—Use of, to contradict hostile witness for the Crown. See EVIDENCE ACT, SS. 155 AND 157. (1917) Pat. 95.

—S. 162—Statements made before police-user of, in court by prosecution for discrediting witness if he tells a different story—Legitimacy. See EVIDENCE ACT, SS. 155, 156, AND 157. 4 Pat. L. W. 325.

## CRIMINAL PROCEDURE CODE, S. 162.

—S. 162—Statements recorded by police—Use of to contradict defence witnesses—Value of such statement.

The statement of a prosecution witness recorded by the police can only be used in the manner prescribed by S. 162 of the Cr. P. Code. There is no provision of law by which the statement of a witness to the Police can be used to impeach his credit when he is called for the defence.

It is generally extremely unsafe to accept statements recorded by the police as verbally accurate or as containing a full and correct attempt of statement made by a witness in matters which are not clearly and obviously essential. (*Saunders, J. C.*) *NGA YON v. EMPEROR.* 3 U. B. R. (1918) 84=

46 I. C. 406=19 Cr. L. J. 726.

—S. 162—Statement of witnesses recorded by police—Admissibility of—Statement as to cause of death—Evidence Act, S. 32 (1).

The statements of witnesses recorded by the Police in the course of an investigation cannot be used in any way whatever in the course of the trial which results from that investigation, except in the one way laid down in S. 162 of the Cr. P. Code with the single exception referred to in clause (2). (*Saunders, J. C.*) *NGA BA THAN v. EMPEROR.*

46 I. C. 298=19 Cr. L. J. 715=3 U. B. R. (1918) 81.

—Ss. 164 and 533—Confession—Recording of by magistrate having no jurisdiction—Form of record—Irregularity.

A Magistrate recording a confession need not be one having jurisdiction in the case. An Honorary Magistrate of the Third Class not empowered to sit singly has nevertheless powers to record the confession.

No form of questions is prescribed by S. 164 (3) of the Cr. P. Code from which a Magistrate recording a confession must satisfy himself that he believes the confession was made voluntarily. Under S. 533 of the Cr. P. Code a defect in compliance with the provisions of S. 164 can be cured by evidence taken by the Court before which the confession is tendered. (*Darson Miller, J. J. Chapman and Atkinson, J. J.*) *GHINUA ORAON v. EMPEROR.*

3 Pat. L. J. 291=(1918) Pat. 57=43 I. C. 423=19 Cr. L. J. 315.

—S. 164—Magistrate—Recording of statements by—Practice—Propriety. See Cr. P. C.; S. 12. 16 P. R. (Gr.) 1918.

—S. 164—Oral confession to a Magistrate—Admissible in evidence—Proof by evidence of Magistrate. See EVIDENCE ACT, SS. 21, 24, 25, 26 and 91. 11 P. R. (Cr.) 1918.

## CRIMINAL PROCEDURE CODE, S. 165

—S. 164—Verification of confession—Statements made by accused in the course of proceedings inadmissible.

Per *Tennant, J.*—That although the verification of a confession is not wholly illegal the statements made by the accused in the course of the verification proceedings having been made in the course of an investigation and recorded in the manner provided in S. 164 are not inadmissible.

Per *Hudd, J.*—The verification of a confession in the presence of the accused leads itself to very great abuses and should be avoided. 17 C. W. N. 220 app. (*Tennant and Hudd, J. J.*) *AMIRUDDIN AHMED v. EMPEROR.*

45 Cal. 557=22 C. W. N. 213=

27 C. L. J. 149=24 I. C. 321.

12 Cr. L. J. 308.

—Ss. 164 (3)—Designated omission of certificate as to voluntary nature of confession—Confession, inadmissible.

Where a Magistrate recording a confession refuses to make the memorandum referred to in S. 164 (3) of the Cr. P. Code on the ground that in his opinion the confession has not been voluntarily made, such confession cannot form part of any judicial record and is, therefore, inadmissible in evidence. 6 Rom L. R. 950 foll. (*Stuart, J. C. and Karkhaya Lal, A. J. C.*) *RAM SUDH v. EMPEROR.*

50 L. J. 70=25 I. C. 267

=19 Cr. L. J. 507.

—Ss. 165 and 166—Police officer search by, outside territorial limits—Validity of.

A police officer on his own responsibility has no jurisdiction to search a house outside the limits of the police station of which the officer is in charge. (*Abdur Reza and Naper, J. J.*) *KRISHNA IYER v. EMPEROR.*

24 M. L. T. 98=3 L. W. 225=(1918) M. W. N. 526.

—Ss. 165 and 173—Scope of, general search for stolen property—Search for particular property—Legality—Report of investigation sent on—Fresh investigation if proper—Damages, stolen property, bona fide search for.

A search for stolen property generally, as opposed to a search for specific stolen property is not authorised by S. 165 of the Cr. P. Code.

A police officer bona fide conducting a search for a particular stolen property is not liable in damages to the person whose house is searched.

The number of investigations into a crime is not limited by law and when one has been completed by the sending of a report under S. 173 of the Cr. P. Code another may be begun on further information received. (*Phillips and Krishnan, J. J.*) *DIYAKAR SINGH v. RAMAMURTHI NAIDU.* 35 M. L. J. 127=47 I. C. 273=19 Cr. L. J. 901.

## CRIMINAL PROCEDURE CODE, S. 172.

—S. 172—*Police Diary—Necessity in non cognizable cases—Investigation under order of Magistrate S. 169—Magistrate—Recording of statements by—Practice of—Property.*

It is incumbent upon the Police Officer who investigates a non cognizable case under the orders of a Magistrate to keep the diary for which provision is made in S. 172 of the Cr. P. Code.

The indiscriminate use of S. 164 of the Code for the purpose of having the statements of witnesses recorded is to be deprecated and no statements should be recorded under that section unless the Magistrate is satisfied that the person making it is a free agent and voluntarily agrees to have his statement taken down. (*Rattigan, C. J. and Le Rossignol, J.*)  
HIBA LAL v. EMPEROR.

16 P. R. (Cr. 1913)=63 P. L. R. 1918=  
18 P. W. R. (Cr.) 1913=  
45 I. C. 277=19 Cr. L. J. 517.

—S. 172—Statements of witness recorded in police diaries, if may be used to contradict witnesses at the trial—Information in the nature of complaint, not confession. See (1917) DIG. COL. 414; DAL SINGH v. EMPEROR.

45 Cal. 876=21 G. W. N. 818=  
15 A. L. J. 475=1 Pat. L. W. 661=  
19 Eom. L. R. 510=33 M. L. J. 555=  
6 L. W. 71=26 C. L. J. 13=  
(1917) M. W. N. 522=  
13 N. L. R. 100=39 I. C. 311=  
9 Cr. L. R. 461=11 Bur. L. T. 54=  
44 I. A. 137 (P. C.)

—S. 173—Investigation report sent in—Fresh investigation not barred. See CR. P. CODE, SS. 165, 173. 35 M. L. J. 127.

—Ss. 181 (2) and 182—Criminal misappropriation of rents realised in one Dt.—Charge if can be tried in another Dt.—Jurisdiction.

The accused was charged in the Magistrate's Court at Burdwan, with criminal misappropriation of moneys said to have been realised by him as the agent of a Zemindar, who lived in Burdwan, from a tenant in the District of Murshidabad. It was alleged by the prosecution in an affidavit that the accused was called to Burdwan after the alleged occurrence and was there asked to render his accounts, but he declined to do so, and then received the order of dismissal.

Held, that on the allegation of the prosecution it might be reasonably said that the accused had retained the moneys, which were due from him, if they were due, in Burdwan, so that the Burdwan Court had jurisdiction to try the accused on a charge of criminal misappropriation by virtue of S. 181 (2) of the Cr. P. Code. (*Chitty and Richardson, JJ.*) GAURANGA SUNDAR MANDAL v. SATISH CHANDRA CHOUDEHUR.

46 I. C. 39=  
19 Cr. L. J. 679

## CRIMINAL PROCEDURE CODE, S. 181.

—Ss. 181 (2) and 531—Penal Code—S. 408—Criminal breach of trust by servant—Trial in a place outside jurisdiction—Conviction when bad.

The accused, a Tahsildar, realised a large sum of money from the tenants at a place M, and being bound to render accounts at a place B presented there a false account with false entries in his papers showing that a less sum than what he had realised, was due from him.

Quære: Whether the Court at B., had jurisdiction to try the offence of criminal breach of trust against the accused.

S. 531 of the Cr. P. Code requires the Court to see in every case, in which it is asked to set aside a conviction on the ground that the trying Magistrate had no jurisdiction to try the case, whether there has in fact been a failure of justice (*Chitty and Beauchcroft, JJ.*)  
BIMAL CHANDRA BANNERJEA v. TEJ CHANDRA BANNERJEA.

47 I. C. 92=  
19 Cr. L. J. 886.

—S. 185—Jurisdiction—Doubts as to—Decision of High Court. See (1917) DIG. COL. 416. BENODE BEHARI MAL v. GANESH CHANDRA. 21 C. W. N. 434=10 Cr. L. R. 18.

—S. 190 (1) (a) & (h)—Complaint—What is—Complaint to Deputy Commissioner—Order to present to Tahsildar—Re presentation to Tahsildar without fresh stamp—Validity.

A complaint was presented to the Deputy Commissioner who endorsed thereon. "The applicant may, if she likes, put up a complaint in the Court of Tahsildar." The complainant then presented the same petition to the Tahsildar without affixing a fresh stamp and without altering the heading giving the name of the Court.

Held, that the document manifestly amounted to a complaint as the order of the Deputy Commissioner must be taken to be one permitting the presentation of the petition, as itself a complaint to the Tahsildar. The omission to alter the heading does not affect the contents of the petition and the Tahsildar had therefore jurisdiction under S. 190 (1) of the Cr. P. Code to try the case. (*Drake Brokman, J. C.*) SANKER v. MUSSAMMAT MANNI.

10 Cr. L. R. 65.

—Ss. 190 (c) and 110—Local inspection by Magistrate—Proceedings under S. 110.

Although S. 190 (c) of the Cr. P. Code in terms applies only to offences, the principle of that section applies to cases of a miscellaneous character e. g. to proceedings under S. 110 Cr. P. C.

Where a Magistrate was influenced by his preliminary local investigation in coming to a finding as to the guilt of an accused person under S. 110 Cr. P. Code.

## CRIMINAL PROCEDURE CODE, S. 191.

*Held*, that the conviction was bad inasmuch as the Magistrate should not under the circumstances, have tried the case himself (*Mullick and Thornhill, JJ.*) GODHRAN AMIR v. EMPEROR. 47 I. C. 95=19 Cr. L. J. 895.

———S. 191—Magistrate taking cognizance of offence under—Duty to place before the accused his option—Omission—Irregularity. See DEFENCE OF INDIA ACT, S. 2.

13 A. L. J. 895

———S. 193—*Penal Code*. S. 193—*Contradictory statements*—*Lengthy cross-examination*—*Statements not absolutely irreconcilable*—*Inexpediency of sanction for prosecution*.

It is not expedient to grant sanction for perjury where the statements complained of were made in the course of lengthy cross-examination and are not absolutely irreconcilable and for which explanations, which go far to reconcile them have been subsequently given. (*Teunon and Richardson, JJ.*) BALDEO DAS TANSUK DAS v. MOHAMED INAMUL HUQ. 43 I. C. 826=19 Cr. L. J. 234

———S. 195—*Court*—*What it*—*Tribunal constituted under Calcutta Improvement Act if a Court*.

The tribunal constituted under the Calcutta Improvement Act is a Court within the meaning of S. 195 of the Cr. P. Code. 17 Cal. 872, 22 C. W. N. 165 ref. (*Chitty and Smither, JJ.*) NANDO LAL GANGULI v. KHETRA MOHAN GHOSE.

45 Cal. 535=27 C. L. J. 463=44 I. C. 331=19 Cr. L. J. 315.

———S. 195—*Delay in application for sanction, when a ground for refusal*—*Initiative taken by Govt.*

Generally delay by a private person in applying for sanction to prosecute indicates want of *bona fides* or culpable negligence or laches. Where however, the real applicant for sanction to prosecute for bringing a false suit was the Government and before the application was made, police enquiries were instituted and the opinion of the Legal Remembrancer was obtained as a result of which seven months elapsed between the date of dismissal of the suit and the date of the application, *held*, that the delay was not such as to show want of *bona fides* and did not amount to wilful negligence. (*Mullick, J.*) THE GOVERNMENT ADVOCATE AND THE PUBLIC PROSECUTOR v. MAHARAJ SINGH.

4 Pat. L. W. 181=2 Pat. L. J. 692=43 I. C. 437=19 Cr. L. J. 149.

———S. 195—*Delay in applying for sanction if a ground for refusal when Govt. is the real prosecutor*.

Ordinarily delay on the part of a private prosecutor in obtaining sanction in respect of offences against public justice is material as

## CRIMINAL PROCEDURE CODE, S. 195.

bearing upon the question of *bona fides* but where the Government is in fact the real prosecutor the question of *bona fides* does not arise. (*Mullick, J.*) JUGESHWAR PERSHAD v. RAGHO MISSEER. 4 Pat. L. W. 143=2 Pat. L. J. 683=43 I. C. 434=19 Cr. L. J. 146.

———Ss. 195 and 476—Order directing prosecution of two persons not parties to the suit for using as genuine a forged document—*Jurisdiction*. See (1-17) DIG. COL. 420. GANGA RAM v. EMPEROR. 40 All. 24=15 A. L. J. 317=42 I. C. 927=19 Cr. L. J. 15.

———Ss. 195 and 476—Qualifications in S. 195 incorporated in S. 476—Courts in the Presidency Towns—Offence committed before. See Cr. P. CODE, SS. 476 AND 1-5.

45 I. C. 686.

———S. 195—*Sanction*—*Delay*—*Sanction for forgery*—*Duty of Court to look at the forged document*.

Before granting sanction to prosecute an accused person for forgery it is desirable that the Court should examine the alleged forged document.

Inordinate and unexplained delay in making an application for sanction to prosecute is a sufficient ground for refusing the sanction. (*Jwala Prasad, J.*) KISHEN DAYAL SINGH v. JAGLAL MANDAL. 45 I. C. 834=19 Cr. L. J. 622.

———S. 195—*Sanction*—*Form and Requisite of*—*Offence and court to be specified*.

Where on an application for sanction to prosecute a person for perjury having been made, the Magistrate passed the following order: "Record seen. Sanction allowed."

*Held*, that this was not a substantial compliance with the letter of the law. The law requires that the Court shall as far as practicable state the offence in respect of which the prosecution is sanctioned and also specify the Court where it was committed. (*Mullick, J.*) SHEO GHULAM SAKU v. KHEYALI THAKUR. (1913) Pat. 366.

———S. 195—*Sanction*—*Hat, holding of rival hat on same day*—*Order prohibiting rival hat to hold it on same day*—*disobedience*—*Sanction to prosecute legality*. See Cr. P. CODE, S. 144. 23 C. W. N. 141.

———S. 195—*Sanction*—*Legality of order granting sanction not to be questioned by Magistrate trying the case*.

A Revenue Assistant sanctioned the prosecution of certain persons under S. 138 of the Penal Code. The Magistrate trying the case dismissed the complaint on the ground of insufficiency of the sanction.

## CRIMINAL PROCEDURE CODE, S. 195.

*Held*, that the Magistrate trying the case had no right to go behind the order of sanction and to question its propriety or legality. all he could do was to stay proceedings in order to allow the accused to get the sanction revoked (*Shadi Lal, J.*) **EMPEROR v. THAMMAN**

8 P. R. (Cr.) 1918=17 P. W. R. (Cr.) 1918=  
44 I. C. 751=19 Cr. L. J. 389.

—S. 195—"Sanction," meaning and essentials of—Direction to prosecute, whether sanction *See* (1916) DIG. COL. 471 DODUMAL AND MOTUMAL v. EMPEROR.

10 S. L. R. 65=35 I. C. 481=  
10 Cr. L. R. 19.

—S. 195—Sanction to prosecute—Expediency of granting when original, and appellate court have come to different conclusions.

Where there is a conflict of opinion between the Original Court and the Appellate Court as to the truth or falsity of any evidence, oral or documentary, the case is ordinarily not one in which sanction to prosecute for falsely giving or fabricating that evidence should ordinarily be accorded. (*Stampon, A. J. C.*) **AMOLAK HAND HERMAJ v. ISHNAJI**

48 I. C. 689=19 Cr. L. J. 769.

—S. 195—Sanction to prosecute—Grant of—Jurisdiction—Offence committed before city Magistrate—Transfer of particular Magistrate—Sanction granted by his successor—Validity.

The Court of the City Magistrate is not a permanent one with a perpetual succession of Judges and consequently sanction under S. 195 of the Cr. P. Code cannot be given by one City Magistrate in regard to an offence committed before his predecessor. (*Wilberforce, J.*) **JIA LAL v. PHOGO MAL**

22 P. R. (Cr.) 1918=34 P. W. R. (Cr.) 1918=  
=47 I. C. 286=  
19 Cr. L. J. 914

—S. 195—Sanction to prosecute—Notice, order of, not essential.

An order granting sanction for the prosecution of the accused under S. 211, I. P. C., is not bad merely because notice was not issued to the accused before the sanction was accorded. (*Broadway, J.*) **JAMAL-UD DIN v. MUHAMMAD ISMAIL**

11 P. W. R. (Cr.) 1918=  
54 P. L. R. 1918=  
43 I. C. 409=19 Cr. L. J. 121.

—S. 195—Sanction to prosecute—Proper form of order, *See* (1917) DIG. COL. 423: **EDULJI LIMJIBAI In re.**

19 Bom. L. R. 910=  
43 I. C. 328=19 Cr. L. J. 104.

—S. 195—Sanction—Small Cause Court Deposition, not read over—Delay in application—Sanction intended to be held in *terrorem* over opponent who held a decree against applicant.

## CRIMINAL PROCEDURE CODE, S. 195.

On the application of a deft. in a Small Cause Court suit, the successor-in-office of the Judge who had decreed the suit granted, after an inordinate delay, sanction for the prosecution of the plff. for perjury in respect of a false statement in his deposition.

*Held*, that as the Court record of the deposition was not read over to the plff. and he was not cross-examined on the statement, and as the sanction was granted after a long delay by a Judge who did not try the case, the sanction should be revoked especially as it would, if not revoked, be used by the deft. in *terrorem* both as regards execution under the decree passed against him and as regards the suit which he had brought for setting aside that decree and which was pending.

*Per Smithier, J.*—When a person wants to prosecute criminally, he must not be dilatory. (*Chitty and Smithier, JJ.*) **PREM CHAND GORAI v. SONATAN SAHA**

45 I. C. 268.  
19 Cr. L. J. 508.

—Ss. 193 and 475—Sections not mutually dependent—Procedure under difference in. *See* CR. P. CODE, SS. 476, 475 AND 195.

15 A. L. J. 912.

—S. 195 (1) (6) and 7—Sanction to prosecute for offence under S. 162 I. P. C.—Information to Dt. Magistrate that a person is in possession of arms without a license—Search by police on search warrant issued by Magistrate—Sanction for prosecution of informant—grant by Dt. Magistrate—Appeal to Session Judge competency of—Arms Act, S. 25—Action of Magistrate under, whether executive or Judicial.

The petitioner wrote to the District Magistrate informing him that one V had in his custody without license 3 pieces of arms and that the possession of such arms by V was dangerous to the lives of the villagers. The District Magistrate directed the issue of a warrant for the search of V's house and the police searched the house but discovered no arms. V thereupon applied for sanction for the prosecution of the petitioner for an offence under S. 182 of the Penal Code to the District Magistrate who granted it. The petitioner then applied to the Sessions Judge who dismissed the appeal holding that that order was passed by the District Magistrate not as a Court but as an executive officer and was not therefore appealable. *Held*, that the order of the District Magistrate granting sanction was a judicial order passed by a Court and was open to appeal under S. 135 (7) of the Cr. P. Code whether in directing a search the District Magistrate purported to act specifically under the Cr. P. Code with reference to an offence which had been brought to his notice or under S. 25 of the Arms Act. 2 Weir 150 not foll. 39 Cal. 629 *rel.* (*Sadasava*

## CRIMINAL PROCEDURE CODE. S. 195.

*Aiyer and Napier, JJ.*) GADDAM v. PANCHALU REDDY. IN RE. 35 M. L. J. 686—  
(1918) M. W. N. 508

———S. 195 (1) (b)—Sanction for perjury—Summary trial—Expediency of Court taking action *suo motu*.

In a summary trial if the Court thinks that perjury has been committed, it ought to take action itself and the grant of sanction to a private party is improper. (*Tudball, J.*) THAKUR DAS v. ABDULLA. 16 A. L. J. 992

———S. 195 (1) (b)—Sanction to prosecute for bringing a false suit—Grant of, when *ex parte* decree not set aside if competent.

A debt against whom an *ex parte* decree has been passed need not have that decree set aside before applying for sanction to prosecute the plaintiff for bringing a false suit. The fact that the period of limitation for setting aside the *ex parte* decree has expired is no bar to the grant of sanction. When the offence against the public justice has been committed the offenders are liable to punishment irrespective of the state of affairs in the civil court. (*Mullick, J.*) JUGESHWAR PRASAD v. RAGHO MISSEER. 4 Pat. L. W. 143—2 Pat. L. J. 688.  
—43 I. C. 434—19 Cr. L. J. 146

———S. 195, and 197—Sanction—Want of Commitment to Sessions—Jurisdiction to acquit accused on ground of want of sanction—Ss. 531, 537, applicability to such a case—Effect—S. 233, Cr. P. Code—Joint trial—Meaning of—Enquiry before committing magistrate if governed by.

A superior court has no power to set aside a Magistrate's order of commitment on the ground that he took cognizance of a complaint in respect of which sanction is required under Ss. 195 and 197 of the Cr. P. Code but in respect of which no such sanction was obtained. The provisions of Ss. 531 and 537 of the Code apply to such a case and the fact that objection based on want of sanction was taken at the earliest opportunity does not affect their applicability. 37 All. 293 and 3 Cr. L. R. 234 diss.

*Semble*.—A Sessions Court to which a commitment is made has power to acquit the accused on the ground of want of sanction under Ss. 195 and 197 of the Code, the prohibition in this respect contained in S. 537 applying only to the Court before which the case comes on appeal or revision.

An enquiry before a committing magistrate is not a trial and does not come within the prohibition contained in S. 233 of the Code. (*Sadasiva Iyer and Napier, JJ.*) THE SESSIONS JUDGE OF TANJORE *In re*.

35 M. L. J. 259.

———S. 195 (1) (a) — Receiver appointed by Court, prosecution of without sanction—Validity—Agent of firm appointed receiver—Position of.

## CRIMINAL PROCEDURE CODE. S. 195.

The accused was a partner and sole representative in Calcutta of a firm to which some moneys were due from a firm of which the complainant was a partner. The firm of the accused brought a suit in the High Court and by virtue of an order for attachment before judgment, took delivery of some bales of jute belonging to the firm of the complainant in respect of which the firm of the accused was appointed receiver. Subsequently an order was made by the High Court with the consent of the parties that on the complainant's firm furnishing security the firm of the accused would give delivery of the jute to the complainant's firm which however on asking delivery of some bales alleged that the jute had been tampered with. A charge was then laid under S. 406 I. P. C. against the accused.

*Held*, that although strictly speaking, the firm of the accused was appointed receiver, the accused as representing the firm must be deemed to be the receiver appointed by the High Court and the prosecution did not lie without the sanction of the Court. (*Chitty and Beachcroft, JJ.*) SANTOKE CHAND v. SUGAN CHAND. 22 C. W. N. 810—  
23 C. L. J. 115—43 I. C. 336—  
19 Cr. L. J. 820.

———S. 195 (1) (a) (b) and (c) (6) and (7)—'Court' in sub-S. (7) meaning of—Public servant acting under sub-S. (1) also a court—Sanction for prosecution order granting or refusing—Applicability of—High Court—Revisional Jurisdiction—Administrative Act of Subordinate Court.

An application to sanction the prosecution of the petitioner for an offence under S. 188 I. P. C. was made to a Second Class Magistrate whose order under S. 144 Cr. P. Code was alleged to have been disobeyed by the petitioner, sanction was refused by the second Class Magistrate but was granted on appeal by the Dt. Magistrate. Application to the Sessions Judge was made by the petitioner to revoke the sanction but the Sessions Judge declined to entertain the application on the ground that Dt. Magistrate was acting as an administrative officer and not as a court granting the sanction.

*Held*, reversing the decision of the Sessions Judge, that the orders of the Second Class Magistrate as well as that of the Dt. Magistrate was a judicial order and that an appeal lay against the order of the Dt. Magistrate to the Sessions Judge under S. 195 (7) of the Cr. P. Code.

The High Court has appellate or revisional authority over an administrative order of a Dt. Magistrate.

A public servant *qua* public servant is not a court subordinate to the authority of the High Court as required by S. 195 (6) of the Cr. P.

## CRIMINAL PROCEDURE CODE, S. 195

Code. (*Sadasiva Aiyar and Napier, JJ.*)  
 ARUNACHELHAM PILLAI v. PONNUSWAMI.  
 35 M. L. J. 254 = S. L. W. 422 =  
 24 M. L. T. 326 = (1918) M. W. N. 825.

—S. 195 (1) (b)—*Perjury—Sanction—*  
*Old conviction—Denial of, in cross-examination—*  
*Sanction if should be granted.*

The accused was convicted of theft thirty years ago. Excepting this bare fact nothing more appeared, the record having been destroyed. In the course of a cross-examination of the accused in a subsequent case he was asked about this conviction which he denied. Thereupon the opposite party applied for sanction to prosecute him for perjury which was granted.

*Held*, that the sanction had been improperly granted under the circumstances. (*Tudball, J.*)  
 GAJADHAR v. EMPEROR. 15 A. L. J. 923 =  
 48 I. C. 463.

—S. 195. (1) (b)—*Sanction to prosecute pendency of proceedings before Magistrate of the first class—Transfer of Magistrate and succession by a Magistrate of the second class—Sanction proceedings sent up to Dt. Magistrate—Sanction granted by the latter valid.*

Abetment of perjury having been alleged to have been committed by the applicant in the course of an enquiry by a committing Magistrate (who was a Magistrate of the First Class) an application for sanction to prosecute the applicant was made to the Magistrate. While the proceedings were pending before him, the Magistrate was transferred and was succeeded by a Magistrate who had only Second Class powers. The outgoing Magistrate, therefore sent the sanction papers to the Dt. Magistrate. The latter took the matter on his own file issued the necessary notice, held an enquiry and gave the sanction.

*Held*, that the Dt. Magistrate had jurisdiction to give the sanction, for he was "such Court" referred to in S. 195 (1) (b) of the Cr. P. Code, as he was an officer on whom devolved the disposal of committal of cases in the District. (*Heaton and Shah, JJ.*) RAMRAO N. BELLARY *In re*. 42 Bom 190 =  
 20 Bom L. R. 117 = 19 Cr. L. J. 332 =  
 44 I. C. 348

—S. 195 (1) (b)—*Trivial case, sanction to prosecute—Charge of trivial offence in complaint—Acquittal of accused—Allegations in complaint—Sanction for prosecution in respect of.*

The petitioner lodged a complaint in the Magistrate's Court accusing the opposite party of offences under Ss. 355 and 304 I. P. C. Some serious allegations were made in the complaint which, however, were declared to be absolutely false in an affidavit put in by the opposite party. The Magistrate after hearing some prosecution witnesses adjourned the case for the convenience of the complainant but on the adjourned date the complainant

## CRIMINAL PROCEDURE CODE, S. 195.

being absent, the Magistrate acquitted the opposite party with the remark that the matter was an extremely trivial one. The Magistrate granted sanction for the prosecution of the petitioner for an offence under S. 211, I. P. C.;

*Held*, that having regard to the trivial nature of the charge which was made in the petition of complaint and having regard to the way in which the Magistrate had dealt with it, namely, that he acquitted the accused on the ground that the case was of a trivial nature and the complainant was not present, it was not a case where sanction to prosecute the complainant under S. 211 ought to have been granted. (*Sanderson, C. J., and Bechcroft, J.*) NAIRCAR v. NALINI RANJAN SIBKAR. 46 I. C. 607 =  
 19 Cr. L. J. 767.

—S. 195 (1) (c)—*Party to any proceeding—Proceedings against person not a party under S. 476, Cr. P. C. if competent.*

*Quare*.—Whether the limitation contained in S. 195 (1) (c) of the Cr. P. Code, in the words "a party to any proceeding in any Court", applies also to an order under S. 476 of the Code by reason of the words in the latter section, "any offence referred to in S. 195." (*Juala Prasad, J.*) RAM SARUP v. EMPEROR.

43 I. C. 828 = 19 Cr. L. J. 236.

—S. 195 (4)—*Omission to state particulars—Order on petition filed on the original trial itself without preliminary inquiry or notice—Legality of prosecution. See (1917) DIG. COL. 428; BARHMA DUTT THAKUR v. NONOO LAL THAKUR. 3 Pat L. W. 346 =*

43 I. C. 333 = 19 Cr. L. J. 169.

—S. 195 (6) and (7)—*Appeal—Forum—Sanction proceedings—Order of Subordinate Judge—Appeal from to District Munsif and not to the High Court—Madras Civil Courts Act, Ss. 13 (d) and 27.*

A District Court is the authority to which the Court of a Subordinate Judge is subordinate within the meaning of sub-section (6) of S. 195 of the Cr. P. Code. The section only refers to the Courts and makes no distinction between appellate and original jurisdiction. An appeal lies, therefore, from orders passed by Subordinate Judges under S. 195 of the Cr. P. Code whether in the exercise of the original or appellate jurisdiction, to the District Court and not to the High Court. (*Bakewell and Phillips, JJ.*) RAPAKA VIYYANNA v. PARAKALA BAJAMMA. 44 I. C. 120 = 19 Cr. L. J. 264.

—S. 195 (6) and (7)—*Collector—Appraisal proceedings under B. T. Act Ss. 69 and 70—Collector to whom Subordinate—Court of original jurisdiction, meaning of. See (1917)*



## CRIMINAL PROCEDURE CODE, S. 196.

—S. 196-A—Interpretation—Conspiracy to commit an offence—Non-cognizable offence or cognizable offence punishable with death—Meaning of—Complaint—Petition by three persons charging a Tahsildar with various offences, whether amounts to *See* (1917. DIG. COL 481. *EMPEROR v. THAKAR DAS*. 40 All. 41=15 A. L. J. 841=42 I. C. 924=19 Cr. L. J. 12.

—Ss. 197, 206 and 213—Offence committed by *Vatandar Patil*—Sanction to prosecute—Magistrate taking cognizance of the case and recording the whole of the evidence in the absence of sanction—Committal to sessions—Production of sanction on the day of commitment—Proceedings before magistrates invalid.

The accused, a *Vatandar Patil*, was charged with harbouring an offender and receiving a bribe from him. No sanction required by S. 197 of the Cr. P. Code was granted before the commencement of the trial. The Magistrate committed the case to the Court of Session. On the day the case was thus committed, sanction under S. 197 was produced before the Magistrate.

*Held*, that inasmuch as the Magistrate had taken cognizance of the case and recorded the whole of the evidence in the absence of a sanction under S. 197, the proceedings before him were without jurisdiction and totally invalid. (*Heaton and Shah, JJ.*) *EMPEROR v. BHIMAJI VENKOJI NADGIH*. 42 Bom 172=20 Bom. L. R. 89=44 I. C. 454=19 Cr. L. J. 342.

—Ss. 197 and 532—Sanction—Public servant—Prosecution of—Sanction in general terms—Not bad.

The *Kulkarni* and the *petil* of a village were charged with the offence of cheating in that they conspired to levy extra amounts of money from three persons who came to pay the land assessment. Sanction for the prosecution of the accused was given by the Collector "for cheating or for such other offence with which it may be necessary to prosecute them in connection with obtaining money from ryots." The Additional Sessions Judge to whom the accused were committed for trial, went on with the trial and recorded the opinion of the assessors. Whilst the case was thus pending for judgment, the Judge being of opinion that the sanction under S. 197 of the Cr. P. Code was invalid made an order under S. 532 of the Code, quashing the commitment and directing a fresh enquiry.

*Held*, that the sanction was not invalid on account of vagueness inasmuch as it had sufficiently designated the offence or offences which might be established in connection with obtaining money from ryots, and that under the circumstances the Additional Sessions Judge had no power to quash the commitment and direct a fresh enquiry under S. 532 of the Cr. P. Code, the proper procedure

## CRIMINAL PROCEDURE CODE, S. 200.

being to make a reference to the High Court for quashing the commitment under S. 215 of the Code (*Shah and Marten, JJ.*) *EMPEROR v. MADHAV LAXMAN*.

20 Bom. L. R. 607.

—S. 199—Offence of criminal trespass with intent to commit adultery—Complaint by husband not necessary. *See* PENAL CODE, SS. 441, 497 and 511. 47 I. C. 77.

—S. 199—Penal Code Ss. 376, 498. Husband—Complaint of theft—Conviction of accused of offence under S. 498—Legality.

Where a husband charged the accused persons only with theft, the Court cannot convict them of an offence under S. 498 of the Penal Code, having regard to the provisions of S. 199 of the Cr. P. Code. (*Scott Smith, J.*) *RODA SINGH v. EMPEROR*.

2 P. R. (Cr.) 1918=44 I. C. 204=19 Cr. L. J. 300.

—Ss. 200, 203, 435, 437, and 528—Complaint—What is—Petition of objection to dismissal of counter-case whether a complaint—Order dismissing counter case without examining complainant—Revision against, to District Magistrate—Maintainability.

A instituted a criminal case against B under S. 457 of the Penal Code and B lodged an information against A alleging that he had committed an offence under S. 437. B was acquitted of the charge under S. 457 and in the counter-case the Magistrate recorded the order "Enter false under S. 379, I. P. C." B thereupon filed a petition of objection before the Sub-Divisional Officer asking that an investigation might be made and A summoned. He also moved the District Magistrate who set aside the order dismissing the counter-case and sent the case to the Sub-Divisional Magistrate for orders. A applied in revision to the High Court to set aside the Dt. Magistrate's order. *Held*,

(1) that the petition of objection was a complaint within the meaning of the Cr. P. Code

(2) that the Magistrate's order directing the case under S. 379 to be entered as false was in substance an order of dismissal under S. 203.

(3) that where the final order is in fact an order of dismissal under S. 203 then the revisional jurisdiction of the Dt. Magistrate can be exercised even though the complainant has not been examined on oath.

(4) that S. 437 contemplates that where a complainant has not been examined on oath that S. 437 contemplates that where the complaint has been dismissed under S. 203 the revisional jurisdiction of the Dt. Magistrate can be invoked irrespective of consideration whether the dismissal is legal or illegal. 30

## CRIMINAL PROCEDURE CODE, S. 200.

Cal. 923 dist. 4 C. W. N. 242 ref. (*Mullick and Atkinson, JJ.*) *SADHU CHARAN RAY v. BEBI SWAIN.* 3 Pat. L. J. 346=

47 I. C. 70=19 Cr. L. J. 874.

—Ss. 200, and 537 (a)—*Letter from Dt. Judge asking Dt. Magistrate to investigate into a case—Omission to examine the judge on oath—Letter treated as complaint—Irregularity, whether vitiates trial.*

A District Judge forwarded to the District Magistrate a copy of his judgment with a letter in which he called attention to the remarks as regards the forgery of a will and requested the latter to take up the matter for prompt investigation. Without examining the District Judge on oath in support of the statements in his letter, the District Magistrate ordered a Police investigation; and treating the letter as a complaint he brought the case to trial before a competent Magistrate:—

Held, that the failure to examine the District Judge on oath was an irregularity of a kind which came within those enumerated in cl. (a) of S. 537 of the Cr. P. Code and that therefore the proceedings against the accused were properly initiated. (*Heaton and Hayward, JJ.*) *In re APPARAO JHAVERILAL.*

20 Com. L. R. 1013= 48 I. C. 682.

—Ss. 202 and 203—*Complaint of assault—Examination of complaint—Issue of summons postponed—Police report that complaint false—Dismissal of complaint without enquiry and investigation—Interference by High Court:—*

Where a person complained to the magistrate that he had been assaulted and caused injuries by the accused and the Magistrate after examining the Complainant postponed the case to another date and in the mean time the police report was submitted pointing out that the complainant's case was false and the Magistrate after perusing that report dismissed the complaint.

Held, that where a full enquiry had been held by the police, the High Court would refuse to exercise its discretion to re-open the matter which may result in harassment of the party and wasting the time of the High Court. But where a perfunctory inquiry has been made by the Police and the report considered in a perfunctory manner by the Magistrate the High Court will interfere and insist upon the provisions of S. 202 being strictly enforced.

Under S. 203 of the Cr. P. Code a court is entitled to dismiss a complaint if after examining a complainant there is in the judgment no ground for proceeding and there is nothing in the section requiring an enquiry under S. 202 of the Cr. P. Code. S. 202 of the Cr. P. Code deals with the question of postponing the issue of process and S. 203 of the Cr. P.

## CRIMINAL PROCEDURE CODE, S. 203.

Code deals with the procedure to be adopted in dismissing the complaint (*Re. J.*) *SHEONANDAN MAHATO v. EMPEROR*

4 Pat. L. W. 111=44 I. C. 119= 19 Cr. L. J. 263

—Ss. 202, 203 and 204—*Issue of process against accused—Postponement of—Local enquiry—Accused allowed to appear and cross-examine—Procedure illegal—No failure of justice—No revision.*

S. 202 is imperative in requiring the Magistrate to give reasons before postponing the issue of process against the accused, and an automatic order for local enquiry is sufficient.

It is wrong for the court to allow accused to attend at preliminary judicial enquiry before issue of process, and to cross examine the prosecution witness.

The Government Circular regarding investigation into charges against Police Officers does not affect the provision of S. 202 of the Cr. P. Code.

But errors of procedure in holding local enquiry will not vitiate the proceeding or order passed therein unless it has occasioned failure of justice, and the High Court will not interfere when the prosecution was not shut out. (*Jwala Prasad, J.*) *MUSABRI RAM MAHURI v. RAJ KISHORE LAL.*

4 Pat. L. W. 307=45 I. C. 237= 19 Cr. L. J. 527.

—Ss. 202 and 203—*Local investigation, meaning of—Dismissal of complaint without examination of witnesses.*

The local investigation referred to in S. 202 of the Cr. P. Code is not restricted to the investigation of the physical features only, it means an enquiry into the truth or the falsity of the allegations made in the complaint petition. The word "local" is used with a view to hold the investigation in the locality for the convenience of the parties and their witnesses, and it may also necessitate in certain cases an inspection of the place of occurrence. The word "investigation" is not defined in the Code, and must be taken to have been used in its ordinary sense. After receiving the result of the local investigation directed under S. 202 of the Cr. P. Code the Magistrate is not bound to examine any witnesses or to hold an enquiry before he dismisses the complaint. (*Jwala Prasad, J.*) *MUNSHI MIAN v. EMPEROR.*

43 I. C. 414=19 Cr. L. J. 126.

—S. 203—*Complaint—Dismissal—Legality—Dismissal without enquiry after order of further enquiry.*

After an order of further enquiry is passed the complainant is entitled to produce, and the Magistrate is bound to receive the whole evidence for the prosecution and is not autho-

## CRIMINAL PROCEDURE CODE, S. 203.

vised to dismiss the complaint again under S. 203 Cr. P. C., simply on the police report. (Shadilci, J.) THAKUR SINGH v. KIRPAL SINGH 53 P. L. R. 1918=

10 P. W. R. (Cr) 1918=  
44 I. C. 964=19 Cr. L. J. 436

—S. 203—Police report that case is false—Complaint to magistrate impugning police report—Examination of complainant on oath—Dismissal of complaint on subsequent date—Legality.

Where the Police after investigating the case submitted a report characterising the case as false and the Magistrate asked the Sub-Inspector to lodge a formal complaint for prosecution under S. 182 I. P. C. and the complainant then lodged a formal complaint to the Magistrate and impugned the Police report and asked for summons on the accused after considering the Police Report in the presence of the muktihar of the complainant and the Magistrate after examining the complainant passed the order that the complaint petition and the Police Report be taken up on a subsequent day and on the day fixed after perusal of the Police Report dismissed the complaint under S. 203 of the Cr. P. Code.

Held, that the order under S. 203 was not illegal. S. 203 empowers the Magistrate to dismiss the complaint without any investigation under S. 202 if after examining the complainant he considers there is no sufficient reason for proceeding. There is nothing in the section to show that he must at once consider it. (Jwala Prasad, J.) NAWAZI SINGH v. JADU DHANUK (1918) Pat 44= 43 I. C. 820=19 Cr. L. J. 228

—Ss. 203 and 437—Summary dismissal of complaint—Further enquiry—Notice to accused if necessary.

Where an accused person was not called upon to appear in the first instance and where an order was only made under S. 203 of the Cr. P. Code the issue of a notice is unnecessary when the order is set aside. (Banerjee, J.) LIAQAT HUSSAIN v. EMPEROR.

49 All. 138=16 A. L. J. 30=43 I. C. 622=  
19 Cr. L. J. 206.

—Ss. 206 and 213—Order of to Sessions in view of a Government resolution and the request of parties—Committal bad.

It is not competent to a Magistrate to commit the case to the Court of Sessions solely by the wishes of the parties and the terms of Government Resolution. (Heaton and Shah, JJ.) EMPEROR v. BHIMAJI VENKAJI NADGAR 42 Bom 172= 20 Bom L. R. 89=44 I. C. 454= 19 Cr. L. J. 342.

—S. 207—Commitment to Court of Session—Assault resulting in death—Commitment when proper.

## CRIMINAL PROCEDURE CODE, S. 210.

The Cr. P. Code does not require that all cases of assault ending in death should be committed to the Court of Sessions. The expression "ought to be tried by such Court" in S. 207 of the Code is limited to cases which the Magistrate is not competent to try or cases in which he is unable to inflict an adequate punishment. (Pratt, J. C. and Hayward, A. J. C.) EMPEROR v. ISMAIL.

11 S. L. R. 79=44 I. C. 335=  
19 Cr. L. J. 319.

—S. 203 (2)—Cross-examination by accused—Postponement of till all the witnesses for prosecution are examined in chief—Procedure illegal—Evidence Act, S. 138.

The proper time for cross-examination of a witness is immediately after the examination in-chief, and an order by a Magistrate allowing an accused, examining the prosecution witnesses until they have been all examined in chief is a proceeding not contemplated by the Cr. P. Code.

An accused has no right under S. 203 (2) of the Cr. P. Code to postpone his cross examination of the witnesses for the prosecution until they have been all examined in-chief. The Magistrate however has power to re-call witnesses for further cross examination if the circumstances of the case call for it (Ormond, J.) TAMBI v. EMPEROR. 44 I. C. 343= 19 Cr. L. J. 327.

—S. 209—Case triable by Sessions Court—Procedure of Magistrate.

In a case triable by the Court of Sessions the Magistrate under S. 209 of the Cr. P. Code is not authorised to write a judgment: all that he is empowered to do is to record reasons for a discharge, if he makes such an order and to pass the order. 26 All 564 ref. (Knox, J.) HAIT RAM v. GANGA SAHAJ. 40 All. 615=16 A. L. J. 486=46 I. C. 290= 19 Cr. L. J. 706.

—Ss. 210 and 213 (2)—Commitment Propriety, of when—Quashing of commitment.

A committing magistrate has a discretion, even after he has framed a charge, of cancelling it, if after the hearing of evidence for the defence he considers that there are no longer sufficient grounds to put the accused on his trial. If he entirely believes the evidence for the prosecution, however numerous the witnesses may be, he ought to discharge the accused. If he is doubtful as to their credibility but the evidence, if believed, would be sufficient for a conviction, he should not take on himself the functions of a superior Court, but commit the case to Sessions (Rigg, J. C.) NGA HMYIN v. EMPEROR. 43 I. C. 326= 19 Cr. L. J. 102.

—S. 215—Commitment, order of—Questioning of—Absence of evidence to support commitment

## CRIMINAL PROCEDURE CODE, S. 215.

Under S. 215 of the Cr. P. Code the High Court is precluded from entertaining an application for revision on a question of fact against an order of commitment made under Ss. 213 and 214 of the Code, but it has power to quash commitment if there is no evidence to support it, the absence of such evidence being a question of law and not of fact. (*Ormond, J.*) **TAMBI v. EMPEROR.**

11 Bur. L. J. 144=46 I. C. 817=  
19 Cr. L. J. 501.

—S. 215—Commitment—Quashing of—  
No evidence to sustain charge—Question of law.

The absence of evidence to warrant a commitment is a point of law. 23 I. C. 478; 5 C. W. N. 411; 14 C. 740 ref. (*Bigg, J. C.*) **NGA HMYIN v. EMPEROR.**

43 I. C. 323=  
19 Cr. L. J. 192

—S. 215—Commitment order—Question of—Point of law. See (1917) DIG. COL. 434; **EMPEROR v. GODA RAM.**

15 A. L. J. 755=43 I. C. 806=  
19 Cr. L. J. 224.

—Ss. 215, 254, and 37—Commitment to Sessions by Magistrate having power to improve the maximum sentence—Legality of.

It is competent to a Magistrate in that behalf to commit a case to the Court of Sessions even though he can himself impose the maximum sentence provided by law for the offence. If in his opinion, the case is one which for other reasons ought to be tried by the Court of Sessions. 24 C. 429; 1 M. L. T. 61; 11 Cr. L. J. 54 not foll. 3 C. 495; 1 Mad 289 rel. on. (*Sadasiva Aiyar and Naxier, JJ.*) **CROWN PROSECUTOR v. BHAGAVATHI.**

35 M. L. J. 559=(1918) M. W. N. 870=  
9 L. W. 14=48 I. C. 337=  
19 Cr. L. J. 997.

—S. 215—Conviction of two persons for offence of kidnapping—Appeal by one to Sessions Judge—Alteration of charge and direction to commit to Sessions Judge—Magistrate committing both accused to the High Court—Jurisdiction.

Two persons were convicted of kidnapping under S. 363 I. P. C., but one of them alone appealed to the Sessions Judge against the conviction. The Sessions Judge acting under S. 423 of the Cr. P. Code set aside the conviction and sentence and ordered the accused to be committed for trial for an offence under S. 366 of the Penal Code. As regards the other accused he referred the case to the High Court and while the latter's case was pending in the High Court the Magistrate committed both the accused to the Court of Sessions for trial for an offence under S. 365 of the Penal Code.

*Held*, that so long as the conviction and sentence against the non-appealing accused on

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the trial under S. 368 of the Penal Code stood, the Magistrate had no jurisdiction to commit that person to the Court of Sessions and the High Court set aside that order in revision. (*Piggot, J.*) **EMPEROR v. BHAGWANI.**

15 A. L. J. 314=45 I. C. 146=  
19 Cr. M. L. J. 492.

—Ss. 215 and 532—Criminal trial—Trial for offences under S. 420, I. P. C., by Assistant Sessions Judge—Judgment reserved—Order quashing commitment and directing fresh inquiry. Illegality of—Proper procedure to make a reference to High Court. See CR. P. CODE, Ss. 197 AND 532 20 Bom. L. R. 607.

—Ss. 221, 222 and 537—Biting—Contents of the charge—Common object not specified—Irregularity.

Though the non-stating of the common object of an unlawful assembly in a charge under S. 147, I. P. C. renders it a defective charge, the defect will not vitiate the trial unless it has really prejudiced the accused (*Kumarasami Sastry, J.*) **DARSHINAMURTHI RAJALI In re**

(1918) M. W. N. 129=  
7 L. W. 83=43 I. C. 616=  
19 Cr. L. J. 200.

—Ss. 221 (7) and 537—Charge omission to set forth previous conviction—Irregularity—Prejudice. See (1917) DIG. COL. 435; **NGA HLA v. EMPEROR**

10 Bur. L. T. 169=  
37 I. C. 63.

—S. 223—Cheating—Omission to state particulars—No prejudice.

The omission to specify in the charge the manner in which the applicant cheated, whether by illegal act or by omission, cannot be regarded as material as it had not misled the accused. (*Acton, A. J. C.*) **JANGILAL v. EMPEROR.**

45 I. C. 993=19 Cr. L. J. 657.

—S. 233—Joint trial, meaning of—Enquiry before committing magistrate if governed by S. 233. See CR. P. CODE, S. 195.

35 M. L. J. 259.

—Ss. 233 and 235—Same transaction—Penal Code, S. 213—Offence under—Incorrect record by Police Officer of various documents connected with same investigation—If triable at one trial and whether one charge is sufficient—If illegal merely because one charge is framed in respect of several offences of the same kind.

The accused, an Inspector of Police, was tried for an offence under S. 213, I. P. C., inasmuch as he had substituted in various documents, including seven Police diaries relating to the investigation of a case, the name of a man called Habiba, son of Kanda, for Habiba, son of Mamun, with intent to save the latter from punishment. The Magistrate framed one charge in respect of all the documents concerned and convicted the accused.

## CRIMINAL PROCEDURE CODE S. 234.

*Held*, that all the documents were prepared with the same object, namely the saving of Bahiba son of Mamun, from punishment, the various acts formed parts of the same transaction within S. 235, Cr. P. C. and could be tried at one trial.

*Held also*, that as the documents concerned all formed parts of one record, the charge against the accused was really one, *viz.*, that of having prepared an incorrect police record and the single charge drawn up by the Magistrate was therefore not defective.

*Held further*, that even if it be considered that the accused should have been charged with separate offences in regard to each document the trial was not illegal merely because one charge was framed in regard to all the documents.

41 Cal. 66 and 30 C. 465 (*F. B.*), foll. 25 Mad. 61 (*P. C.*), ref. 40 Cal. 843, not foll. (*Scott, Smith and Shadi Lal, JJ.*) *EMPEROR v. MAHOMED HUSSAIN* 12 P. R. (Cr.) 1913= 83 P. L. R. 1918=23 P. W. R. (Cr.) 1918=45 I. C. 276=19 Cr. L. J. 510.

—Ss. 234 and 235—Cheating—Several persons alleged to have been cheated at the same time by similar representations—Joinder of charges—Trial defective.

Where the accused summoned several persons in a village to assemble and induced them to part with money in his favour on the representation and inducement that he would not compel them to subscribe up to a particular limit for the war loan and the accused took the money paid by each villager he committed a distinct offence and the trial of the case in respect of all the offences was therefore, bad for misjoinder of the charges as under S. 234 of the Cr. P. Code the applicant could not be tried for more than three charges. (*Kotwal, A. J. C.*) *JANGILAL v. EMPEROR.* 45 I. C. 993=19 Cr. L. J. 657.

—Ss. 234, 235 and 238—Issue of several false receipts and falsifying many items in accounts with a view to abetting cheating within a year—Trial for more than the different items by different courts.

The accused who was a clerk in a Sugar Factory was charged with having issued false receipts to tenants for supply of sugar cane which had not been supplied and with having falsified accounts with a view to cheating the Factory in respect of the price of sugar-cane, and three items were selected and he was committed to the Court of Sessions for trial on charges under Ss. 463 and 471 A of I. P. C. While this case was pending, the accused was put on his trial in respect of some other items before a Deputy Magistrate on a charge under S. 420, I. P. C.

*Held*, that under S. 234 of the Cr. P. Code the separate trial of the accused was not illegal. If a person commits fifty offences in

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the course of twelve months of the same kind S. 234 of the Cr. P. Code does not require that he shall be tried only for three of these offences and the trial in respect of the rest of the charges shall not be abandoned.

The facts out of which the several offences arose did not form one and the same transaction within the meaning of S. 233 Cr. P. Code although the motive or object underlying the commission of all these offences was one *viz.*, to cheat the Factory.

It is desirable that the case should be tried by the same Court so that punishment may not be piled upon the accused. (*Atkinson, J.*) *SITAL PRASAD v. EMPEROR.*

4 Pat. L. W. 105=44 I. C. 47=19 Cr. L. J. 255.

—Ss. 234 and 239—Joint trial—Legality—Same transaction—What is. *See* (1917) DIG. COL. 436; *JAI SINGH v. EMPEROR.*

44 P. R. (Cr.) 1917=43 I. C. 324=19 Cr. L. J. 100.

—S. 234—Joint trial of several accused not bad, person—"General clauses" Act S. 3 (39).

The word "person" in S. 234 of the Cr. P. Code, is not confined to the singular number 33 C. 292 not foll. 38 A. 457 foll.

It is for the trial court in the exercise of its discretion to determine whether the trial of more than one accused should be joint or not. If a joint trial would prejudice the accused the trial should be separate. (*Mullick and Atkinson, JJ.*) *KAILASH PRASAD VARMA v. EMPEROR.*

3 Pat. L. J. 124=5 Pat. L. W. 34=46 I. C. 33=19 Cr. L. J. 67.

—S. 234—Joint trial—Same transaction. *See* (1917) DIG. COL. 437. *RAM RATAN, SAKUL v. EMPEROR.*

21 C. W. N. 1111=42 I. C. 977=19 Cr. L. J. 17.

—Ss. 234 and 110—Misjoinder—Security proceedings—Joint Trial Habitual association between person charged in respect of misconduct alleged in complaint—Proof of, necessary. *See* Cr. P. CODE, Ss. 110 AND 234. (1918) M. W. N. 751.

—S. 234—Misjoinder of charges. *See* (1916) DIG. COL. 483; *RAHIM BIBI v. MOBARAK MANDAL.* 20 C. W. N. 672=34 I. C. 336=10 Cr. L. R. 94,

—Ss. 234 and 537—Misjoinder of charges—Procedure—Forest Act, S. 25 (f)—Cutting of several trees.

Where an accused was charged under S. 25 (f) of the Forest Act for having cut 69 trees and convicted on three separate charges. *Held*, that the accused was guilty of 69 offences and that the trial of the accused on three charges

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for 69 offences though bad in law, the irregularity was covered by S. 537 of the Cr. P. Code and a re trial was not necessary especially as the punishment was adequate.

The ordinary course for the prosecution in cases in which accused has committed numerous offences of the same kind is to select a small number of typical cases, to frame charges accordingly and to prosecute these before a Magistrate. If a result of these proceedings is to penalise an accused, and the sentence inflicted is considered to meet the ends of justice, the remaining charges which might still be brought need not be proceeded with. If on the other hand, through some unforeseen accident or miscarriage at the trial the accused is acquitted of those charges, then it is open to the prosecution to proceed with the remaining charges. (*Piggott and Welch, JJ.*) EMPEROR v. RAGHUNATH.

43 I. C. 577=19 Cr. L. J. 151.

—S. 235—Charges of embezzlement under S. 408, I. P. C. and of misappropriation of two other sums received from two other persons.

A joint trial for three charges of embezzlement as a clerk under S. 408, I. P. C. and of misappropriation of two other sums received from two other persons is illegal. (*Alex, J.*) KARIM-UD-DIN v. EMPEROR.

40 All. 565= 16 A. L. J. 596=  
47 I. C. 867=19 Cr. L. J. 967.

—S. 235—Charges misjoinder of—Criminal misappropriation—Additional charge—Act forming one transaction.

The accused a manager appointed by court of an idol as such manager, and entrusted with the funds belonging to the idol was charged with misappropriations or portions of these funds under S. 409 of the I. P. C. The first item related to costs of the High Court decree in an appeal to which the idol was a party. The second was of a sum of Rs. 185 said to have been improperly retained by the accused on 23rd July 1915. The third was one of Rs. 512-3 also misappropriated by the accused as such manager between 1st December 1915 and 8th January 1916. Subsequently a charge under S. 210 of the I. P. Code was added to the effect that on or about the 16th Dec. 1914, the accused fraudulently obtained an order from the Dt. Judge for the payment to himself a sum of Rs. 1841-8-3 which sum was not due to him, or which was larger than was due to him from the estate of the idol. This offence had some relation to one of the three charges of criminal misappropriation but not to the other two; and, in part, it referred to matters not included in any of those three charges as the accused was said to have committed criminal misappropriation of a further sum of Rs. 200 out of the Rs. 1841-8-3.

Held, that the accused could not be legally tried on the fourth charge along with the three charges of criminal misappropriation, as

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it was not an act forming one transaction with them. A re trial of the accused was directed. (*Chetty and Smither, JJ.*) EMPEROR v. RAJENDRA L. CH.

22 C. W. N. 596=  
27 C. L. J. 311=47 I. C. 64.

—S. 235—Joinder of charges—Same transaction. Meaning of.—Illegal possession of opium and cocaine—Single trial proper. See (1911) DIG. COL. 438; EMPEROR v. NGALU GALE.

—S. 235—Joint Trial.—Same transaction.—Illegal possession and sale of opium on different occasions.

The accused was tried for offences under S. 41(a) of the Benar and Orissa Excise Act and S. 3(a) and 9 (i) of the Opium Act in the same trial in respect of two sales of opium to the same person and for possession of the residue of the opium after the sale. Held that the whole series of acts constituted one transaction and that the trial was good. (*Alex and Inam, JJ.*) BALI SANGU v. EMPEROR.

3 Pat. L. J. 432=  
44 I. C. 974=19 Cr. L. J. 446.

—Ss. 236 and 237—Charge under S. 376 I. P. C.—Conviction under S. 44 Castle Trespass Act, whether legal.

S. 397 Cr. P. Code would apply only in cases where S. 236 would apply. It only enables a Court to convict the accused of offences for which no charge has been framed but for which no charge could have been framed under S. 236 of the Cr. P. Code. S. 236 applies only when there is no doubt as to the facts of the case but a doubt exists as to the section of the law upon the facts found. The "doubt" referred to in S. 236 is a doubt of law and not of facts.

An offence under S. 44 of the Castle Trespass Act is triable as a summons case and no charge need be framed out where a charge was framed under S. 376 I. P. C. and the accused's attention directed towards meeting that charge, the conviction ought to be set aside and re trial ordered. (*Shank Prasad, J.*) BHOWNATH SINGH v. EMPEROR.

4 Pat. L. W. 40=  
43 I. C. 618=19 Cr. L. J. 202.

—S. 235—Scope of—Section not applicable when facts disclosed leave no room for doubt as to offence. See CR. P. CODE, Ss. 403 (1) AND 235.

43 I. C. 409.

—S. 235—Appellate Court, power of—Rioting, acquittal of, and conviction for criminal trespass, and hurt, legality of. See (1911) DIG. COL. 438; MONGALU MORODHON. HATHI v. EMPEROR.

41 I. C. 828=  
16 Cr. L. R. 5.

—S. 235—Several offences, one transaction, test of—Penal Code, Ss. 147, 323,—Separate sentences.

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The real and substantial test for determining whether several offences are connected together so as to form the same transaction, depends upon whether they are so related to one another in point of purpose or as cause and effect or as principal and subsidiary acts as to constitute one continuous action. 27 Bom. 135 ref. to.

When the object of an unlawful assembly is to cause hurt, then a member of that unlawful assembly, if he is convicted under S. 124 cannot be convicted also under S. 323 or S. 325 read with S. 149 unless he is himself proved to have caused hurt in the course of the riot (*Abdur Rahim and Napier, JJ.*) KRISHNA AITAR v. EMPEROR. 24 M. L. T. 96= 8 L. W. 225=(1918) M. W. N. 526.

— S. 239—Joint trial—Public servants cheating three persons by taking money from them under the pretext of collecting land revenue.

The Kulkarni and the Patil of a village were charged at one trial with the offence of cheating in that they conspired to levy extra amounts of money from three persons who came to pay in the land assessment. Held, that the joint trial was not against law for the three offences charged were committed in the same transaction, there being clear proximity of time and space, a clear continuity of action and a sufficiently specific community of purpose. (*Shah and Marten, JJ.*) EMPEROR v. MADHAV LAXMAN. 20 Bom. L. R. 607.

— S. 242—Summons case—When commences. See (1917) Dig Col. 439; ROTAYYA v. VENKAYYA. 40 Mad. 977=45 I. C. 257= 9 Cr. L. R. 290=19 Cr. L. J. 497.

— Ss. 247 and 253—Complaint of offences triable (1) as summons case and the other as warrant case—Single trial—Order discharging accused—Fresh complaint in respect of offence committed in the same transaction, if maintainable.

Where, in a case in which a complaint was made of offences under Ss. 362 and 504 I.P.C. committed in the course of one and the same transaction, the complainant was absent on the date fixed for the case and the Magistrate discharged the accused by an order which stated 'complainant absent accused discharged,' held that the order did not amount to an acquittal of the offence under S. 362 Penal Code, and that it was not a bar to a fresh complaint in respect of the same offences committed in the same transaction. (*Abdur Rahim and Napier, JJ.*) RAGHAVALU NAICKER v. SINGARAM. 41 Mad. 727.

34 M. L. J. 369=7 L. W. 520 (1918) M. W. N. 827=45 I. C. 817= 19 Cr. L. J. 613.

— S. 250—Compensation order for, justifiable only when there is a complete discharge or acquittal.

## CRIMINAL PROCEDURE CODE, S. 250.

The accused was charged under Ss. 500 and 506, I. P. C., but convicted under S. 500 being acquitted under S. 503. The Magistrate ordered the complainant to pay compensation for bringing a frivolous and vexatious charge under S. 506 I. P. C. Held, that the order directing the payment of the fine was illegal inasmuch as S. 50 of the Cr. P. Code could only operate where the trial or enquiry ended in the unqualified discharge or acquittal of the accused. 24 Cal. 53 foll. (*Piggott, J.*) MAHOMED ALI KHAN v. RAJA RAM SINGH. 40 All. 610=16 A. L. J. 499.

45 I. C. 1008=19 Cr. L. J. 670.

— Ss. 250 and 253—Compensation, order for—Legality of—Discharge of accused by Magistrate in a case triable by court of session.

Several persons were charged before a Magistrate of the first class with an offence under S. 494 I. P. C. He discharged the accused and ordered the complainant to pay compensation. Held, that inasmuch as the Magistrate had no jurisdiction to try the case (it being neither a warrant nor a summons case) the order directing payment of compensation was illegal: all that the Magistrate could do was to follow the procedure laid down in Chap. XVIII of the Cr. P. Code in which chapter neither S. 250 nor S. 253 found a place. (*Knox, J.*) HAIT RAM v. GANGA SAHAI.

40 All. 615=16 A. L. J. 486.  
45 I. C. 290=19 Cr. L. J. 706.

— S. 250—Compensation—Order for when to be made.

A Magistrate when acquitting the accused called upon the complainant to show cause why an order for compensation should not be made against him. On the same day and on the next page he recorded the statement of the complainant and then made an order against him to pay compensation.

Held, that this was sufficient compliance with the provisions of S. 250 of the Cr. P. Code. (*Chevis, J.*) EMPEROR v. SAUDAGAR RAM. 44 I. C. 972=19 Cr. L. J. 444.

— S. 250—Compensation—Upon whose information the accusation was made—Information given by one to another intending that complaint should be made—Dismissal of complaint as frivolous—compensation by informant—Intervention of third party immaterial. See (1917) Dig. Col. 411, EMPEROR v. BABAWAL SINGH.

40 All. 79=15 A. L. J. 879=43 I. C. 108= 19 Cr. L. J. 76.

— S. 250—Compensation—Order for when accusation found to be false—Propriety of.

There is no reason why a case in which the accusation is found to be false should be considered as being outside the scope of S. 250 of

## CRIMINAL PROCEDURE CODE, S. 253.

the Cr. P. Code. Where during the course of a trial facts come to the notice of the complainant which if true would prove the innocence of the accused, it is his duty to investigate these facts and if he finds them to be true to inform the Magistrate accordingly. (*Mauq K'n, J.*) A S SHAIK DAWOOD v. A. MAHOMED EBRAHIM.

43 I. C. 538  
=19 Cr. L. J. 172

—Ss 253, 435 and 439—Discharge of accused—Revision—Interference by High Court, limits of—Injury to person or property of alien enemy—Resident in British India—offence—Complaint by alien enemy residing in British India and trading under license from the Crown—Discharge of accused—Application for revision by High Court—Maintainability of.

The High Court will not lightly interfere in revision with an order of discharge under S. 253 of the Cr. P. C. at the instance of private parties. Where the order of discharge is based on a consideration of all the prosecution evidence and there is no question of any evidence having been shut out or any illegality or irregularity in the procedure of the lower Court, the High Court will not in revision set aside the order of discharge though it might have come to a different conclusion on the evidence.

There is nothing to warrant the view that an alien enemy has no right to complain against crimes directed against his person or property or that a subject of His Majesty can with impunity violate the provisions of the Penal Code simply because the offence is committed in respect of the person or property of an alien enemy.

When an alien enemy resides in British India by license of the Crown he stands on the same footing as an alien friend or an ordinary subject of the Crown, so far as the right to maintain actions is concerned, the right of suit being incidental to the right to the protection of the crown.

The complainant, an alien enemy residing in British India under a license from the Crown, filed a complaint against the accused charging him with cheating and criminal breach of trust. The accused was discharged under S. 253, Cr. P. Code, whereupon the complainant applied to the High Court in revision to set aside the order of discharge. During the pendency of the application the license of the complainant was cancelled, he was himself interned and his property became vested in the custodian of enemy property who applied to continue the application for revision.

Held, that under the provisions of S. 439 of the Cr. P. Code, the High Court could dispose of the application for revision notwithstanding the fact that the original applicant became an alien enemy during the pendency of the case in the High Court. (*Kumara-swami Sastri, J.*) MELLOR v. MUTHIAH CHETTY.

35 M. L. J. 518.

## CRIMINAL PROCEDURE CODE, S. 239.

—Ss. 253 and 437—Further enquiry after order of discharge—Notice to accused necessary. See CR. P. CODE, SS. 437 AND 253. 4 Pat. L. W. 226.

—Ss. 254, 347 and 215—Magistrate having power to impose the maximum sentence—committal to Sessions—Legality of. See CR. P. CODE, SS. 215, 254 and 347. 35 M. L. J. 559

—S. 260 (1)—clause (d) and (i)—Summary trial—Validity—House Breaking with intent to commit theft and Commission of theft.

Though the offence of house breaking with intent to commit theft is triable summarily by reason of Cl. 1 S. 260 (1) Cr. P. Code 1898, it cannot legally be so tried if theft was actually committed and the value of the property stolen exceeds Rs. 50, Cl. (d) being operative in such a case.

Summary procedure is inappropriate where the circumstances, alleged indicate that a very serious offence has been committed, (*Drake Brockman J. C.*) DIPCHAND v. EMPEROR.

14 N. L. R. 190=  
48 I. C. 343=19 Cr. L. J. 1003.

—S. 263 (h)—Summary trial—Duty of magistrate—Finding and reasons to be clearly stated—Revision.

The finding and the reasons required to be recorded under S. 263 (h) of the Cr. P. Code should be so stated that the High Court in revision may judge whether there was sufficient material before the Magistrate to support the conviction (*Jwala Prasad, J.*) JANAKIDAR v. RAGHUNATH LAL.

46 I. C. 303=  
19 Cr. L. J. 719.

—Ss. 284 and 285—Trial with assessors—Absence of one assessor—Person not in the list acting as assessor—Trial is valid.

Where one of two assessors who had been summoned to assist the Sessions Judge in a trial for forgery was absent on the day when the trial opened, and the Judge ordered another person who was not on the official list of assessors to act as assessor, held that the trial was illegal. 8 I. C. 574 and 35 All. 570 foll. (*Atkinson and Jwala Prasad, JJ.*) BALAK SINGH v. EMPEROR.

3 Pat. L. J. 141=  
44 I. C. 587=5 Pat. L. W. 16=  
19 Cr. L. J. 333.

—Ss. 289 and 527—Omission by the Judge to call on accused to enter his defence—More irregularity.

The omission by the Sessions Judge to call upon the accused to enter on his defence is a mere irregularity and is covered by S. 537 of the Cr. P. Code, unless it is shown that the accused has been prejudiced thereby. (*Banerjee and Walsh, JJ.*) PREMGI v. EMPEROR.

16 A. L. J. 41=43 I. C. 785.  
=19 Cr. L. J. 209.

## CRIMINAL PROCEDURE CODE, S. 297.

—Ss. 297 and 298—Trial by jury or assessors—Duty of Judge—Private defence—Niceties of the law relating to, to be explained to jury or assessors. See PENAL CODE SS 99, 147, 148 ETC

3 Pat. L. J. 653.

—Ss. 297 and 298—Trial by Jury—Direction—confession of accused before police relied on as evidence—Functions of judge and jury as to the evidence—Direction of Judge to be sober and impartial. See CRIMINAL TRIAL 22 C. W. N. 213=44 I. C. 321.

—S. 298—Trial by jury—Judge's charge—Duty of Judge—Misdirection and non-direction—Document admitted in evidence without objection—Omission to draw attention to statutory presumption—Effect of.

Where a document, which is not *per se* inadmissible is admitted by the Court in a criminal trial without formal proof of execution, and the accused omits to take any objection, he cannot afterwards, in appeal, impeach the verdict of the jury on the ground that the document had been admitted without formal proof.

A *parcha slip* granted in the course of survey proceedings is not a public document and is inadmissible in evidence to prove title or possession. The Judge in a criminal trial is competent to draw the attention of the jury to the fact that the *parcha slip* was granted to a particular person as a fact relevant to the question of possession.

The omission to draw the attention of the jury to the provisions of S. 103 B. of the B. T. Act and the presumption arising therefrom does not constitute a serious error on the part of the Judge, where the point has been thoroughly discussed by Counsel and the jury are under no misconception regarding it.

Where there is no evidence of a particular matter, it would be an error on the part of the Judge to lay down the law to the jury on that matter, which is not a matter legally and properly before the Jury.

The ability of the Counsel engaged in the defence does not relieve the Judge of his task, which the law imposes upon him, of fully and fairly charging the Jury. At the same time it is reasonable that the Judge should take into account the elaboration and the skill of the Counsel.

Per *Thorhill, J.*—If in a criminal trial evidence has been admitted which should have been rejected, it is competent to the High Court to consider whether, after excluding the evidence wrongly admitted, the rest of the evidence is sufficient to sustain the verdict. (*Mullick and Thornhill, JJ.*) RAM BHAGWAN v. EMPEROR. 47 I. C. 32=12 Cr. L. J. 88d.

—S. 303—Jury—Retirement to consider—Communication with stranger before delivery

## CRIMINAL PROCEDURE CODE, S. 307.

*of verdict—Verdict if to be set aside—Prejudice to accused, if a necessary element for upsetting verdict.*

Where after the judge's charge to the jury had been delivered, the jury retires to consider their verdict, and a person other than a juror spoke to or held a communication with a member of the jury without leave of the Court, before their return and their delivery of the verdict.

*Held*, that the verdict should be set aside.

Having regard to the terms of S. 300 of the Cr. P. C. it is not necessary or relevant to consider whether the irregularity has in fact prejudiced the accused.

The course to be adopted by the court when the jury retire to consider their verdict after the charge has been delivered, pointed out. (*Sanders v. G. J. and Beacherft, J.*) BENIMADHAB KUNDU v. EMPEROR. 22 C. W. N. 740=27 C. L. J. 553=46 I. C. 513=19 Cr. L. J. 737.

—S. 307—Jury—Verdict of—No interference by High Court when verdict not perverse.

Where the accused were tried on several charges and the jury unanimously found them not guilty on all the charges but the Sessions Judge not accepting the verdict as to some of the charges referred the case to the High Court.

*Held*, that in the circumstances of the case the verdict could not be said to be perverse or erroneous and the accused should be acquitted. (*Chitty and Smither, JJ.*) ASGHAR MANDAL v. EMPEROR. 22 C. W. N. 811=48 I. C. 600.

—S. 307—Reference to High Court—Acceptance of verdict of jury on some charges and reference to High Court on others—High Court, if can consider entire evidence in relation to all charges—Procedure of High Court in testing verdict. See (1917) DIG. COL. 446 EMPEROR v. ANNADA CHARAN ROY. 21 C. W. N. 435=39 I. C. 635=10 Cr. L. R. 103.

—S. 307—Reference to High Court, when to be made.

It is no longer the law that before making a reference under S. 307 of the Cr. P. Code, a Sessions Judge must be satisfied that the verdict of the Jury is perverse. It is sufficient that he should be clearly of opinion that a reference is necessary for the ends of justice. (*Teunon and Newbould, JJ.*) ISMAIL SARKAR v. EMPEROR. 46 I. C. 845=19 Cr. L. J. 83d.

—S. 307—Reference to High Court by Sessions Judge on disagreement with jury—Scope of High Court's Interference.

The accused was tried on charges under Ss. 395, 411, 412, I. P. C., and found not guilty

## CRIMINAL PROCEDURE CODE. S. 309.

by a majority of the Jury. The Sessions Judge disagreeing with the Jury referred the case to the High Court under S. 337 of the Cr. P. Code. The High Court on a consideration of the evidence held, that the guilt of the accused was not proved beyond reasonable doubt and acquitted the accused. (*Toumon and Newbould, JJ.*) **EMPEROR v. CHANOO LAL BANIA**

22 C. W. N. 1028.

—S. 309—Assessors—Delivery of opinion by—Judge delivering judgment after privately visiting locality.

Under S. 309 (2) of the Cr. P. Code a Sessions Judge is bound to give judgment after the assessors have given their opinions and he is not competent to take into account his observation of the locality where the crime was committed and which is visited by him alone after the assessors have given their opinions (*Twomey and Parlett JJ.*) **DEVA v. EMPEROR**

9 L. B. R. 89=43 I. C. 86=19 Cr. L. J. 54.

—Ss. 337 and 339—Approver—Trial of—Legality—Absence of formal withdrawal of pardon—Effect forfeiture of pardon—Validity—Conditions.

Under the present Cr. P. Code of 1893, S. 339, as a preliminary to the trial of the approver it is unnecessary that there should be any formal withdrawal of the pardon and therefore an objection that the pardon has been withdrawn by an unauthorised Magistrate is of no avail.

Held, that an approver who had screened one of his 4 accomplices is liable to have his pardon forfeited notwithstanding that he helps to secure the conviction of the other three. (*Le Rossignol J.*) **SURAJ BHAN v. EMPEROR.**

24 P. R. (Cr) 1913

=36 P. W. R. (Cr) 1918=

47 I. C. 442=19 Cr. L. J. 926.

—S. 342—Duty of Court to question accused after examination of prosecution witnesses—Failure to perform—Effect.

The duty imposed upon the Court by S. 342 of the Cr. P. Code to question the accused generally on the case after witnesses for the prosecution have been examined and before he is called on for his defence is mandatory and not discretionary and the omission to perform such a duty must be presumed to have prejudiced seriously the accused and necessitates a retrial. (*Scott Smith J.*) **GHULLA v. EMPEROR.**

1 P. R. (Cr) 1913=44 I. C. 184=

19 Cr. L. J. 230

—Ss. 342, 364 and 537—Magistrate's failure to examine accused—Not a mere irregularity. See (1917) DIG. COL. 447. **EMPEROR v. NGA PO MYA.**

11 Bur L. T.

134=42 I. C. 176.

—S. 342, Cl. (4)—Oaths Act (X of 1873), S. 5—Accused, competency of to give evidence.

## CRIMINAL PROCEDURE CODE. S. 345.

Although the Evidence Act is silent as to the competency of the accused persons as witnesses yet in view of the provisions of S. 5 of the Indian Oaths Act and S. 342, cl. (4) of the Cr. P. Code an accused person actually under trial cannot be sworn as a witness, and if two or more persons are being jointly tried none of them is a competent witness for or against the other. But if the two persons accused of complicity in the same matter are tried separately each is a competent witness at the trial of the other. (*Toumon and Richardson, JJ.*) **AKHOY KUMAR v. EMPEROR.**

45 Cal. 720=

22 C. W. N. 405=27 C. L. J. 31=

45 I. C. 998=19 Cr. L. J. 663.

—S. 344—Costs of adjournment—Order when to be made.

A Magistrate in granting adjournment of a case, can under S. 344 of the Cr. P. Code, 1893, order the costs of the day to be paid by the party applying for the adjournment in those cases only where the circumstances are exceptional and where for some reason or other the ordinary every day method of conducting criminal cases must be departed from. (*Heaton and Shah, JJ.*) **ABDUL RAHMAN, In re**

42 Bom. 254=20 Bom. L. R. 124=

44 I. C. 342=19 Cr. L. J. 328.

—S. 345—Composition—Compromise petition filed when judgment being written, if may be rejected.

A case may be compromised under S. 345 of the Cr. P. Code at any time before sentence is pronounced; and a Magistrate cannot refuse to accept a petition of compromise filed at the time when the judgment was being written. (*Chitty and Richardson JJ.*) **ASLAM MEAH v. EMPEROR.**

45 Cal. 816=22 C. W. N. 744=

23 C. L. J. 261=45 I. C. 523=19 Cr. L. J. 752.

—S. 345—Composition with one of the accused—Effect of.

The composition of an offence with one of several accused persons under S. 345 of the Cr. P. Code does not have the effect of acquittal of all the accused persons. 7 C. W. N. 176 diss. (*Ayling and Sadasiva Iyer, JJ.*) **MUTHIA NAIK v. EMPEROR**

41 Mad. 323=

43 I. C. 592=19 Cr. L. J. 176.

—S. 345—Compounding offences—Composition out of court—Complainant resiling from agreement before hearing, effect of—Composition before complaint is laid or proceedings taken in Court if valid.

The composition referred to in S. 345 of the Cr. P. Code is not limited to acts done in Court nor to cases in which the parties continue to be of the same mind until the case comes on for hearing before the Court. Once there has been a composition of an offence compoundable under the Cr. P. Code the matter is at an end and the person injured cannot afterwards

## CRIMINAL PROCEDURE CODE, S. 343.

effectively resile from the agreement. If he chooses to do so, it is for the Court to enquire into the allegation of the accused that the offence was compounded out of Court and if it finds that it was so compounded to acquit the accused under S. 345. 39 M. 946 foll.

A lawful composition of a compoundable offence can be made even before a complaint is laid or proceedings are taken, in court, by or at the instance of the injured person, as regards offences which can be compounded only with the permission of the Court, the operation of the composition is suspended until the court sanctions it. *Keir v. Leeman* 6 Q. B. 380; *The Queen v. Burgess* 16 Q. B. D. 141 rel. (*Abdur Rahim and Napier, J.L.*) KUNARASWAMI CHETTI v. KUPPUSWAMI CHETTI.

41 Mad. 685=34 M. L. J. 217=  
23 M. L. T. 240=(1918) M. W. N. 493=  
7 L. W. 274=44 I. C. 533=19 Cr. L. J. 359.

## —S. 345 (7)—Prohibition—Scope of.

The prohibition contained in S. 345 (7) of the Cr. P. Code is a perfectly general one, which governs the composition of offences whether any steps to prosecute the alleged offender have been taken or not. (*Drake Brokerage, J.C.*) WARISALI v. MAHOMED AZI-MULLA KHAN. 46 I. C. 424.

## —Ss 346, 350 and 537—Transfer of case from file of Magistrate not competent to try it—De novo trial—Accused, if can waive right—Evidence recorded by Magistrate incompetent to try the case.

Where a case is transferred from the file of a Magistrate who is not competent to try it under S. 346 of the Cr. P. Code, there must be a trial *de novo* of the whole case, and the whole of the prosecution evidence must be recorded afresh. In such a case the accused have no power to waive their right to a trial *de novo*. The evidence recorded by the Magistrate from whose file a case is transferred under this section, having been recorded by a Magistrate who was not qualified to record it, cannot be taken into consideration by the Magistrate who actually tries the case.

The failure to hold the trial *de novo* in such a case is an illegality which vitiates the trial and not merely an irregularity covered by S. 537 of the Cr. P. Code. (*Imam, J.*) AMBICA SINGH v. EMPEROR. 5 Pat. L. W. 40=45 I. C. 673=19 Cr. L. J. 625.

## —Ss. 350 and 16—Applicability of—Difference of opinion between Honorary Magistrate trying a case—Case referred to a Magistrate under rules framed under S. 16—Procedure.

Where a case in which there was a difference of opinion between the Honorary Magistrate was referred back under the rules framed under S. 16 of the Cr. P. Code, to the Sub-Divisional Officer the provisions of S. 350

## CRIMINAL PROCEDURE CODE, S. 350.

of the Cr. P. Code, apply to the case, so that the Magistrate does not act without jurisdiction if in the absence of a demand for a *de novo* trial on the part of the accused he hears arguments and passes judgment without holding a *de novo* trial. (*Chetty and Walmsley, J.J.*) CHAND TARAFDAR v. SHAMSHER FAKIR. 34 I. C. 328=19 Cr. L. J. 312.

## —S 350—Ceases to exercise jurisdiction therein—Magistrates—Transfer—Case transferred from one Magistrate to another—De novo trial—Jurisdiction.

S. 350 of the Cr. P. Code applies as much to cases in which a Magistrate ceases to exercise jurisdiction so far as the particular question is concerned by reason of its transfer to another court as to cases in which the Magistrate ceases to exercise jurisdiction by reason of his own death or transfer to another post. 35 Cal. 457, 39 Cal. 781 and 32 Mad. 218 foll. (*Piggott and Walsh, J.J.*) RAM DASS v. EMPEROR.

40 All. 307=16 A. L. J. 217=  
44 I. C. 682=19 Cr. L. J. 378.

—S. 350 — Scope of — Statement by pleader of accused of his intention not to apply for re-hearing—Subsequent demand by accused for trial *de novo*—No waiver.

The general rule is that the decision as to the innocence or guilt of an accused person must be by the Judge who has heard all the evidence.

S. 350 of the Cr. P. Code introduces an exception to this general rule and the exception should not receive a more extended interpretation than its actual words clearly justify. Where therefore a case which had been partially tried by one court was transferred to another court and during the arguments on the transfer application, the pleader for the accused stated his intention not to have a *de novo* trial in the court to which the case was transferred and subsequently the accused demanded a trial *de novo*, held, that there was no waiver of their right under S. 350 and that there must be a *denovo* trial. (*Kotwal, A. J. C.*) JANGILAL v. EMPEROR.

45 I. C. 993=19 Cr. L. J. 657.

## —S. 350—Transfer of trying Magistrate—De novo trial—Procedure.

In a criminal trial the Magistrate was transferred after the prosecution evidence was heard and a charge framed. The accused claimed a trial *de novo* before the succeeding Magistrate. Thereupon the witnesses were resummoned, their statements were read over to them and they were further cross-examined. No fresh charge was framed nor was the accused examined by the Magistrate:

Held, that the provisions of S. 350 of the Cr. P. Code were not complied with and a new trial must be ordered. 2 L. B. R. 17; 12 C. W. N. 138 rel. (*Robinson, J.*) HNIN YIN v. THAN PE. 11 Bur. L. T. 58=44 I. C. 337.

## CRIMINAL PROCEDURE CODE, S. 350.

—S. 350 (1)—*Death of Magistrate—Case taken up by Dt. Magistrate—Applicability of the section.*

On the death of a Magistrate empowered under S. 30 of the Cr. P. Code, the Dt. Magistrate being the only remaining Magistrate, in the District having powers under that section, took upon his file a case which was being tried by the deceased :

*Held*, that the Dt. Magistrate must be regarded as having succeeded the deceased Magistrate under S. 350 (1) of the Cr. P. Code.

A liberal construction should be placed upon the provisions of S. 350 (1) of the Cr. P. Code 7 C. L. J. 488 : 32 Mad. 215 : 39 Cal. 751 foll. 1 N. L. R. 157 dist. (*Drake Brothman, J. C.*)

GOBELAL v. EMPEROR. 45 I. C. 239=

19 Cr. L. J. 705.

—Ss. 355 and 537—*Recording of evidence in other than court language—Illegality.*

The direction contained in S. 537 of the Cr. P. Code is mandatory. The recording of evidence, therefore, in a language which is not the language of the Court, is not merely an irregularity but an illegality which vitiates the trial. Even if it is an irregularity it is so grave and material that it cannot be cured by S. 537 of the Code (*Jwala Prasad, J.*)

JANKI PRASAD v. EMPEROR. 43 I. C. 827

=19 Cr. L. J. 235.

—S. 360—*Depositions—Reading over—What amounts to—Cr. P. Code, S. 197—Case under—Procedure as regards reading over of depositions. See PENAL CODE, §. 193.*

(1913) Pat. 13.

—S. 362—*Duty of Magistrate in a case coming under, to take note of all facts.*

It is the duty of the Magistrate in a case which comes within S. 362 of the Cr. P. Code to take a note of all the material facts whether they appear in the course of the examination-in-chief or in the course of cross examination. (*Sanderson C. J. and Beauchef, J.*)

AH FOONG v. EMPEROR. 22 C. W. N. 834=

28 C. L. J. 105=43 I. C. 504.

—S. 367—*Judgment—Several accused—Case of each to be separately discussed.*

Where several persons are charged with an offence the judgment of the court should contain a discussion of the evidence as against each accused. (*Kumaraswami Sastri, J.*)

PENUSAMETSA TIRUMALAI RAJU v. EMPEROR.

44 I. C. 40=19 Cr. L. J. 248.

—Ss. 369 and 439—*Revision—Order refusing to grant sanction—Appeal against, to Dt. Magistrate—Order of temporary dismissal of appeal subsequent order of Dt. Magistrate granting sanction—Illegal.*

One L. filed a complaint against B. under S. 106 of the I. P. Code. It was dismissed by a

## CR. PROCEDURE CODE, Ss. 396 &amp; 110.

Bench of Honorary Magistrates. B applied to them for sanction to prosecute L, which application was refused. In the meantime L sued B to recover the money in respect of which he had complained against E. During the pendency of the suit B appealed to the Dt. Magistrate against the order refusing sanction. The Dt. Magistrate dismissed the appeal till the suit was decided. When the Civil Court decided the suit against L. B. again moved the Dt. Magistrate who granted the sanction sought for and set aside the lower court's order :—*Held*, on revision that the order was illegal, the District Magistrate having become *functus officio* with respect to the appeal when he dismissed it. Temporary dismissals of appeals are unknown to the law. (*Thakail, J.*)

LACHMI NARAIN v. BINDRABAN.

16 A. L. J. 216=44 I. C. 532=

19 Cr. L. J. 353.

—Ss. 369 and 115—*Revision of order under S. 115, not competent—Correction of clerical errors.*

Orders under S. 116 of the Cr. P. Code cannot be reviewed by the same Court, though clerical errors may be corrected under S. 369 of the Code. (*Jwala Prasad, J.*)

LACHMI SINGH v. BHUSI SINGH. 43 I. C. 817=19

Cr. L. J. 225.

—S. 369—*Trial of, offence under S. 397 I. P. C.—Sentence passed on charge—Further trial in the same case in the course of the day on a charge under Ss. 75 and 379—Sentence—Legality.*

The accused was charged with an offence punishable under S. 379 of I. P. C. and also under Ss. 75 and 379 of the code. At the trial before a Session Court by a Jury the learned Judge tried the accused on the first charge alone and convicted and sentenced him. The further charge of previous convictions was next inquired into and the accused was again sentenced on that charge. On appeal :—

*Held*, that the subsequent proceedings with reference to the charge under S. 75 of I. P. C. was not valid, because after the judgment including the sentence was pronounced in the trial on the first charge, there was no power to review or alter the same under S. 369 of the Cr. P. Code. (*Heaton and Shah, J.*)

EMPEROR v. MARI PARSU.

42 Bom. 202=20 Bom L. R. 87=44 I. C.

133=19 Cr. L. J. 279.

—Ss. 396 and 110—*Bail—Object of—Detention of accused during pendency of security proceedings—Demand of heavy security—Unfair trial—Order quashed.*

When a man who is arrested is not accused of a non-bailable offence, no needless impediments should be placed in the way of his being admitted to bail. The intention of the law undoubtedly is that in such cases the man is ordinarily to be at liberty, and it is only he

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is unable to furnish such moderate security, if any as is required of him, and as is suitable for the purpose of securing his appearance before Court pending enquiry, that he should remain in detention.

The applicant against whom an order was passed under S. 112 of the Cr. P. Code to give his own cognizance for Rs. 10,000 and one surety for Rs. 5,000 was during the enquiry ordered to be released on bail if he furnished his own recognizance for Rs. 10,000 and a surety for the same amount. Owing to his inability to find out the surety he was kept in custody during the important part of the enquiry which resulted in a final order against him. On application to the High Court:—

*Held*, that the order should be set aside as the applicant had not had a fair trial. (*Heaton and Shah, JJ.*) **EMPEROR v. MIR HASHAMALI MIR KASAMALI**, 20 Bom. L. R. 121=44 I. C. 345=19 Cr. L. J. 329.

—S. 397—*Concurrent sentences of imprisonment—Separate trials on the same day.*

An order that sentences of imprisonment passed upon an accused in two trials held on the same day should run concurrently is not illegal for until an accused has actually passed in the jail he is not undergoing a sentence of imprisonment within S. 397 of the Cr. P. Code. (*Know, J.*) **MAKHAN v. EMPEROR** 43 I. C. 623=19 Cr. L. J. 207.

—S. 397—"Concurrent sentences" meaning of—Sentence of imprisonment what is implied in—Detention in Civil prison whether amounts to imprisonment—Prisons Act. S. 42—Burma Jail Manual, R. 563 (S). See. (1916) DIG. COL. 508. **SHIN TAUNG v. EMPEROR** 10 Bur. L. T. 266=36 I. C. 160.

—Ss. 403 and 247—*Autrefois acquit* on default of prosecution—Fresh Complaint on the same facts—Trial not barred. See (1917) DIG. COL. 452; **KOTAYYA v. VENKAYYA**, 40 M. 977=45 I. C. 257=9 Cr. L. R. 290=19 Cr. L. J. 497.

—S. 403—*Autrefois acquit*—Previous trial on charges under Ss. 330 and 411, I. P. C. if bars subsequent trial under S. 54 A. of the Calcutta Police Act.

The petitioner who was found in possession of a quantity of jute was tried on charges under Ss. 330, 411 I.P.C. and convicted by the Magistrate, but acquitted by the High Court. He was again placed on his trial under S. 54 A of the Calcutta Police Act in respect of the same act *Held*, that the subsequent proceedings were barred by S. 403 Cr. P. Code. (*Richardson and Beacheroff, JJ.*) **MANHARI CHOWDHANI v. EMPEROR**, 45 Cal. 727=22 C. W. N. 199=27 C. L. J. 484=43 I. C. 614=19 Cr. L. J. 198.

—Ss. 403, 429, 439 and 494—*Summons case—Criminal trespass—Charge sheet by*

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police—Withdrawal of prosecution by the Public Prosecutor before service of summons on accused—Complaint by aggrieved person on the same facts charging accused with offence under S. 417, I. P. C.—*Autrefois acquit*—Difference of opinion between two Judges of the High Court in a Criminal Revision case—Procedure. See (1917) DIG. COL. 452; **DUDEKULA LAL SAHEB Inre**, 40 Mad. 976=33 M. L. J. 121=22 M. L. T. 69=6 L. W. 175=45 I. C. 251=9 Cr. L. R. 422=19 Cr. L. J. 501.

—Ss. 403 (1) and 236—*Autrefois acquit*—Conviction on one charge, if bars subsequent trial on separate and distinct charge—Connected transactions.

A conviction under S. 352 of the Penal Code on the complaint of A is no bar to the trial of the accused under Ss. 147 and 323, I. P. C., on the complaint of B, that the accused were assaulting A when he interfered and tried to stop them and that thereupon the accused turned upon B and beat him.

In order to apply S. 403 (1) of the Cr. P. Code it is necessary to see whether under S. 236 of the Code any charge in the previous trial could have been framed for the offences for which the accused is sought to be tried at the second trial. S. 236 of the Code only applies when the act or a series of acts is of such a nature that it is doubtful which of the several offences the facts would constitute. Where the facts disclosed in the previous trial leave no manner of doubt as to the offences they constitute S. 236 has no application. (*Jwala Prasad, J.*) **HAYAT KHAN v. EMPEROR**, 43 I. C. 409=19 Cr. L. J. 121.

—S. 403 (1)—*Autrefois acquit*—First trial with abinitio for want of complaint—Fresh trials if barred.

The phrase "has once been tried by a Court of competent jurisdiction" in S. 403, subsection (1) of the Cr. P. Code, is not one which limits the application of the provisions to reasons affecting the nature or ordinary powers of the Tribunal. It is wide enough to cover a case where the first trial was ab initio void owing to the absence of a complaint.

In such a case, therefore, S. 403 (1) is no bar to a fresh trial of the accused. (*Findlay O. A. J. C.*) **NANAK RAM v. EMPEROR**, 46 I. C. 716=19 Cr. L. J. 796.

—S. 403 (2)—*Acquittal on a charge under S. 465, I. P. C. if bars subsequent trial for offence under S. 467.*

A person tried and acquitted on a charge under S. 465 of the I.P.C. may on the same facts be committed to the Court of Session for trial for an offence under S. 467 on the allegation of the prosecution that the document said to have been forged is a valuable security. Such a case clearly falls within the purview of

## CRIMINAL PROCEDURE CODE, S. 408.

S. 408 (4) of the Cr. P. Code (*Shadi Lal, J.*) KHUDA BAKSH v. EMPEROR. 19 P. R. (Cr.) 1915= 33 P. W. R. (Cr.) 1918= 46 I. C. 518=19 Cr. L. J. 742.

—S. 408—Appeal—Aggregate sentences—Consecutive and not concurrent sentences—Concurrent sentences—While sentence not exceeding four years—No appeal. See CR. P. CODE, Ss. 35 AND 408. 3 Pat. L. J. 138.

—Ss 408 and 408—Appeal from a conviction from the Asst. Sessions Judge—Promotion of Asst. Sessions Judge to the position of the Sessions Judge before filing of the appeal—Practice—Stay of trial pending appointment of successor or reference to High Court.

An appeal from a conviction and sentence of an Assistant Sessions Judge, where the sentence is less than four years' rigorous imprisonment lies to the Sessions Judge and the mere fact that before the appeal is filed, the Assistant Sessions Judge is promoted to the position of Officiating Sessions Judge, does not entitle the accused to appeal to the High Court.

In such a case the appeal should be filed in the Sessions Court and the Officiating Judge should either send it to the High Court for disposal or postpone the hearing of it until the return of the Sessions Judge. (*Roe and Imram, JJ.*) GARIB LAL v. EMPEROR. 3 Pat. L. J. 192=5 Pat. L. W. 24= 44 I. C. 970=19 Cr. L. J. 442.

—Ss. 403, and 413—Joint trial of several persons—Some accused receiving non-appealable sentences—Appeal by the accused receiving appealable sentences—Appellate court if should examine the case of the former.

Where certain accused persons were awarded non-appealable sentences by a First Class Magistrate in a criminal trial.

Held, that the language of S. 413 of the Cr. P. Code was imperative and took away the right of appeal in such cases and that the accused could not require that right by reason of the fact that they were tried jointly with some other persons who received appealable sentences and who in fact preferred an appeal therefrom and the Appellate Court need not on such appeal consider or examine the case of such first-mentioned accused persons. 21 M. L. J. 837 and 16 M. L. T. 88 ref. (*Abdur Rahim and Napier, JJ.*) ANNASWAMI NADAVAN In re. 24 M. L. T. 182=7 L. W. 571= 45 I. C. 527=19 Cr. L. J. 623.

—S. 408 (b)—Sentence of imprisonment for 4 years' imprisonment in default of payment of fine—Appeal—Forum.

The phrase "sentence of imprisonment for a term exceeding four years" in cl. (b) of S. 408 of the Cr. P. Code, has reference to the substantive sentence of imprisonment apart from fine or imprisonment in default of the

## CRIMINAL PROCEDURE CODE, S. 417.

payment of the fine. (*Shadi Lal, J.*) KHUDA BAKSH v. EMPEROR. 19 P. R. (Cr.) 1915= 33 P. W. R. (Cr.) 1918= 46 I. C. 518=19 Cr. L. J. 742.

—S. 417—Acquittal appeal against—Duty of appellate court hearing the appeal—Conclusion of fact by the first Court, value of.

Where the findings of fact of a trial Court are in favour of the accused's innocence a Court of appeal will not in an appeal against the order of acquittal interfere with the verdict unless the indications of mistake in the judgment of the lower court are obvious or evidence as to the accused's guilt is too strong to be rejected. It is immaterial that the appellate court might have arrived at a different conclusion had it been trying the accused as a Court of original jurisdiction. (*Scott Smith and Shadi Lal, JJ.*) EMPEROR v. MUSSAMMAT JAWAI. 70 P. L. R. (1913)=19 P. W. R. (Cr.) 1913=44 I. C. 173=19 Cr. L. J. 275.

—S. 417—Acquittal appeal from, when maintainable—Guilt of accused doubt as to—No interference.

Before the Chief Court will interfere with an acquittal, the culpability of the accused must be very clear and indubitable. (*Rattigan, C. J. and Le Rossignol, J.*) EMPEROR v. LACHMAN DAS. 46 I. C. 294=19 Cr. L. J. 710.

—S. 417 Appeal, against acquittal—Superintendent and Remembrancer of legal affairs if public prosecutor within the meaning of the section.

In an appeal against an order of acquittal filed by the Superintendent and Remembrancer of Legal Affairs objection was taken that the appeal was incompetent on the ground that the appeal was not presented by a Public Prosecutor within the meaning of the section inasmuch as the office of Legal Remembrancer which received legislative sanction in Reg. VIII of 1816 was abolished by Reg. III of 1829.

Held that the office was revived in 1841 or 1845 and the fact that it is now the creation of executive or administrative order in no way obscures the identity of the officer and the objection failed. (*Townson and Cuming, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS v. TULARAM BARODIA. 23 C. W. N. 96.

—S. 417—Appeal from acquittal—Interference by High Court when justified.

In an appeal from an order of an acquittal the High Court will not interfere unless the finding of the lower Court are obviously wrong or the evidence is too strong to be rejected. (*Rattigan, C. J. and Le Rossignol, J.*) EMPEROR v. MUHAMMAD SHAFI. 25 P. R. (Cr.) 1918=46 I. C. 403= 19 Cr. L. J. 723.

## CRIMINAL PROCEDURE CODE, S. 417.

—S. 417—Appeal from acquittal—Interference, when—Forgery—Will, scribe of, antedating it, effect of—Penal Code S. 405. See (1915) DIG. COL. 512; *EMPEROR v. DURGA PRASAD*. 3 O. L. J. 477= 36 I. C. 588=10 Cr. L. R. 69.

—S. 421—Appeal—Judgment—Contents of—Summary dismissal of appeal; when proper.

S. 421 of the Cr. P. Code empowers an appellate court to dismiss an appeal summarily without writing a judgment or giving reasons, but it is within the powers of the High Court in revision to say after having regard to facts of each particular case whether or not the appellate court has exercised a proper discretion in acting under that section. If the High Court finds that the case is one which should not have been dealt with summarily, the High Court will send the case back ordering the appellate court to hear it on its own merits and pass a judgment. (*Mawng Kin, J.*) *NGA BA MYIT v. EMPEROR*. 44 I. C. 332= 19 Cr. L. J. 316.

—S. 421—Summary dismissal of appeal involving complicated questions of law and fact not justifiable.

Though S. 421 of the Cr. P. Code gives an Appellate Court power to summarily dismiss an appeal, the power must be exercised with judicial discretion. Appeals which are complicated both in law and in fact should not be disposed of under this section. (*Chitty and Smither, JJ.*) *KAILASH CHANDRA CHAKRA BARTY v. EMPEROR*. 43 I. C. 820= 19 Cr. L. J. 223.

—S. 421—Summary dismissal of appeal without giving reasons—Validity—Effect.

In dismissing appeals under S. 421 of the Cr. P. Code some reason should be given and the omission to give such reason would involve either a remand of the appeal to be admitted and heard or an examination of the evidence by the High Court on appeal. 2 Pat. L. J. 695; 4 Pat. L. W. 153 foll. (*Imarr, J.*) *RANKANT PANDIT v. EMPEROR*. 4 Pat. L. W. 212=44 I. C. 208= 19 Cr. L. J. 304.

—S. 421—Summary dismissal of appeal—Reasons for, to be stated.

An appellate court dismissing an appeal under S. 421 of the Cr. P. Code, should give some reason for dismissing the appeal summarily although not required by law to write a judgment. 21 Cal. 92; 20 Bom. 349; 15 Mad. 584; 17 All. 241; 32 Cal. 178; 38 Cal. 307 ref. (*Sharfuddin and Ewe JJ.*) *GURUBARI BEHARA v. EMPEROR*. 2 Pat. L. J. 695= 4 Pat. L. W. 153=43 I. C. 439= 19 Cr. L. J. 151.

—S. 421—Summary dismissal of appeal when proper.

## CRIMINAL PROCEDURE CODE, S. 423.

A Court of appeal ought not to reject an appeal summarily if the appeal on the face of it involves a question of law or if the judgment under appeal is a long and intricate one requiring careful consideration (*Ewe and Imam, JJ.*) *SUKHDEO PATHAK v. EMPEROR*.

3 Pat. L. J. 339=4 Pat. L. W. 39= (1918) Pat. 287=43 I. C. 785=19 Cr. L. J. 209.

—S. 422—Notice to complainant—Necessity—Practice. See Cr. P. C. S. 515. 14 N. L. R. 131.

—S. 423—Criminal appeal—Powers of appellate court to alter finding and maintain sentence—Alteration of finding on point of law—Alteration of conviction under S. 323 I. P. C. to one under S. 147, I. P. C., while maintaining sentence—Legality.

In a case where the accused were placed upon their trial on charges under Ss 147 and 353 of the Penal Code, the charge actually framed having been that they were members of an unlawful assembly with the common object of resisting the arrest and rescuing the persons arrested by the Excise Inspector and the trial court being of opinion that the common object of the assembly was not to resist arrest but to resist the search, acquitted them of the offence charged under S. 147 but convicted them under S. 323 with which offence they were not charged and on appeal the Sessions Judge pointed out that the conviction on the charge under S. 323 could not be maintained, but convicted them of rioting under S. 147 after going into the facts of the case.

Held, that the alteration of the conviction under S. 323 to a conviction under S. 147 maintaining the sentences imposed under S. 323 under provisions of S. 423 of the Cr. P. Code was not illegal.

S. 423 of the Cr. P. Code empowers the Appellate Court to alter the finding, maintaining the sentences, and there is no valid reason for limiting the word finding to a finding upon a point of law as distinct from a finding upon a point of fact. 25 Cal. 975 dist. 18 C. W. N. 498 ref. (*Ewe and Imam, JJ.*) *MAHANGU SINGH v. EMPEROR*. 3 Pat. L. J. 565= (1918) Pat. 192=46 I. C. 145= 19 Cr. L. J. 735.

—Ss. 423 and 435—Procedure—Evidence of a witness not taken by first Court—Dt. Magistrate ordering retrial on this ground—Revision.

Where a District Magistrate ordered a retrial of an accused person on the ground of defect in the procedure of the Court of first instance that certain evidence had not been brought upon the record which ought to have been there, the High Court in revision set aside the order for re-trial and directed the District Magistrate to summon and examine the

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witnesses named by them (1917) J. ISHWAR PRASAD v. EMPEROR. 16 A. L. J. 325=45 I. C. 149=19 Cr. L. J. 425.

—S. 423—Retrial by High Court in trials by Jury.

The petitioner was tried and found guilty by a jury. In appeal the High Court set aside the verdict and observing that it would be open to the Crown to proceed further with the case, if so advised directed the petitioner to be released on bail until fresh trial if any.

Held, that the order amounted to a re-trial. (Sanders v. C. J. and Patten J.) BENI MADHUB KUNDU v. EMPEROR.

25 C. W. N. 94=29 C. L. J. 34

—Ss. 423 and 428—Retrial ordered by Appellate Court with direction that evidence on record be treated as evidence in the case—Legality of—Re-trial so held and subsequent proceedings, if void. See (1917) DIG. COL. 436. BHOSO SINGH v. EMPEROR.

3 Pat. L. W. 224=1917 Pat 87=

43 I. C. 109=19 Cr. L. J. 77.

—Ss. 423 (1) (b) and 439—Appellate court—Powers of—Held by—Attack by three persons—Death caused by blows—All guilty of murder—Altering conviction.

Where three persons attack one and strike him blows with lathis which result in his death, all the three are equally guilty of the offence of murder. An appeal against a conviction opens out the entire case, and an appellate court being empowered under S. 423 (1) (b) of the Cr. P. Code to alter the finding, may record a conviction for an offence of which the trial court has found the accused not guilty. (Piggott and Walsh, JJ.) DULLI v. EMPEROR. 16 A. L. J. 918=48 I. C. 502.

—S. 429—Reference under—Duty of third Judge—Practice.

In a case referred under S. 429, Cr. P. Code, a third Judge could not differ upon a point on which both the referring Judges were agreed unless there were strong grounds for doing so. (Woodroffe, J.) GRANADE VENKATA RATNAM v. THE CORPORATION OF CALCUTTA.

22 C. W. N. 745=28 C. L. J. 32=

46 I. C. 583=19 Cr. L. J. 753.

—Ss. 430, 438 and 439—Revision on a report—Orders by the Session Judge against order of acquittal—Competence—Interference—Serious injustice due to error of law.

The High Court has jurisdiction to entertain a revision application against an order of acquittal on a report for orders by the Sessions Judge under S. 438 of the Cr. P. Code. But the order of acquittal will not be interfered with unless serious injustice has been caused by error of law. (Phillips and Napier, JJ.) MOGAL BEG In re.

35 M. L. J. 665=

25 M. L. T. 22=48 I. C. 817.

## CRIMINAL PROCEDURE CODE, S. 435.

—Ss. 435 and 439—Revision against order of acquittal—Appellate court quashing conviction—Without discussing evidence at all—Interference.

Where an appellate Court quashes a conviction for criminal trespass without discussing the evidence or coming to any conclusion thereon, on the mere ground that the case is of a civil nature especially when the first Court has tried out the matter and has come to the conclusion that the accused is guilty of the offence charged. Held, that the High Court would interfere in revision and direct a rehearing. (Chetty and Smiller, JJ.) HARAI CHANDRA NAMA v. USMAN ALI.

27 C. L. J. 226=

44 I. C. 337=19 Cr. L. J. 321.

—Ss. 439 and 435—Revisional power of High Court—Extent of—Quashing of proceedings before Dt. Magistrate.

Eight persons were charged with offences under several sections of the Penal Code. Three of the accused had not been arrested when the proceedings were initiated, but they surrendered at a later stage. The other five accused were acquitted by the trying Magistrate. The case of the three accused who had surrendered themselves later relied on the same evidence, and on the Trying Magistrate asking for orders from the Dt. Magistrate as to whether the prosecution against them should be continued or not, the latter ordered the continuance, of the proceedings and transferred the case to another Magistrate. Although it was held that the prosecution could not succeed upon the evidence on the record. Held, that the High Court was competent in revision to set aside the order of the Dt. Magistrate and quash the proceedings. 14 A. L. J. 881 foll. (Banerji, J.) JAI NARAIN LAL v. EMPEROR.

16 A. L. J. 488=46 I. C. 407=

19 Cr. L. J. 727.

—Ss. 435 and 439—Revision—Discharge of accused—Revision by High Court only in exceptional cases when clearly required by ends of justice. See Cr. P. CODE SS. 253, 435 AND 439.

35 M. L. J. 518.

—Ss. 435 and 439—Revision by Dt. Magistrate—Power when to be exercised. See (1917) DIG. COL. 459. LAKANAW v. EMPEROR.

10 B. P. L. T. 166=(1916)

2 U. B. R. 124=38 I. C. 739.

—Ss. 435, 438 and 439—Revisional power—Exercise of, by High Court, practice—Concurrent jurisdiction of Subordinate Court—Duty of aggrieved party to seek his remedy before Subordinate Court before applying to High Court. See Cr. P. CODE, SS. 125, 435, 438 AND 439.

4 Pat. L. W. 327.

—Ss. 435 and 439—Revision—Dt. Magistrate—Administrative order of—High

## CRIMINAL PROCEDURE CODE, S. 435.

Court not competent to revise See CR. P. CODE S. 195 (1) (a) (b) etc. 35 M. L. J. 454.

—Ss. 435 and 439—Revision—Ministerial order—Order of Dt. Magistrate under S. 8 (1) of the Press Act, not open to revision. See PRESS ACT S. 8 (1). 20 P. R. (Cr). 1918.

—Ss. 435 cl. (3) and 145—Proceedings under chapter XII—Revision of, under S. 107 Govt. of India Act if proceedings taken without legal foundation. See GOVT. OF INDIA ACT, S. 107. 16 A. L. J. 189.

—Ss. 435 (3) and 145—Revision—Power of High Court—Limits of interference. See CR. P. CODE. SS. 145 AND 135 (3). 44 I. C. 655.

—S. 435 (4)—Revision application presented to Sessions Judge—Action by Dt. Magistrate *suo motu* during pendency of application, whether valid. See (1916) DIG. COL. 517; EMPEROR v. NGA PO GYI. 10 Bur. L. T. 172=8 L. B. R. 361=36 I. C. 455.

—S. 436 -- Discharge of accused — Commitment to Sessions by Dt. Magistrate, Grounds for. See (1917) DIG. COL. 517; SRI KISHAN LAL v. EMPEROR. 1 Pat. L. J. 97=35 I. C. 506=10 Cr. L. R. 74.

—S. 436—Graver charge not put forward or pressed by prosecution—Jurisdiction of Dt. Magistrate to direct the Subordinate Magistrate to commit accused to Sessions.

Where a graver charge was neither mentioned in the Police charge sheet on which the subordinate Magistrate took cognisance nor pressed by prosecution for framing a charge before the Sub-Magistrate, the Dt. Magistrate has no jurisdiction under S. 436 Cr. P. Code to direct the Sub-Magistrate to commit the accused to the Sessions on the graver charge (*Sadasiva Iyer and Napier, JJ.*) In re MARAPPA GOUNDAN. 41 Mad 982=35 M. L. J. 667=24 M. L. T. 82=(1918) M. W. N. 486=47 I. C. 663=19 Cr. L. J. 945.

—S. 436—Triable exclusively by Court of Session—Meaning of.

S. 436 of the Cr. P. Code gives the District Magistrate jurisdiction if he considers that the case is triable exclusively by the Court of Session. That may mean either (1) in a case where the District Magistrate considers that the fact constitutes an offence which is triable only by the Court of Session, or it might mean that (2) a case in which the District Magistrate considers that the sentence which the Magistrate with Special Power could pass might not be sufficient and, therefore, that it was a case which should be tried by a Court of Session.

## CRIMINAL PROCEDURE CODE, S. 437.

The words "triable exclusively by the Court of Session" in S. 433 of the Cr. P. Code refer to cases which are only triable by the Court of Sessions under Schedule II of the Code and S. 30 of the Code, which gives the Local Government power to invest a Magistrate with special powers is not intended to curtail the jurisdiction given to the District Magistrate under S. 433 of the Cr. P. Code. (*Ormond, J.*) TAMB v. EMPEROR. 11 Bur. L. T. 144=46 I. C. 817=19 Cr. L. J. 801.

—S. 437—Discharge of accused by Magistrate—District Magistrate ordering further enquiry—Absence of notice—Judicial discretion.

Nothing in S. 437 of the Cr. P. Code requires previous notice to be given to any accused person who has been discharged before further enquiry into his case is ordered by a competent authority, that is by the High Court, or the Sessions Judge or the District Magistrate. Nevertheless as a matter of judicial discretion it is advisable that previous notice should issue when the matter for consideration is the setting aside of an order of discharge in favour of the accused person who has been actually before the court to answer the facts alleged against him. (*Piggott, J.*) ABDUL LATIFF v. EMPEROR 50 All. 416=16 A. L. J. 298=44 I. C. 929=19 Cr. L. J. 401.

—S. 437—Discharge by trying Magistrate—Retrial ordered by Dt. Magistrate—Absence of notice to accused. See (1917) DIG. COL. 459; ABRAHAM ADAM ISHE v. EMPEROR 19 Bom. L. R. 908=43 I. C. 325=19 Cr. L. J. 101.

—Ss. 437 and 253—Further enquiry after order of discharge—Notice to accused necessary.

Although a District Magistrate is not bound in law to issue any notice to the accused before ordering a further enquiry, under S. 437 of the Cr. P. Code after he has been discharged under S. 253 of the Cr. P. Code, it is right and proper that such notice should be given. (*Imam, J.*) RAMBAHAL RAI v. EMPEROR. 4 Pat. L. W. 220=44 I. C. 751=19 Cr. L. J. 399.

—S. 437—Further enquiry — Warrant case—Charge framed and accused called upon to plea—Plea of not guilty—Accused not convicted—Acquittal—Revision.

Where in a warrant case the charge having been framed the accused was called upon to plead and he pleaded not-guilty and the Trying Magistrate did not convict him, held that the effect of the order was that the accused had been acquitted (though the Magistrate wrote 'discharged') and that the Dt. Magistrate had no jurisdiction to order a further enquiry (*Banerji, J.*) CHHOTELAL v. EMPEROR. 16 A. L. J. 388=45 I. C. 500=19 Cr. L. J. 586

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———S. 437—Order for further enquiry—Court bound to give reasons for. See (1917) DIG. COL. 460. *NGA MIN DIN v. EMPEROR.* 42 I. C. 926=19 Cr. L. J. 14

———S. 437—Revision—District Magistrate Jurisdiction—Interference with illegal order dismissing complaint. See CR. P. CODE, SS. 200, 203, 437 AND 438.

3 Pat. L. J. 315.

———SS. 437 and 203—Summary dismissal of complaint—Further enquiry—Order for—Notice to accused not necessary. See CR. P. CODE, SS. 203 AND 437. 15 A. L. J. 30.

———SS. 438 and 439—Reference by Dt. Magistrate—Enhancement of sentence without notice to accused, improper—Review of order in criminal case in High Court. See (1917) DIG. COL. 461; *EMPEROR v. ROMESH CHANDRA GUPTA.* 22 G. W. N. 163=46 I. C. 157=19 Cr. L. J. 701.

———S. 439—High Court—Revision—Power to direct re-hearing of appeal after admitting additional evidence—Govt. of India Act, S. 107.

Both under the Cr. P. Code and under S. 107 of the Government of India Act, the High Court has power to direct a Sessions Judge to re-hear an appeal after obtaining additional evidence.

When petitions are made to the Court it is improper, merely to direct them to be filed with the record. (*Mullish and Thornhill, J.J.*) *MAHOMED ZAMIRUDDIN v. EMPEROR.*

3 Pat. L. J. 632=47 I. C. 274=19 Cr. L. J. 902.

———SS. 439 and 145—No final order—No revision.

Where, in a proceeding under S. 145 of the Cr. P. Code a Magistrate merely expresses his opinion on the documents produced and their legal effect without passing final orders under sub-sec (6) the High Court cannot interfere in revision. (*Spencer, J.*) *RAWRI MANIKYAM In re.* (1918) M. W. N. 37=43 I. C. 95=19 Cr. L. J. 63.

———S. 439—Order of acquittal—High Court—Interference in revision—Jurisdiction—Practice. See. (1917) DIG. COL. 468 *FAREDOON COWASJI PARBHU. In re* 41 Bom. 560=19 Bom. L. R. 354=40 I. C. 318=10 Cr. L. R. 8.

———SS. 439, 107 and 125—Order requiring security for good behaviour—Power of Dt. Magistrate to set aside order—Interference by High Court when justifiable. See CR. P. CODE, SS. 107, 125 and 439. 47 I. C. 96.

———S. 439—Revision—High Court—Powers of—Conviction in Courts below under

## CRIMINAL PROCEDURE CODE, S. 439.

———S. 439—Revision—Interference of section maintaining conviction—*Deputy.*

Where the lower courts have convicted an accused under a wrong section in a case in which no charge was framed it is open to the High Court, if necessary, to revise the section under which the conviction has been recorded without any further proceedings.

Where a letter removed from the godown of a railway company a bag filled with pilferings from a number of bags consigned to others, that the bag being in possession of the railway as bailee, the taking it out of the godown amounted to theft. (*Rao and Imram, J.J.*) *SOURJCHAND SAG v. EMPEROR.*

3 Pat. L. J. 354=47 I. C. 80=19 Cr. L. J. 884.

———S. 439—Revision—High Court—Practice—Revisional jurisdiction of Sessions Judge or Dt. Magistrate—Duty of party aggrieved to apply to Lower Court first. See CR. P. CODE, SS. 125, 435, ETC.

4 Pat. L. W. 327.

———S. 439—Revision—Interference only if there are merits—Order under S. 522.

Where certain persons were convicted and subsequently to the conviction the complainant applied, through the police under section 522 of the Cr. P. Code, for an order for possession over certain land which application was refused by the trying Magistrate but on appeal the Dt. Magistrate directed that such possession should be given; held, whether the Dt. Magistrate had power or not to pass the order in question, there was no case for interference on the merits. (*Knox, J.*) *KHUBI o BAKH TAYAL.* 16 A. L. J. 499=45 I. C. 414=19 Cr. L. J. 731.

———S. 439—Revision Material irregularity—Summary trial of offence under S. 445, I. P. C. See (1917) DIG. COL. 465; *MEWA LAL v. EMPEROR.* (1917) Pat. 363=3 Pat. L. J. 147=4 Pat. L. W. 359=44 I. C. 41=19 Cr. L. J. 239.

———S. 439—Revision—Order of lower court refusing sanction—Appeal against to Dt. Magistrate—Order of temporary dismissal of appeal—Subsequent order of Dt. Magistrate granting sanction—Illegality. See CR. P. CODE, SS. 369 and 439. 16 A. L. J. 210.

———S. 439—Revision—Power to examine evidence—Non appealable sentence.

A High Court, as a Court of Revision, has a power to re-examine the evidence if there are *prima facie* good grounds for doing so, especially where the accused has been given a non-appealable sentence and has no means of vindicating his character except in revision. (*Batten, O. A. J. C.*) *TRIKKAR v. PIYABILAL* 45 I. C. 1002=19 Cr. L. J. 666.

## CRIMINAL PROCEDURE CODE, S. 439.

—S. 439—*Revision — Revenue appeal before Collector—Decision that certain receipts filed not genuine—No steps taken by Collector—Order for prosecution as Dt. Magistrate—Legality.*

The Collector of a district in deciding a Revenue appeal came to the conclusion that a receipt filed in the case was not genuine. He took no steps in this connection as Collector, but acting as Dt. Magistrate, committed the case to a Subordinate Magistrate for trial;—*Held*, that the High Court had jurisdiction to interfere in revision, the order passed by the Dt. Magistrate being *ultra vires* (Tudball, J.) RAM SAHAI v. EMPEROR.

40 All. 144=16 A. L. J. 68=43 I. C. 617=  
19 Cr. L. J. 201.

—S. 439—*Revision against acquittal—Chief Court—Practice of.*

A revision to the Chief Court against an order of acquittal may be allowed when legal points alone are involved. (Shadi Lal, J.) EMPEROR v. THAMMAN. S. P. R. (Cr.) 1918. 17 P. W. R. (Cr.) 1918=44 I. C. 751=  
19 Cr. L. J. 399.

—S. 439—*Revision against acquittal—Criminal trespass—Trial and conviction for—Reversal of by appellate Court solely on the ground that it was a civil matter.*

When the trial Court has tried out a case on the merits and came to the conclusion that the accused was guilty of criminal trespass, it is not competent for a Court of Appeal without going into the case or discussing the evidence or coming to any conclusion thereon, to acquit the accused on the ground that the matter is of a civil nature.

The High Court in such a case, can interfere with the order of acquittal (Chitty and Smither, JJ.) HARAI CHANDRA NANA v. OSMAN ALI. 27 G. L. J. 226.  
44 I. C. 337=19 Cr. L. J. 321.

—S. 439—*Revisional Jurisdiction of High Court—Remarks of Sessions Judge unfavourable to complainant—Application to expunge the record. See (1917) DIG. COL. 465; SIDRAMAYYA v. EMPEROR.*

19 Bom. L. R. 912=43 I. C. 321=  
19 Cr. L. J. 97.

—S. 465—*Preliminary enquiry—Scope of—Not a trial.*

The preliminary enquiry held under S. 465 of the Cr. P. Code is not a trial in the sense of ascertaining whether the accused is guilty or not of offences charged (Miller C. J. Chapman and Atkinson, JJ.) GHINUA ORAON v. EMPEROR.

3 Pat. L. J. 291=(1918) Pat. 57=  
43 I. C. 423=19 Cr. L. 135 (F. B.)

—S. 471—*Criminal lunatic—Power to order detention in jail, pending orders of Govt.*

## CRIMINAL PROCEDURE CODE, S. 476.

Where a Court acquits under S. 470 of the Cr. P. Code a criminal lunatic of the offence charged, it has the power under S. 471 of the Code to order that he be detained in custody in the jail where he then is, until the further orders of the Government, and that the case be reported to the Government for further orders (Shah and Marten, JJ.) EMPEROR v. SOMYA HIRYA MAHAR. 20 Bom. L. R. 629=  
46 I. C. 691=18 Cr. L. J. 771.

—Ss. 476 and 478—*Commitment order by Munsif—Procedure prescribed not followed—Illegal. See (1917) DIG. COL. 467; EMPEROR v. BABOO PRASAD. 40 All. 32=*  
15 A. L. J. 805=42 I. C. 1000.  
=19 Cr. L. J. 49.

—S. 476—*Judicial Proceeding—Execution proceedings—Resistance to attachment—Prosecution—Sanction by Court.*

Resistance offered during the course of an attachment in execution of a decree is offered in the course of a judicial proceeding pending before the executing court which is competent to sanction a prosecution under S. 476 of the Cr. P. Code. (Jwala Prasad, J.) BARHANDO SINGH v. EMPEROR. 43 I. C. 431=  
19 Cr. L. J. 153.

—S. 476—*Jurisdiction—Direction to prosecute—Power of Assistant Collector hearing Revenue Appeal to direct prevention of party to appeal as also of the Mamlatdar deciding case—Preliminary inquiry by Asst. Collector himself and also by C. I. D.—Direction to prosecute as the result of such inquiry—Whether should be part of a continuation of the Revenue proceeding in Appeal.*

An Assistant Collector who heard on 18-7-1916, an appeal in a revenue case decided by a Mamlatdar, held that a Kabuliya produced in the case by the Inamdar was not genuine and called for an explanation of the Inamdar as well as a report from the Mamlatdar. On perusal of the explanation and the report he deemed that the matter was serious and demanded further enquiry; and he applied for assistance of the Criminal Investigation Department and Dt. Magistrate. The Assistance was given and enquiry made by the Police. The Asst. Collector considered all the matters before him and passed an order on 2-7-1917 referring matter to the nearest First Class Magistrate for enquiry under S. 476 of the Cr. P. Code. The Magistrate inquired into the case and committed the accused to take their trial before the Sessions Judge. The learned Sessions Judge convicted and sentenced the accused.

*Held*, that under S. 476 of the Cr. P. Code, what was provided for was that after making preliminary enquiry into any offence brought to notice the case might be sent for inquiry to the nearest First Class Magistrate, that is to say, it was the case which was to be sent and not

## CRIMINAL PROCEDURE CODE, S. 476.

necessarily all the offenders who might be concerned in the commission of the offence;

(2) that a part of the enquiry having been made by the Asst. Collector himself, he was not deprived of jurisdiction to act under S. 476 of the Code, merely because he took the precaution of making a more careful and deliberate enquiry with the assistance of the C. I. D., or because he applied to the Dt. Magistrate, as head of the Police, for assistance.

(3) that there was nothing in the wording of S. 476 of the Code to hold that officers acting under it were bound to make their enquiry either in the actual course of the judicial proceedings or so shortly thereafter as to make it really a continuation of those proceedings. 32 Bom. 181 full. 31 Mad. 840. F. B. 32 Mad. 49. F. B. 34 Cal. 551 and 37 Cal. 643 diss. (*Heaton and Hayward, JJ.*) EMPEROR v. WAMAN. 20 Bom. L. R. 998

—S. 476—Offence under S. 464—Proceedings under S. 476 against persons not parties to the proceeding—If competent. See CR. P. CODE, S. 195 (1) (c) 43 I. C. 828.

—Ss. 476 and 537—Order for prosecution for institution of false complaint by—Successor of the Magistrate who dismissed the complaint—Enquiry by Subordinate Magistrate—Irregularity. See (1916) DIG. COL. 526; BAIJ NATH SINGH v. EMPEROR.

1 Pat. L. J. 553=(1918) Pat 30=  
37 I. C. 36=10 Cr. L. R. 77

—Ss. 476 and 195—Pending judicial proceedings—Land registration proceedings finished before a Deputy Collector—Successor if can sanction prosecution for an offence under S. 209 I. P. C. in respect of the land registration proceedings completed in the time of his predecessor. See (1917) DIG. COL. 471; RAM NIGAH SINGH v. EMPEROR.

(1918) Pat. 65=1 Pat. L. W. 772=  
4 Pat. L. W. 441=41 I. C. 1007.

—Ss. 476 and 195 Qualifications in S. 195 incorporated in S. 476—Courts in the Presidency Towns.

S. 476 of the Cr. P. Code does not apply to an offence committed before a Court in Presidency towns, consequently it is not competent to the High Court, acting under S. 476, to direct the prosecution of a person for the forgery of abetment of forgery brought to its notice in the course of hearing an appeal in a Probate case.

The qualifications mentioned in S. 195 of the Cr. P. Code are to be treated as incorporated in the provisions of S. 476 of the Cr. P. Code. (*Fletcher and Huda, JJ.*) IN THE MATTER OF A YAKIL. 45 I. C. 686=  
19 Cr. L. J. 638.

## CRIMINAL PROCEDURE CODE, S. 479.

—S. 476—Sanction to prosecute for perjury—Omission to set out passages relied upon—Effect. See PENAL CODE, S. 193.

(1918) Pat. 13.

—S. 476—Scope of—Order should be based on evidence—Prosecution when lies against person not a party to the proceeding.

Where a person filed a petition for execution of a decree on behalf of a decree holder who was dead at the time of the filing of the execution petition and on the judgment-debtor's objection, the execution case was dismissed and the judgment-debtor thereupon applied for sanction to prosecute the person who filed the petition, and on notice issued on him, he appeared and contended that he had nothing whatsoever to do with the execution petition but the Court directed his prosecution under S. 476 of the Cr. P. Code.

Held, that as there was no evidence on the record to show that the petitioner has anything to do with the execution petition the order for his prosecution was bad in law. (*Mullick and Thornhill, JJ.*) SHEIKH ABDUL SATTAR v. EMPEROR. (1918) Pat. 332.

—Ss. 477 and 439—Procedure under—Perjury—charge—Sessions Judge refusing adjournment to accused and holding summary trial—Accused not able to defend—Revision—Irregular exercise of Jurisdiction.

S. 477 of the Cr. P. Code, nowhere lays down that the trial for any offence committed before a Court should be a summary one nor does it demand a decision which is to be more prompt and speedy than that of any ordinary trial.

Where a Magistrate charged a witness with having given false evidence before him in connection with a trial and at once proceeded with the trial and refused to grant an adjournment prayed for by the accused for the purpose of taking legal advice to put in his defence, and in consequence the accused refrained from making any defence, held, that the court in so acting had acted hastily and irregularly in the exercise of its jurisdiction and the trial and conviction were bad in law. (*Tudball, J.*) HADIYAR KHAN v. EMPEROR. 16 A. L. J. 926=48 I. C. 673.

—Ss. 479, 478 and 195—Scope of—Proceedings before Dt. Munsif—Commission of offence under Ss. 193, 209, 210, I. P. C. Commital of accused for trial to Session.

The words "referred to in S. 195" which have found a place in S. 476 of the Cr. P. Code are merely words descriptive of the class of offences with which a particular court can deal with. They do not mean that S. 195, governs S. 476 to any extent other than this.

Hence, where in the course of a judicial proceeding before the Munsif of Fatehabad in Agra District certain offences under S. 193

## CRIMINAL PROCEDURE CODE, S. 480.

209, 210, 467 and 471 of the Penal Code, committed in Bengal, were brought under the notice of the court and the Munsif committed the accused for trial to the Court of Sessions at Agra, *held*, that the court had jurisdiction under S. 478 read with S. 476 of the Cr. P. Code, (*Knowl, J.*) **EMPEROR v. KHUSHALI RAM.** 40 All. 116—15 A. L. J. 9:2=43 I. C. 426—19 Cr. L. J. 148.

—S. 480—Witness refusing to answer questions because adjournment refused by Judge—Intentional interruption—Proceedings under S. 480—Conviction under S. 228 I. P. C. propriety of, *See* PENAL CODE, S. 228. 14 P. R. (Cr.) 1918.

—Ss. 487 and 195—Accused guilty of disobedience of order to appear before magistrate—Conviction by the same magistrate illegal.

A person was ordered by a Magistrate to appear before him which that person failed to do. He was thereupon convicted by that Magistrate under S. 174 I. P. C. and fined Rs. 10. *Held*, that having regard to S. 487 of the Cr. P. Code, the Magistrate whose order has been disobeyed could not try the case, it being a case within S. 195. (*Banerjee, J.*) **DEO SARAN TEWARI v. EMPEROR.** 16 A. L. J. 432=46 I. C. 48=19 Cr. L. J. 688.

—S. 488—Application by mother for maintenance of her child—Decree of Civil Courts declaring that the child was not born to the person alleged to be its father—Release of right to maintenance by the mother, effect of *See* (1917) DIG. COL 473; **NARAYANAN MOOSAD v. ITTICHERY AMMA.** 33 M. L. J. 449=22 M. L. T. 293=(1918) M. W. N. 65=22 I. C. 331=9 Cr. L. R. 525.

—S. 488—Maintenance—Duty of husband—Burmese law.

After a husband's suit for restitution of conjugal rights has been dismissed he is bound to maintain his wife, especially where the wife lives apart on account of the husband's cruelty. (*Ormond, J.*) **MA THEIN ME v. PO GYWE.** 10 Bur. L. T. 212.

—Ss. 488 and 489—'Unable to maintain,' meaning of—Incapacity to earn—Children pursuing higher education.

Where a person's daughters in whose favour an order for maintenance has been made have become sufficiently old and capable of maintaining themselves, the order may be discharged notwithstanding that the daughters are desirous of continuing their education or are reluctant to work for their living. (*Robinson, J.*) **MA YU v. G. D. F. COLOGUHOON.** 43 I. C. 448=19 Cr. L. J. 160.

—Ss. 488 (3) and 489—Arrears of maintenance—Execution of order—Amount it can be reduced or apportioned. *See* (1917) DIG. COL. 475; **THUMBUSAMI v. MA LONE.** 10 Bur. L. T. 209=27 I. C. 311.

## CRIMINAL PROCEDURE CODE, S. 512.

—S. 488 (4)—Maintenance—Rights of—Burmese Buddhists—First wife refusing to live with husband—Husband taking second wife in consequence—Claim of first wife to maintenance—Maintainability.

Ordinarily the fact that the husband takes a second wife is among Burmese Buddhists a good reason for the first wife declining to live with him in a separate house. But when the first wife chooses to live separately from her husband, and declines to return to him when asked, and the husband takes a second wife she is not entitled to maintenance under S. 488 (4) of the Cr. P. Code (*Fratt, J.*) **PONYEIN v. MA SEWE KIN.** 11 Bur. L. T. 105=47 I. C. 866=19 Cr. L. J. 966.

—S. 485—Complainant, right of, to conduct prosecution whether affected by complainant being also Prosecuting Inspector—Permission, grant of—Discretion of Court. *See* (1916) DIG. COL 531; **MAUNG PU v. EMPEROR.** 10 Bur. L. T. 213=36 I. C. 166.

—S. 493—Bail—Power of a British Magistrate to grant bail to a person arrested under a warrant issued under S. 7 of the Indian Extradition Act. *See* Indian Extradition Act. S. 18. 20 Bom. L. R. 1009.

—S. 499—Commitment to Sessions—Release on bail—Omission to mention date for appearance of accused—Forfeiture of security.

An accused person, who was committed to take his trial at the Sessions Court was released on bail. The bail bond was in form No. 42, Cr. P. Code the accused binding himself to appear at the Sessions Court on a specified date. Below his signature was the undertaking by the surety that he shall cause the accused's appearance at the Sessions Court for the trial, and that in case of the accused making default he shall be liable to forfeit the amount of the security. The later declaration did not, however, mention the date for the accused's appearance. The accused having made default, the security was forfeited.

*Held*, that the bail bond should be read as one document and the undertaking by the surety should be read as referring to the date mentioned in the portion of the bond signed by the accused and that, therefore, the bond was rightly forfeited for accused's default of appearance. (*Abdur Ramim and Napier, JJ.*) **MAPPILLAI KADIR ROWTHEER v. EMPEROR.** 46 I. C. 47=19 Cr. L. J. 687.

—S. 512—Absconding accused—Evidence taken in the absence of—No finding by magistrate that there was no immediate prospect of arrest—Evidence if admissible.

The mere non-recital by the Magistrate in his order of a finding that there was no immediate prospect of the arrest of the accused who

## CRIMINAL PROCEDURE CODE, S. 514.

he clearly found had absconded. does not render the evidence taken by him, under S. 512 of the Cr. P. Code, inadmissible against them when arrested. 38 All. 28 dist. (Richardson, C.J. and Tudball, J.) BHAGWATI v. EMPEROR. 16 A. L. J. 902=43 I. C. 431.

—S. 514—Bond for appearance before the police under the City of Bombay Police Act (IV of 1902, Ss. 106 and 10—Forfeiture of bond—Jurisdiction of Presy. Magistrate.

The Presidency Magistrate of Bombay has no jurisdiction, under S. 514 of the Cr. P. Code, to order the forfeiture of a bond taken by the police under S. 107 of the City of Bombay Police Act. (Shah and Martin JJ.) In re HUBERT CRAWFORD. 42 Bom. 400=20 Bom. L. R. 379=45 I. C. 511=19 Cr. L. J. 507.

—S. 514—Security Bond—Forfeiture—Conditions of.

Where a person gave security for Rs. 1,000 for a bad character apparently at the request of the Thanadar who then had the surety's son under the arrest and that person's brother tracked down the absconder and secured his arrest.

Held, on revision, that forfeiture of the whole bond was very hard for the surety and that not more than Rs. 25 be realized from him and even that only if the whole penalty be not recovered from the principal. (Le Rossignol, J.) SHEER v. EMPEROR. 5 P. W. R. (Cr.) 1918.

—S. 514 and Sch. 5, Form XI.—Security bond for good behaviour—Forfeiture against the sureties—Conditions—Conviction of principal of offence in Native State—Effect.

The petitioners in this case were sureties for the good behaviour of one SS. and executed the surety bond prescribed in Form XI Schedule V of the Code of Criminal Procedure, binding themselves as sureties for SS "that he will be of good behaviour" to His Majesty the King Emperor of India and to all his subjects during the said "term etc." SS. was convicted by a Court of the Kapurthala State of an offence under S. 457 of the Penal Code.

Held, that by transgressing the laws of the Kapurthala State, SS did not make any default in his undertaking to be of good behaviour to His Majesty the King Emperor and his subjects and that the sureties were consequently not liable to have their bond forfeited. 20 P. R. (Cr.) 1878, 37 P. R. (Cr.) 1881 and 30 P. R. (Cr.) 1889, referred to. (Rattigan and Le Rossignol, JJ.) BAHADUR SINGH v. EMPEROR. 26 P. R. (Cr.) 1918=35 P. W. R. (Cr.) 1918=47 I. C. 440=19 Cr. L. J. 924.

—Ss. 514 and 122—Surety—Rejection of, on the ground that surety though respect-

## CRIMINAL PROCEDURE CODE, S. 517.

able had only immoveable property, bad. See CR. P. CODE, SS. 122 AND 514. 16 A. L. J. 503.

—S. 517—Confiscation of property found with persons against whom proceedings under Ss. 109 and 110 have been taken when justifiable. See CR. P. CODE, SS. 109 AND 110. 8 L. W. 350=24 M. L. T. 256.

—S. 517—Order for disposal of property regarding which offence has been committed—Property, conversion of—Sale proceeds property in the hands of vendor.

A gold ornament was stolen from the complainant and was converted by the thief into bangles. The bangles were sold by the thief for Rs. 184-4-0 to the applicant, who converted them into gold and sold it in pieces to the different persons. In the course of trial of the theft case, the applicant was made to produce Rs. 184-4-0 and at the end of the trial the Magistrate ordered the sum to be paid over to the complainant.

Held, that the money could not be paid over to the complainant under S. 517 of the Cr. P. Code since it merely represented the sum which the applicant paid to the accused, as price of the gold bangles, and it could not be treated under the explanation to the section as property with reference to which an offence had been committed. (Shah and Kemp, JJ.) ANANT VIRUPAX In re. 20 Bom. L. R. 604=46 I. C. 401=19 Cr. L. J. 721.

—S. 517—Pledge of stolen debentures—Fledgée, position of—Power, of Court to restore debentures to owner, when equities not decided.

Three debentures belonging to S were stolen and sold by thief to F., who pledged them to N. A prosecution of F. Under S. 411 I. P. C. ended in his acquittal. During the trial N having been called upon to produce the debentures made them over to the Magistrate. Subsequently on the application of N for the return of the debentures the Magistrate ordered that they should be made over to S.

Held, that the Magistrate should not have made the order, as there were questions between N and S as to which of them was the rightful owner which could only be determined in a Civil suit, and that in order to prevent the possibility of N's dealing with the debentures until the decision of the Civil Court N should be directed to deposit them with an officer of the court for three months, within which S must be directed to bring a civil suit to determine the ownership of the debentures. (Sanderson, C.J. and Beachcroft, J.) NARENDRA NATH MITRA v. E. STUDD. 46 I. C. 768=19 Cr. L. J. 788.

—S. 517—Scope of—Madras Towns Nuisances Act (III of 1889), Ss. 6 and 7—Conviction under—Sovereigns found in

## CRIMINAL PROCEDURE CODE, S. 520.

*accused's pocket and waist cloth—No proof that sovereigns had been staked—Confiscation—Legality.*

The fact that money is found in the pocket or waist cloth of a person engaged in gambling does not, by itself lead to the inference that it has been staked. Where a Magistrate convicted the accused of offences under Ss. 6 and 7 of the Madras Towns Nuisances Act and at the same time made an order for the confiscation of four sovereigns found in his pocket and waist cloth and there was no evidence that the sovereigns had been actually staked, *held*, that the order of confiscation was illegal.

Per *Ayling, J.*—S. 517 of the Cr. P. Code, wide as it is, does not confer on a Court an absolute power of disposition of property regarding which an offence had been committed and which has not been used for the commission of an offence. (*Ayling and Phillips JJ.*) APPAJI IYER *In re.* 41 Mad. 644=34 M. L. J. 253=7 L. W. 523=44 I. C. 205=19 Cr. L. J. 301.

—S. 520—Disposal of property—Order for, can be made only by a Court of appeal or revision—Appeal against acquittal by First Class Magistrate—Jurisdiction of Sessions Judge.

A Magistrate of the first class in acquitting an accused person charged with theft of cattle, ordered the cattle to be returned to him. On appeal, the Sessions Judge reversed the order and held that the complainant was entitled to the custody of the cattle.

*Held*, that the Sessions Judge had no jurisdiction to act under S. 523 of the Cr. P. Code since he was neither a Court of appeal nor a Court of revision in the case. 35 Bom. 253, foll. 9 Mad. 448 diss. (*Shah and Marten, JJ.*) *In re KHIMA RUKHAD.* 20 Bom. L. R. 395=45 I. C. 501=19 Cr. L. J. 597.

—S. 522—Criminal force—Meaning of—Mere show of criminal force insufficient—Penal Code, Ss. 349 and 350.

The foundation of an order under S. 522 of the Cr. P. Code should be finding of the Court to the effect that the person in whose favour the order is made has been dispossessed of a specific property by use of 'criminal force.' This interpretation of the language of the statute works as a hardship, but concurrent decision of all the High Courts have to be accepted. 25 Cal. 434 ref. (*Jwala Prasad, J.*) BUNDI SINGH *v.* EMPEROR. 4 Pat. L. W. 322=45 I. C. 276=19 Cr. L. J. 516.

—S. 526—Criminal case—Transfer—Award of compensation by way of costs for adjournment—Local inspection by Magistrate with a view to understand evidence about to

## CRIMINAL PROCEDURE CODE, S. 526.

be given. See (1917) DIG, COL. 477; RAGHUNANDAN PRASEAD *v.* RAMADHIN SINGH, 2 Pat. L. W. 218=42 I. C. 918=19 Cr. L. J. 6.

—S. 526—Transfer, grounds for—Local inspection by magistrate—Record of impressions formed not made. See (1917) DIG, Col. 479: MURAT LAL *v.* EMPEROR. 3 Pat. L. W. 261=43 I. C. 252=19 Cr. L. J. 92.

—Ss. 526 and 526—Transfer, grounds for—Adverse opinion in another case.

The opinion expressed by the Magistrate in a previous case in which the accused was tried and convicted on a separate and distinct charge is in itself no ground for the transfer of the case. (*Jwala Prasad, J.*) HAYAT KHAN *v.* EMPEROR. 43 I. C. 409=19 Cr. L. J. 121.

—S. 526—Transfer—Serious charge—Case pending before Honorary Magistrate—Trial before Sessions Court.

Where a person was charged with offences falling within Ss. 409 and 420 of the I. P. C. of which he was acquitted on trial, and he obtained sanction under S. 211 of the Penal Code to prosecute the complainant for falsely charging him with the aforesaid offences, and the case was filed before a Joint Magistrate who transferred it to the Court of an Honorary Magistrate having first class powers where the case remained pending for four months, *held*, that the case was of a nature serious enough to be tried either in a Court of Sessions or by a more experienced Magistrate. (*Know, J.*) MAGAN LAL *v.* GANESH PRASAD. 16 A. L. J. 294=45 I. C. 515=19 Cr. L. J. 611.

—S. 526—Transfer of case—Magistrate necessary witness for defence—Effect of.

In applying for the transfer of a case on the ground that the Magistrate before whom it is pending is a witness for the defence, the accused must satisfy the High Court that the Magistrate will not be a necessary and essential witness for the defence. (*Chitty and Smither, JJ.*) SRILAL CHAMARIA *v.* EMPEROR. 28 C. L. J. 370=45 I. C. 680=19 Cr. L. J. 682.

—S. 526 (e)—Transfer of criminal case—Grounds for—Allegation that justice is more likely to be done by another Magistrate who did not know the parties.

The High Court will not, under S. 526 (e) of the Cr. P. Code transfer a criminal case from one Court to another when the only ground alleged is that it will be in the interests of justice if the trial were held by a court which knew nothing about either party. (*Know, J.*) MEWA RAM *v.* NARAIN DAS. 16 A. L. J. 490=46 I. C. 158=19 Cr. L. J. 702.

## CRIMINAL PROCEDURE CODE, S. 525

—S. 525—District Magistrate—Transfer of case on the ground of a more serious offence being disclosed and on the ground of delay in disposal—Order improper.

On an application under S. 525 of the Cr. P. Code, the Dt. Magistrate transferred the case against an accused tried for offences under Ss. 500 and 504 I. P. C. to his own file on the grounds that no offence under S. 500 was disclosed, that the offence under S. 504 was triable summarily and that the trial before the Subordinate Magistrate had already become protracted:—

*Held*, that it was for the Subordinate Magistrate to determine whether a case under S. 500 or 504 of the Penal Code was made out and that the Dt. Magistrate was not at that stage competent to decide whether an offence under S. 500 was or was not committed; that the delay in disposing of the case could not be a ground for taking action under S. 525 of the Cr. P. Code and that if the Dt. Magistrate thought there was delay he should have asked the Subordinate Magistrate to expedite the trial; and that the order of the Dt. Magistrate was bad and must be set aside. (*Jwala Prasad, J.*) *JEWARAJ RAMJI DAS v. DULLAVJI HOWJI.* (1918) Pat. 78= 43 I. C. 407=19 Cr. L. J. 119.

—S. 528—Initiation of proceedings by Dt. Magistrate against person residing outside the limits of local jurisdiction—Transfer of proceeding to subordinate magistrate, if valid. See CR. P. CODE, S. 107 (2).

27 C. L. J. 314.

—Ss. 530 (p) and 537—Bengal Excise Act (V of 1909) S. 46—Offence under—Complaint by police officer in rank below an officer in charge of the Station—Proceedings of Magistrate without Jurisdiction void. See BENGAL EXCISE ACT, SS. 46 AND 83 (a).

47 I. C. 813.

—S. 531—Conviction—Objection to Jurisdiction of trial Court—No interference on appeal or revision, if no failure of justice. See CR. P. CODE, SS. 181 (2) AND 531.

47 I. C. 92.

—S. 532—Criminal trial—Trial for offences under S. 420 I. P. C., Assistant Sessions Judge—Judgment reserved—Order quashing commitments and directing fresh inquiry on account of misjoinder of charges and vagueness of sanction—Order illegal—Proper course to make a reference to High Court. See CR. P. CODE, SS. 197 AND 532.

20 Bom. L. R. 507.

—Ss. 533 and 164—Defect in compliance with the provisions of S. 164—Cure of by evidence taken by the court before which the confession is tendered. See CR. P. CODE, SS. 164 AND 533.

43 I. C. 423 (F. B.)

## CRIMINAL PROCEDURE CODE, S. 555.

—Ss. 537 and 540—Examination of some prosecution witnesses after defence closed—Opportunity to cross-examine—No prejudice—No revision.

In a criminal case after the evidence for defence had closed the Magistrate examined certain witnesses for the prosecution giving at the same time full liberty to the accused to cross-examine them, held that in revision it is not proper for the High Court, having regard to S. 540 of the Cr. P. Code, to interfere with the Magistrate's order on this ground. (*Lindsey, J. C.*) *GUN BAKSH TEWARI v. EMPEROR.* 21 O. C. 95=45 I. C. 673= 19 Cr. L. J. 630.

—S. 537, and Chs. 21 and 22—Procedure—Trial, change of, from regular into summary, legality of. See (1917) DIG. COL. 482; *ADOO v. EMPEROR.* 10 S. L. R. 135= 39 I. C. 939=10 Cr. L. R. 82.

—Ss. 537, 559 and 75—Warrant of arrest—Portion directing arrest initialled by magistrate—Mere irregularity—Arrest not illegal. See CR. P. CODE, SS. 75, 77 ETC.

3 Pat. L. J. 493.

—S. 537 (b)—Want of sanction—Commitment to Sessions—Acquittal on the ground of want of sanction—Section 537 (b) Cr. P. C. applicable only to appeals and revision. See CR. P. CODE SS. 195 AND 197.

35 M. L. J. 259.

—S. 540—Criminal trial—Examination of few prosecution witnesses after defence closed—Opportunity to accused to cross-examine—No prejudice—No interference. See CR. P. CODE, SS. 537 AND 540 21 O. C. 95

—S. 545—Compensation—Award of—Power of court—Prosecution under S. 193 I. P. C.—Compensation under Sub S. (b) for Perjury—Jurisdiction—Cr. P. C.—S. 422—Notice to complainant—Necessity—Practice.

A Court in a prosecution under S. 193 I. P. C. can award under S. 545 of the Cr. P. Code only the expenses properly incurred in the prosecution, and has no power to award compensation under sub-section (b) for perjury.

Although under S. 422 of the Cr. P. Code the Court is not required to issue notice to the complainant in cases instituted upon a complaint, it is nevertheless, as a matter of practice, always desirable to do so where compensation has been ordered to be paid to him. Failure to do so, however, is not a ground for interference in revision. (*Mitra, C. A. J. C.*) *MANGALCHAND v. MOHAN.* 14 N. L. R. 131=47 I. C. 443=19 Cr. L. J. 927.

—S. 556—Magistrate—Disqualification—Sanction by Magistrate of prosecution at

## CRIMINAL PROCEDURE CODE, S. 562.

*meeting of Municipal Committee—Disqualification to try case.*

When a Magistrate who has a Municipal Commissioner has taken part in promoting a prosecution, as for instance by sanctioning it at a meeting of the Committee or otherwise, he will be disqualified under S. 566 of the Cr. P. Code, from trying the case, by reason of the existence of a personal interest over and above what may be supposed to be felt by every Municipal Commissioner in the affairs of the Municipality. (*Mitra, A. J. C.*) *DINDAYAL v. SECRETARY, MUNICIPAL COMMITTEE CHINDWARA.* 14 N L R 14

—S. 562 — Cheating, whether section applicable to a conviction under S. 420 C. P. C.

The word 'cheating' in S. 562 of the Cr. P. Code does not cover the form of cheating punishable under S. 420 of the I. P. C. 16 Cr. L. J. 781, foll. 12 A. L. J. 465 diss. (*Ajiting and Phillips, JJ.*) *SUNDARAM AIYAR v. EMPEROR.* 41 Mad. 533 = 47 I. C. 658 = 19 Cr. L. J. 934.

—S. 562—Trivial offence—Stealing cow and leading it to slaughter house. See (1917) DIG. COL. 483; *ADOO v. EMPEROR.* 10 S. L. R. 185 = 39 I. C. 939 = 10 Cr. L. R. 32.

**CRIMINAL RULES OF PRACTICE MAD R. 188**—Criminal case—Application for copy of judgment—Search fee need not be paid—See PRACTICE, CRIMINAL CASE.

35 M L J. 401.

**CRIMINAL TRIAL**—Accused—Duty of, to explain, when facts within his special knowledge. See EVIDENCE ACT, S. 196. 43 I. C. 605.

—Alternative defences—Pleas of *alibi* and private defence—Both open to accused. See EVIDENCE ACT S. 105. 16 A. L. J. 169.

—Appeal from the conviction of Asst. Sessions Judge—Asst. Sessions Judge promoted to the position of the Session Judge before appeal filed—Stay of hearing pending appointment of successor or reference to High Court. See Cr. P. CODE. SS. 408 AND 409. 3 Pat. L. J. 192.

—Assessors—Absence of one, on the day of trial—Nomination of another person whose name was not in the official list of assessors—Trial illegal. See Cr. P. CODE, SS. 284 AND 285. 3 Pat. L. J. 141.

—Assessors—Direction to—Duty of judge to explain the law relating to private defence, if it is pleaded as a defence—General direction, not enough. See PENAL CODE, SS. 99 147, ETC. 3 Pat. L. J. 653.

## CRIMINAL TRIAL.

—Bail—Refusal of, in bailable offence—Demand of abnormal security—Omission to furnish—Accused in custody during greater part of trial—Miscarriage of justice—Conviction set aside and re-trial ordered. See Cr. P. CODE, SS. 396 AND 110. 20 Bom. L. R. 121.

—Bench of Magistrates—Judgment pronounced by Bench of which one of the members had not heard all the evidence—Illegality—Retrial. See Cr. P. CODE SS. 15 AND 350. 16 A. L. J. 884.

—Benefit of doubt—Scope of the rule—Where the prosecution evidence is unsatisfactory and doubtful, the Court should give the accused the benefit of the doubt without going into the question whether he has been able to establish his defence. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) *EMPEROR v. SAHEB DIN.* 5 O. L. J. 167 = 46 I. C. 145. = 19 Cr. L. J. 689.

—Charge—Numerous offences of the same kind—Separate charges for—Expediency of prosecution charging only for 2 or 3 offences and dropping the others, on conviction for the former. See Cr. P. CODE, SS. 234 and 587. 43 I. C. 577.

—Charge—Several connected offences—Accused issuing many false receipts and falsifying many items in accounts with a view to abetting cheating within a year—Trial for more than three items by different Courts—Legality of—Desirability of same Court trying all the offences. See Cr. P. CODE SS. 234, 235 AND 238. 4 Pat. L. W. 105.

—Conduct of accused—Relevancy of.

The conduct of an accused person, such as, absconding after the occurrence and giving false name and residence when found may be a ground for suspicion against him and may be regarded as some evidence of guilty intent, but it is not alone sufficient and conclusive in the absence of reliable evidence. Such conduct is not a part of the *res gestae* of the criminal act with which the accused is charged. (*Atkinson and Imam JJ.*) *EMPEROR v. RITBARAN SINGH.* 4 Pat. L. W. 120 = 46 I. C. 709 = 19 Cr. L. J. 789.

—Conviction—Proof of guilt, what constitutes. See (1917) DIG. COL. 484; *ASHRAF ALI v. EMPEROR.* 21 C. W. N. 1182 = 43 I. C. 241 = 19 Cr. L. J. 81.

—Costs—Adjournment—Day costs when to be granted. See Cr. P. CODE, S. 344. 20 Bom. L. R. 124.

—Cross cases—Rioting—Conviction in one case on plea of guilty—Conviction in counter-case if proper.

## CRIMINAL TRIAL.

The fact that there has been a conviction in one rioting case, on a plea of guilty, is no bar to a conviction in a cross case of rioting in connection with the same occurrence which arose out of a dispute regarding the exclusive possession of a piece of land. (*Newbold and Huda, JJ.*) HAFIZUDDIN KHAN v. MAHOMED ELIM. 46 I. C. 606=19 Cr. L. J. 766.

——Duty of prosecution. See PENAL CODE, SS. 463 AND 464. (1918) Pat. 36.

——Evidence in—Accused, incompetency of, to give evidence. See CR. P. CODE, S. 342 (4) 27 C. L. J. 91

——Evidence—Duty of prosecution to produce direct evidence of alleged offence—Omission unexplained. See (1917) DIG. COL. 485 ASHRAF ALI v. EMPEROR. 21 C. W. N. 1152=43 I. C. 241=19 Cr. L. J. 81.

——Evidence—Police diaries—Use of, to discredit hostile witness for the Crown. See EVIDENCE ACT, SS. 155 AND 157. (1913) Pat. 95.

——Ex parte order—Power to set aside See CR. P. CODE, SS. 135 AND 137. 4 Pat. L. W. 30.

——Interlocutory applications in—Duty of Court to pass orders on—Direction to keep on record—Impropriety of. See CR. P. CODE, S. 439. 47 I. C. 274.

——Joint trial—Several accused—Trial not bad. See CR. P. CODE, S. 184. 3 Pat. L. J. 124.

——Jury—Direction to—Confession of accused before police, relied on as evidence—functions of Judge and Jury as to evidence—Direction by Judge to be sober, impartial and free from slang.

A Sessions Judge misdirected the Jury in speaking of the statements of the co-accused which were not self-incriminating as confessions or confessional statements asking the Jury to take them into consideration against the Appellant.

Where a magistrate admits in evidence the confession before a police officer not merely so much as led directly to the discovery of but practically the whole of such statement and directed the Jury that these statements could and should be used not merely against the maker but against his co-accused, it is a clear misdirection.

It is for the Judge to admit or exclude evidence in accordance with the law on the subject and for the Jury, to weigh and value the evidence admitted and there is a misdirection to Jury in leaving to them, after

## CRIMINAL TRIAL.

explaining SS. 24 to 30 of the Evidence Act, to decide whether the statements or confessions made to the Magistrate and how much of the confessions made to the police were admissible.

Use of expressions assuming the guilt of the accused and of slang and colloquial phrases and of the interrogative method in charging the Jury condemned. (*Tousson and Shamsul Huda, JJ.*) AMIRUDDIN AHMED v. EMPEROR. 43 Cal. 567=22 C. W. N. 213=27 C. L. J. 143=44 I. C. 321=19 Cr. L. J. 303.

——Jury—Retirement of, to consider verdict—Communication with outsiders before delivery of verdict—Verdict to be set aside, without proof of prejudice to accused. See CR. P. CODE, S. 340. 27 C. L. J. 553.

——One offence falling under different sections of Penal Code—Separate trials and convictions for—Legality—Selling of girl and cheating purchaser if one act or different acts.

A man cannot be tried and convicted in two separate trials for the same offence, even though that offence may be one falling within two different sections of the Penal Code. The selling of a girl under false representations and thereby cheating the purchaser are not different acts and separate trials and convictions therefore are not legal (*Cheris, J.*) RAJ BAHADUR v. EMPEROR. 23 P. R. (Cr.) 1918=28 P. W. R. (Cr.) 1918=47 I. C. 447=19 Cr. L. J. 931.

——Preliminary enquiry—Postponement of process against accused—Allowing accused to appear and cross-examine witnesses—Procedure illegal. See CR. P. CODE, SS. 202, 203 AND 204. 4 Pat. L. W. 307.

——Prosecution, duty of, in letting evidence.

It is the duty of the Crown Prosecutor to put only such questions in his examination-in-chief as are relevant and not to get facts admitted into evidence which are not admissible. It is the duty of the Judge to require the prosecution to adopt a correct and proper attitude in the examination of witnesses. (*Atkinson and Imam, JJ.*) EMPEROR v. RITBA-RAN SINGH. 4 Pat. L. W. 120=46 I. C. 709=19 Cr. L. J. 789.

——Re-trial—Order for long delay—Effect of.

Certain persons were tried for an offence under S. 147 read with S. 347 I. P. C. and acquitted by the Magistrate on 4th Dec. 1916. A revision having been filed against the order by the complainant (there having been no appeal filed by the Local Government) the Sessions Judge referred the case to the High Court on 4th Jan. 1918 recommending a re-trial, held,

## CRIMINAL TRIAL.

that having regard to the long lapse of time a re trial was inadvisable. (*Richards, C. J.*) *RAM SAMBHARI TEWARI v. RAJMAN NAIK.*

16 A. L. J. 373  
= 45 I. C. 511 = 19 Cr. L. J. 607.

— *Re-trial—Order of — Validity in absence of notice to accused.*

An order of re-trial is bad in the absence of notice to the accused so that he may have an opportunity of urging his objections to the same. (*Le Rossignol, J.*) *GAMAN v. EMPEROR.*

49 P. L. R. 1918 = 6 P. W. R. (Cr.) 1918.

— *Re-trial—Order for not to be made with a view to fill in gaps in the prosecution story.*

It is important that in a Criminal case the prosecution should understand that it must put in all its evidence, and a re-trial should not be ordered to enable it to fill up gaps in its evidence. (*Smither, J.*) *GRANADE VENKATA RATNAM v. THE CORPORATION OF CALCUTTA.*

22 C. W. N. 745 = 28 C. L. J. 32 =  
43 I. C. 593 = 19 Cr. L. J. 753.

— *Sentence—Separate trials on the same day—Order for concurrent sentences of imprisonment—Propriety of.* See Cr. P. CODE, S. 397.

43 I. C. 666.

## CRIMINAL TRIBES ACT (XXVII of 1871) S.

23—*Entering dwelling house door open and abstracting things—Theft—Lurking house-trespass and house breaking by night—Essentials of offence—Prior conviction for dacoity—sentence for transportation for life.*

Where an accused person belonging to a criminal tribe with two previous convictions for dacoity finding the door of a dwelling house open walked into it and abstracted certain things in a room upstairs, but before he could remove them alarm was given by one of the occupants of the room and he was caught, held, that he was guilty of theft and not of lurking house-trespass or house-breaking by night and he could not be sentenced to transportation for life under S. 23 of the Criminal Tribes Act: (*Richards, C. J. and Banerji, J.*) *EMPEROR v. BHAGWANA.*

16 A. L. J. 383 = 45 I. C. 513 =  
19 Cr. L. J. 609.

**CROWN—GRANT**—Power of Crown to fix line of devolution unknown to Hindu Law. See GRANT.

21 O. G. 106 (P.G.)

**CROWN DEBTS**—*Priority of—English mortgage—Common Law of England—Applicability to India.*

The Crown is not entitled to priority over a mortgagee in respect of immoveable properties mortgaged under an English mortgage.

In such a mortgage the ownership is wholly transferred to the creditor which is however

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liable to be divested by the repayment of the loan on the appointed day. The mortgagee is not obliged to apply for sale of the property mortgaged under, S. 18, Sch. II of the Pres. Towns Insol. Act. He has no debt provable in insolvency until his security has been proved or realised. He stands outside the bankruptcy. 29 All. 587 and 28 Mad. 420 ref.

The ownership of the property passes to the first mortgagee in an English mortgage, but not to the puisne mortgagee, and he is not entitled to priority over the Crown.

Shares merely deposited and not actually transferred do not create a right in favour of the depositee superior to the right of the Crown.

According to English law whenever the right of the Crown and the right of the subject with respect to payment of a debt of equal degree come into competition, the Crown right prevails. This rule is of universal application except in so far as the legislature has thought fit to interfere with it. (*Chaudhuri, J.*) *THE BANK OF UPPER INDIA v. THE ADMINISTRATOR-GENERAL OF BENGAL.*

45 Cal 653 = 22 C. W. N. 793 =  
47 I. C. 529.

— *Escheat—Zemindar Resident in house on the abadi in village Sakitra—Death without legal heirs. See ESCHEAT, CROWN AND ZEMINDAR.*

16 A. L. J. 653.

**CUSTOM**—*Abadi site—Alienation of, by non-proprietor—Status of alienor, how determined—Malik gabsa entitled to site. See ABADI.*

43 I. C. 696.

— *Adoption—Aroras in Lahore District—Adoption of daughter's son—Validity—Proof—Onus.*

The adoption of a daughter's son, being opposed to Hindu Law as well as the general agricultural custom of the Province, the presumption is against its validity and a person relying upon a special custom or usage must prove it. 50 P. R. (1893) ref. 50 P. R. 1874, 77 P. R. 1878, 35 P. R. 1885, 57 P. R. 1888 dist. 79 P. R. 1901 diss. (*Rattigan, C. J. and Le Rossignol, J.*) *GOPI CHAND v. MUSSAMAT MALAN.* 106 P. R. 1918 = 48 I. C. 373.

— *Alienation Necessity—Proof of—Alienor being possessed of large estate, effect of—Extravagance or waste—Proof of.*

In the absence of any proof as to any immorality, reckless extravagance or wanton waste on the part of the alienor, the mere fact of his owning a large area of land is insufficient to prove that he had no necessity.

Where all the three proprietors of a joint ancestral holding, one of whom is not childless join together in alienating, it, there is a strong indication of bona fides and the natural infer-

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ence is that they did not join to injure either their own or their reversioners' interests. (*Scott-Smith and Shadi Lal, JJ.*) **RAGHUBAR DAS v. MUXSRI.** 27 P. W. R. 1913=45 I. C. 511.

—Adoption—Validity—Punjab agriculturist, Ghosewa Rajputs—Adoption of sister's son—Validity—Proof—Onus.

The general presumption in the case of the Punjab agriculturists against the validity of the adoption of a sister's son applies to Ghosewa Rajputs and the onus of rebutting that presumption is on the party setting up the validity of such adoption. (*Scott-Smith and Shadi Lal, JJ.*) **ABDULLA v. NABIA.** 25 P. W. R. 1913=45 I. C. 9.

—Alienation—Abadi deh—Mauza Mazara District Hoshiarpur—Right of non-proprietors to sell their sites.

Held, that a custom had been established according to which the non-proprietors of Mauza Tuto, Mazara in the Hoshiarpur District have the right to sell their sites. 5 P. R. 1882 and 18 and 50 P. R. 1339. (*Leslie Jones, J.*) **NANDU v. PUNJAB INGE.** 35 P. R. 1918=52 P. W. R. 1918=45 I. C. 96.

—Alienation by male owner—Reversioner's suit for declaration of its invalidity as against reversion—Declaration if can be made against person acquiring property under decree for pre-emption.

A suit by the reversioners for a declaration that an alienation shall not affect their reversionary rights except to the extent of the amount raised for necessity is competent against a person who has acquired the property under a decree for pre-emption, in the same way as against the original vendee—presumption being simply a right of substitution, entitling the pre-emptor to stand in the shoes of the vendee in respect of all rights and obligations arising from the sale. 7 All. 775 ref. (*Rattigan, C. J.*) **LAL v. MILKHI.** 64 P. R. 1918=46 I. C. 454.

—Alienation—Necessity—Money spent in defence of the head of a family in a criminal case.

According to the custom, money raised on ancestral lands for the purpose of the defence of the head of the family on a criminal charge is money raised for a valid necessity. 3 All. 4 ref. *Broadway, J.* **NABAIN SINGH v. KHAZAN SINGH.** 22 P. R. 1918=44 I. C. 814.

—Alienation—Right to challenge—Acquisition of occupancy rights in property by person as Government tenant—Acquisition by his sons of full proprietary rights—Alienation of lands by them—No rights in their sons to challenge alienation.

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The grandfather of plffs. was a Govt. tenant of the land in dispute and acquired occupancy rights therein. He was succeeded by his sons (the defts. 1 to 3, who on payment of Rs. 450 acquired full proprietary rights and subsequently sold the land for Rs. 7,150. Plffs. sued for a declaration that the sale should not affect their reversionary rights.

Held, that as the occupancy rights merged in the proprietary rights and were acquired by the alienors themselves and were consequently not ancestral *qua* the plffs, the latter had by custom no locus standi to challenge the alienation. (*Scott-Smith and Leslie Jones, JJ.*) **LAL v. GAUHAR.** 5 P. R. 1913=44 I. C. 129.

—Alienation—Widow—Necessity—Raising money for maintenance.

A widow is justified in alienating property to pay her deceased husband's creditors and to raise money for her maintenance. The alienee is not bound to see to the application of the money. (*Leslie Jones, J.*) **HOTU RAM v. SURKA RAM.** 43 I. C. 530.

—Alienation—Will by sonless proprietor devising whole of his ancestral property to daughter in presence of brother and nephew—Validity—Mair Rajputs, Chakwal tahsil, Jhelum District.

By custom among Mair Rajputs of the Chakwal tahsil of the Jhelum districts a sonless proprietor is competent to devise the whole of his ancestral estate in favour of his daughter in the presence of his brother and nephew. (*Shadi Lal, J.*) **HAYAT v. MUSSAMMAT GULLAN.** 87 P. R. 1918=47 I. C. 931.

—Essentials of valid customs.

A custom must be ancient, certain, reasonable, being, in derogation of the general rules, of law must be construed strictly. (*Sanderson, C. J. Woodroffe Mookerjee, JJ.*) **MARIAN BIBEE v. SHEIKH MAROMED IBRAHIM.** 28 C. L. J. 306=48 I. C. 561.

—Evidence of—Wajib-ul-arz entry in.

An extract from wajib-ul-arz recording a custom of pre-emption is *prima facie* evidence of the existence of the custom and as pointed out by the Privy Council in 37 A. 129, it is unnecessary for the plff. to give instances in support of the entry, but the deft. in such a case is entitled to give evidence to show that no custom of pre-emption exists. (*Richards, C. J. and Banerjee, J.*) **KALLU v. KALLU SINGH.** 43 I. C. 854.

—Existence of—Question as to when a ground of second appeal. See C. P. C. s. 100 (a) 23 M. L. T. 44 (F. B.)

—Family custom—Modification of ordinary law of succession—Evidence—Proof

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in certain instances, even if numerous, the relatives did not take the trouble to claim the property of the eunuch but permitted it to go to another eunuch. (*Stuart, A. J. C.*)  
**DADHIG SINGH v. BASTI.**

5 O. L. J. 189=46 I. C. 77.

—*Succession—Jullundhur District Tehsil Jullundhur Arushal estate—Daughter succeeding to death of, leaving daughter and sisters—Preference, custom—Onus of proof.*

Among Sayads of Tehsil Jullundhur in the Jullundhur District the daughter of a daughter succeeding by custom to the ancestral estate of her father is not excluded by her mother's sisters. The onus of proving a custom to the contrary is on those setting it up. (*Leslie Jones, J.*) **ABIM BIBI v. UMTAN BIBI.**

21 P. W. R. 1918=44 I. C. 979.

—*Succession to gifted land—Reversioners of donor in presence of donee's daughter's son—Res judicata—Point of custom wrongly decided in a previous suit—Necessary issue.*

K and C gifted land to their sister's son B. On death of B his widow succeeded and made a gift of part of the land to her daughter's son T. C. The present defendants, the agnates of K. and C, brought a suit for a declaration that the gift by the widow of B should not affect their reversionary rights. During the pendency of the suit the widow died, so the suit was changed into one for possession. It was held that upon the donee dying unless the property gifted would revert to the collaterals of the donors. It was however also held that as the reversioners with the exception of one B had acquiesced in the gift their suit should be dismissed. B was given a decree for his 1/6th share. The rest of the land which was not the subject of the gift by the widow of B to T. C. was in dispute and the questions were (1) whether T. C. daughter's son of the original donee is entitled or the defendants who are reversioners of the original donors and (2) whether the erroneous decision in the question of custom operates as *res judicata* in the present suit.

*Held*, that there is no reversion to the collaterals so long as descendants of the donee, whether in the male or female line are existing and that consequently the daughter's son of the original donee was entitled to the land in preference to the collaterals.

84 P. R. 1909 and 68 P. R. 1911, referred to. *Held also*, that the decision in the former case on the point of custom, though erroneous, was *res judicata* in regard to those parties in respect of whom it was a necessary issue for the decision of the case and consequently the previous decision was not binding in respect of reversioners who were found to have acquiesced in the gift but only in respect of B, who had not acquiesced in it. (*Scott Smith and Shadi Lal, J.J.*) **TANI v. TABA CHAND.**

82 P. R. 1918=160 P. W. R. 1918=47 I. C. 373.

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—*Succession—Karoo Jats of Multan Dt.—Mahomedan Law, if applicable—Sister if excludes collaterals.*

Among Karoo Jats of Multan District the sisters of a male proprietor do not exclude his collaterals as near as first cousins. The Onus is on the person setting up the contrary to prove a custom to that effect. No rule of specific custom having been proved, held the Mahomedan Law must prevail. Pliffs. could not be deprived of their right to half the property merely because they had claimed the whole of the property in accordance with custom. (*Scott Smith and Martineau, J.J.*) **KHUDA BAKSH v. FATTEH KHATUN.**

140 P. W. R. 1918=46 I. C. 679.

—*Succession—Lahore District—Jats of Mouza Galwehra—Ancestral property—Succession to—Custom of distant collaterals excluding daughter held not proved. (Shadi Lal and Broadway, J.J.)* **MANGAL SINGH v. MUSST. BUDHO.**

4 P. R. 1918=46 I. C. 798.

—*Succession—Self acquired property—Gariwal Jats of Ludhiana Dt.—Daughters and collaterals—Difference.*

Among the Gariwal Jats of the Ludhiana District there is a special custom, contrary to general custom, whereby daughters are excluded from succession to self-acquired property by collaterals. (*Scott Smith, J.*) **HAZARA SINGH v. BISHEN SINGH.**

71 P. L. R. 1918=72 P. W. R. 1918=44 I. C. 833.

—*Succession—Sister and sisters's son—Right to succeed under customary law—Goudals of Deowal, Tahsil Bhera, Shahpur Dt.*

It is too broad and sweeping a proposition that a sister and a sister-son cannot under any circumstances be regarded as heirs to property in cases governed by the general customary law of the province. The onus is on them to prove their rights of succession as against near and possibly even remote collaterals, but in the absence of any agnatic heirs, their right to succeed is preferable to the rights of the proprietary body or the Government, especially in villages which are homogeneous and are composed of proprietors belonging to different religions, different castes and different tribes. Among the Goudals of Mauza Deowal, Tehsil Bhera, Shahpur Dt. a sister succeeds to the property left by her brother in the absence of his collaterals (*Rattigan, C. J. and Le Rossignol, J.J.*) **MAHOMED YAR v. UMAR HAYAT KHAN.**

65 P. R. 1918=103 P. W. R. 1918=14 P. L. R. 1918=45 I. C. 924.

—*Of trade—Bombay silver market—Kachcha adat—Principal of Kachcha adatia whether can sue to recover damage for breach of contract direct from the vendor without intervention of the kachcha adatia—Kachcha adatia*

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*hac* and *pakka adatia*. See (1917) DIG. COL. 499  
ABRAHAM v. SARUPCHAND. 42 Bom. 224=  
19 Bom. L. R. 608=41 I. C. 256

———Trade—Proof of contract of service—  
Notice of termination of customary notice.  
See (1917) DIG. COL. 499; WITTENBAKER v.  
GALSTAUN. 44 Cal. 717=43 I. C. 11.

———Unreasonable — Zemindars right to  
eject—Occupants of houses in town area. See  
(1917) DIG. COL. 550; RABIUNNISA v.  
MAHOMEDALI. 20 O. C. 299=43.  
I. C. 189.

———Validity opposed to public policy—  
Custom of brothel-keeper succeeding to property  
of *Nauchis*.

Held, that a custom by which a brothel-  
keeper succeeds to the property of a *Nauchi*  
or slave kept for the purpose of prostitution  
could, by reason of its immorality, have no  
legal force. (*Scott Smith and Le Rossignol, J.J.*)  
MAHOMED BAKSH v. NAWAZISH ALI.  
75 P. R. 1918=48 I. C. 73.

———Validity of—Reasonableness and cer-  
tainty, essential—Rent, suit for—Defence that  
by custom no rent is payable respect of certain  
classes of land in years of inundation.

Where in a suit for rent, the tenants  
claimed remission of rents payable on account  
of what are called *hajabad* land under an  
alleged custom under which in years of inun-  
dation, no portion of such rent, irrespective of  
the rent of the land inundated or of the crops  
destroyed, was recoverable from them:

Held, that the custom was both unreasona-  
ble and uncertain and was in consequence  
invalid in law. (*Mockerjee and Wainsley, J.J.*)  
SIBNARAIN MOOKERJEE v. BHUTNATH  
GUCHAIT 45 Cal 475=22 C. W. N. 422=  
28 C. L. J. 148=45 I. C. 89.

———Void for uncertainty — Occupancy  
holding—Custom of transferability subject  
to payment of *Nazar*—Amount of *Nazar*, in-  
definite. See OCCUPANCY HOLDING.  
45 I. C. 747.

**CUSTOMARY LAW**—Male proprietor governed  
by—Exchange—Validity—Test.

A male proprietor governed by the custom-  
ary law may make an exchange to improve the  
estate or to benefit the person interested  
therein. The test of the validity of the  
transaction is whether it is a fair and *bonafide*  
one, such as may be regarded as an act of  
good management. (*Shadi Lal, J.*) NAZIR  
v. AMAR CHAND. 9 P. W. R. 1918=  
44 I. C. 224.

**CUTCHI MEMONS**—Mahomedan Law, appli-  
cability of—Halai Memons—Succession and

## DAMAGES.

A Halai Memon, domiciled in Porebunder  
in Kathiawar died intestate in Bombay leaving  
moveable and immoveable properties in Bom-  
bay and Porebunder. The plff. his daughter,  
having brought a suit for a share in his estate  
according to Mahomedan Law:—

Held, that the plff. was entitled to a share  
in her father's estate as he was governed by  
Mahomedan Law in matters of succession and  
inheritance and not by Hindu Law (*Marten,*  
*J.*) KHATUBAI v. MAHOMED HAJI ABU  
20 Bom. L. R. 289=45 I. C. 619.

**CYPRES**—Doctrine of—Recognised by Hindu  
Law—Scheme suit—Power of courts to direct  
*cypres* application of trust funds. See C. P.  
CODE, S. 92. 47 I. C. 611.

**DAMAGES**—Measure of — Tenant holding  
over. See C. P. C. S. 11 EXPL. IV.  
70 P. R. 1918.

———Breach of contract—Person not per-  
forming his portion of the contract if entitled  
to sue.

A plff. who has himself failed to perform his  
part of a contract and has given no evidence  
that he has suffered any damage by the deft's  
breach of contract, cannot succeed in a suit  
for damages for breach of contract. (*Fletcher*  
*and Huda, J.J.*) NABENDRA LAL KHAN v.  
MANMOTHA RANJAN PAL. 47 I. C. 197.

———Carrier—Railway — Misdelivery of  
goods—Delivery of goods without getting back  
railway receipts—Not amounting to negligence  
—Fraud of third person — Non-liability of  
Railway. See RAILWAYS ACT S. 77.  
35 M. L. J. 35.

———Cause of action for—Religious office  
—*Joshi* — Right to fees, where ceremonies  
dispensed with by client.

Deft. No. 1 who was a non-brahmin, on the  
occasion of his mother's death, instead of call-  
ing the plff. who was the Vatandar *Joshi* of  
the village performed with the help of his  
friend, also a non-brahmin, certain non-  
Brahminical ceremonies over the body of the  
deceased. No fees were paid to deft. No. 2.  
The plff. having sued to recover the fees which  
would have been paid to him.

Held, dismissing the suit, that inasmuch as  
the plff.'s titles to his fees resulted from his  
expert knowledge in the details of the Brah-  
minical ceremonies had been deliberately  
avoided.

Per *Batchelor, A. C. J.* "It is one thing to  
say that if the Hindu villager chooses to have  
Brahminical ceremonies conducted, he must  
employ his Village *Joshi*, or fee him if he had  
not employed him but it is a different thing  
to say that though the villager might prefer  
another rite and choose not to have the  
Brahminical ceremony he is still under obli-  
gations to pay the *Joshi*." *Batchelor, A. C. J.*  
*and Kemp, J.* BALIA v. BALWANT.  
20 Bom. L. R. 454=46 I. C. 140.

**DAMAGES.**

—Continuing wrong—Obstruction to water course—Failure of plff. to obtain order from court for removal of obstruction in execution of a decree in a prior suit—Not a question of contributory negligence. *See* (1917, DIG. COL. 501, RAGHUNATH SINGH v. ACHUTANAND. 3 Pat. L. W. 233—43 I. C. 374.

—C. I. F. Contract—Sale of goods—Breach of Contract—Measure of damages. *See* CONTRACT ACT, S. 73 23 M. L. T. 320.

—Illegal seizure of cattle—Onus of proving illegality of seizure on person claiming damages. *See* BURDEN OF PROOF 44 I. C. 241.

—Libel—Judicial proceedings—Privilege—Non-liability. *See* DEFAMATION 16 A. L. J. 360 (F. B.)

—Malicious prosecution—Malice, proof of—Complaint false to the knowledge of Complainant—Acquittal of accused after trial—Cause of action, complete. *See* MALICIOUS PROSECUTION, DAMAGES 16 A. L. J. 463

—Master and servant—Wrongful dismissal—Suit for damages before expiry of the period of employment—Maintainability of—Right to full wages. *See* MASTER AND SERVANT. 46 I. C. 615.

—Measure of, in buyer's suit for breach of contract of sale of goods—Case where there is a market at which plff. can buy goods and case where there is none—Destruction. *See* CONTRACT ACT, S. 73 ILL. (A). 23 M. L. T. 320.

—Negligence—injuries due to, Measure of—principles—Award of trial Judge—Interference in appeal—Principles.

In suits for damages for injuries sustained by plff. on account of deft's. negligence the proper rule as regards the measure of damages is that something fair and reasonable but less than absolute compensation should be given. Plff. is entitled to compensation for the pain and sufferings he has undergone and will have to undergo as well as for the loss of his carrier.

When the damages are assessed by the trial Court and it gives its reasons the appellate Court can of course form its own opinion on the reasons given but should be slow to interfere unless in its opinion the damages awarded are clearly excessive or inadequate. (*Wallis, C. J. and Sadasiva Iyer, J.*) VINAYAGA MUDALIYAR v. PARTHASARTHY IYENGAR. 23 M. L. T. 312—7 L. W. 415—45 I. C. 552.

—Sale of goods—Breach of contract—Basis of ascertaining damages—Market at the place of delivery—Absence of—Effect of—Measure of damages—English and Indian Law. *See* CONTRACT ACT, S. 73 23 M. L. T. 320.

**DECREE.**

—Search for stolen property by police officer—*Bona fide* conduct whether liable in damages *See* CR. P. CODE, SS. 165, 172. 35 M. L. J. 127.

—Suit for, malicious prosecution—What the plff. has to prove—Innocence, proof of, if relevant. *See* MALICIOUS PROSECUTION 34 M. L. J. 517.

—Suit against Railway Company for loss of goods carried under Risk note C—Plaintiff not setting up case of wilful negligence and not adducing evidence in support thereof—Company pleading to case of wilful negligence and adducing evidence to meet it—Courts going into the case of wilful negligence and finding against Company on its evidence alone—Legality—Interference with finding in second appeal—Practice. *See* RAILWAY COMPANY. 2 Pat. L. W. 369.

—Suit for, Representative suit, not maintainable. *See* C. P. CODE O. 1 R. S. 45 I. C. 423.

—Use and occupation—Measure of—Double the rate of rent, where occupation wilful and contumacious—Proper award. (*Scott Smith and Shadi Lal, JJ.*) MADAN MOHAN LAL v. BORJOAH AND CO. 70 P. R. 1913—11 P. L. R. 1918—71 F. W. R. 1918—44 I. C. 859.

—Vendor and purchaser—Sale in Consideration of vendee paying off simple debts of vendor—Provision for compensation for vendee's default—Failure of vendee to pay debts o. due date—Vendor's right to recover amount from vendee, though no actual damage sustained. *See* VENDOR AND PURCHASER. 24 M. L. T. 230.

DECLARATION—Grant of—Discretion of Court—Declaration prayed for merely introductory to claim for possession—Party against whom declaration sought not interested in relief for possession—Effect. *See* SP. REL. ACT, S. 42. 4 Pat. L. W. 412.

DECLARATORY SUIT—If lies at mother's instance as to legitimacy of child. *See* SPECIFIC RELIEF ACT S. 42. 23 G. W. N. 171.

—Trespasser not entitled to maintain. *See* SP. REL. ACT, S. 42. 45 I. C. 303.

DECREE—Amendment of—Appellate decree—No difference between judgment and decree—No power to amend. *See* C. P. CODE, S. 152. 15 A. L. J. 451.

—Amendment of clerical errors and accidental slips—Jurisdiction of court which passed decree—Pendency of appeal—Effect. *See* C. P. C. S. 152. 7 L. W. 8.

## DECREE.

—Amendment—Consent decree—Can not be altered without reference to Court. See C. P. CODE, S. 92. (1918) M. W. N. 595.

—Amendment—Dismissal of appeal for default—Application for amendment to be made to first Court. See C. P. CODE, S. 153. 43 I. C. 360.

—Amendment of, in execution—Mortgage—Misdescription of property in decree—Partner not deceived by error—Jurisdiction to correct decree.

In a decree for sale on a mortgage the property mortgaged was misdescribed and ordered to be sold as *muafi* while the property was in fact assessed to revenue. When the mortgagees applied for execution of his decree, the objector who had purchased the same property in execution of a simple money decree pleaded that there was no *muafi*. The mortgagee's lien had been proclaimed at the time of his purchase. Held, that the misdescription not having deceived the objector, when he purchased, the court was not debarred from doing what was right by correcting the error in the decree. (*Tudball and Rafiq, JJ.*) BASANTI v. KUNJ BEHARI LAL. 16 A. L. J. 262=44 I. C. 998.

—Assignment—Pleader of judgment-debtor taking assignment of decree if can execute decree. See C. P. CODE, O. 21, R. 16 44 I. C. 13

—Consent decree—Variation—Procedure. See MALABAR LAW, DEVASWOM. (1918) M. W. N. 595.

—Construction—Decree in suit for khas possession by one co-sharer

Plff. sued as a co-sharer to recover khas possession of a plot of land and plff's right to an eight-annas share in the land was declared, and he was directed to khas possession "thereof."

Held, on a construction of the decree that the plff. was given a decree for joint possession and if he wanted exclusive possession of his eight-annas share his remedy was by a separate partition suit, but that he was not entitled to evict the persons in actual possession of his share in execution (*Fletcher and Huda, JJ.*) MOHENDRA NATH PAL v. NASIBUDDIN MUHAMMAD. 46 I. C. 837.

—Construction—Instalment decree—Whole decree becoming payable on failure to pay two instalments—Failure to pay one instalment—Acceptance of over due instalment—Waiver of right to execute decree for the whole amount See EXECUTION, INSTALMENT DECREE. 20 Bom. L. R. 335.

—Construction—Maintenance decree based on award—Creation of charge on property

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—Decree if can be executed personally against judgment-debtors.

Decrees should be drawn in such a way as to make them self-contained and capable of execution without reference to any other document. Where, however, a decree is made in terms of a document filed with the record without embodying the terms of the document in the decree, it is not necessarily bad.

A decree for maintenance was made by the Court in terms of an award. The award created a charge upon the immoveable property for the payment of the maintenance.

Held, that in view of the fact that the charge had not been created before the decree and that the charged property was not sought to be sold, the decree was capable of execution personally against the judgment-debtors. (*Mullick and Thornhill, JJ.*) MAHAMAYA. PRASAD SINHA v. SUKHDAL KOER. 46 I. C. 169.

—Construction—Mortgage decree—"Do pay" meaning of.

Where a mortgage decree directs the defendants to pay, etc., the defendants are *prima facie* personally liable. (*Sadasiva Iyer and Napier, JJ.*) ZEMINDAR OF KARVETNAGAR v. SUBBARAYYA PILLAI. (1918) M. W. N. 146=7 L. W. 36=43 I. C. 871.

—Construction—Mortgage decree—"do pay", Meaning of—Personal liability of Mortgagee, none. See C. P. CODE, O. 34, R. 10. 15 A. L. J. 914.

—Execution—Admission of liability by judgment-debtor—Subsequent repudiation of liability—Estoppel. See ESTOPPEL, EXECUTION. 3 Pat. L. J. 454.

—Execution Application—Dismissal or striking off—Effect—Conduct of decree holder if material. See LIM. ACT, ARTS. 180 AND 181. 7 L. W. 16.

—Execution—Objection that decree is a nullity or one passed without jurisdiction—Executing Court—Jurisdiction. See EXECUTING COURT. 42 P. L. R. 1918.

—Execution—Right to—Assignee of decree pending appeal—Appellate decree in favour of assignor—Right of assignee to execute appellate decree. See C. P. CODE, O. 21, R. 16. (1918) M. W. N. 154.

—Execution—Transfer of decree in favour of pleader for judgment-debtors—Right to execute, if lost—Duty of pleader to re-transfer decree to his clients. See C. P. CODE, O. 21, R. 16. 44 I. C. 13.

—Execution—Transmission for—Effect on powers of Court which passes decree. See C. P. C. S. 89 AND O. 21, Rr. 6 to 9. (1918) M. W. N. 4.

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— *Ex parte* setting aside, effect of— Court if bound to review and proceed with trial of suit. See (1917) DIG. COL. 511; DHARA NIDHAR ADITYA v. HEMANGA CHANDRA JANA. 21 C. W. N. 1087=

27 C. L. J. 592=41 I. C. 956.

— Form of— Conditional decree in a suit on a promissory note— Decree conditional on indemnity— Propriety of. See PROMISSORY NOTE, SUIT ON. 43 I. C. 551.

— Form of— Co-sharers— Permanent lease by majority, suit to set aside lease by minority. See CO-SHARERS; PERMANENT LEASE. 35 M. L. J. 402.

— Form of— Duty of court to make decree self-contained. See DECREE, CONSTRUCTION. 46 I. C. 169.

— Form of— Easement— Interference with— Injunction— Form of decree See EASEMENTS ACT. SS. 7 III. (i) AND 23. 23 M. L. T. 210.

— Form of— Imposition of conditions as to the property against which money decree is to be primarily executed, illegal. See C. P. CODE, O. 20, R. 6 (2) 45 I. C. 250.

— Form of— Injunction against interference with natural right of easement— Details not to be embodied in decree See INJUNCTION. (1918) M. W. N. 167.

— Form of— Joint Hindu family— Father and son, suit on mortgage against— Son exempted in decree— Proper form— Dismissal of suit against son. See C. P. CODE S. 47. 16 A. L. J. 752.

— Form of— Mesne profits in suits for partition. See C. P. CODE, O. 20, R. 12 43 I. C. 458

— Form of— Promissory note— suit on— Conditional decree on giving security, bad. See PROMISSORY NOTE. 43 I. C. 551.

— Form of— Restraint as to mode of executing and exempting judgment-debtor from personal liability— Decree improper.

Where in a suit for rent the Court finds that the deft.—tenant is liable, it should pass a decree in favour of the landlord-plaintiff in the ordinary way without any limitation as to the execution of the decree, *e.g.* that the decree shall only be executed against the jama in default and not against the tenant personally. (Fletcher and Shamsul Huda, JJ.) DWARAKA NATH DEY CHOUDHURY v. SAILAJA KANTA MULLICK. 45 I. C. 762.

— For indorsement of promissory notes by defendant to plaintiff— Failure of defendant to comply with decree— Notes barred in

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consequence— Remedy of plaintiff. Fresh suit for damages— Maintainability. See C. P. C. O. 21, R. 32 AND S. 47. (1918) M. W. N. 333.

— For possession— Reversal in appeal— recovery of property in execution of original decree— Purchase of property in execution of decree against person so recovering restitution as against such purchaser See RESTITUTION DOCTRINE OF. 27 C. L. J. 489.

— For prohibitory injunction— Enforcement of— Separate suit— Application under OR. 21, R. 32 C. P. C. See C. P. CODE, OR. 21, R. 32. 27 C. L. J. 506.

— Instalment decree— Default— Waiver— Acceptance of overdue instalments— Effect of.

Where a decree provides for payment by instalments subject to the condition of the entire decretal amount becoming payable at once on failure to pay any fixed number of instalments regularly, the mere acceptance of overdue instalments by the decree-holder is not of itself sufficient proof of waiver on his part to execute the decree for the entire amount (Pratt, J. C. and Hayward, A. J. C.) FIRM OF BHAWAN DAS FEROMAL v. MEGHRAJ. 11 S. L. R. 120=45 I. C. 324.

— Instalment decree— whole amount payable on default of first instalment— Application for execution— Limitation. See LIM. ACT ART. 182 (1) AND (7). 20 Bom. L. R. 773.

— Minor— No proper representation of minor in suit— Sale of his property in execution— Suit to recover property after minor attains majority— Limitation. See MINOR, DECREE AGAINST. 113 P. R. 1918.

— Money paid under— Suit for recovery of, on the ground of mistake in the decree— Bar. See DECREE, SETTING ASIDE. 3 Pat. L. J. 465.

— Mortgage— Final decree— Objection to execution on the ground that application for final decrees barred— Not maintainable. See EXECUTION, DECREE. 47 I. C. 143.

— Objection to decree passed without jurisdiction— Objection can be taken at any stage. See JURISDICTION. 4 Pat. L. W. 445.

— Partition Suit— Mesne profits— Prior to suit— Provision for in final decree awarding possession— Propriety of. See C. P. CODE O. 20, R. 12. 43 I. C. 458.

— Possession— Reversal in appeal— Application by successful appellant for restitution— Subsequent application for profits for period during which adversary in possession

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— Maintainability—limitation — Period for which profits will be allowed. *See* C. P. C. S. 144. 3 Pat. L. J. 367.

— Preliminary and final— Reversal or modification of preliminary decree on appeal

— Final decree *ipso facto* becomes inoperative *See* C. P. CODE S 97 35 M. L. J. 361.

— Setting aside — Collateral attack — Judicial order — 'Jurisdiction' — Error of law — Not a ground of attack — Suit by receiver possession of property — Illegality of order appointing receiver if can be pleaded.

The propriety of an order or decree made in a cause in which the Court has jurisdiction cannot be challenged collaterally. The 'jurisdiction' may be taken to be the power the Court to hear and determine cases, and to adjudicate or exercise any judicial power with reference to them. In the exercise of its jurisdiction the Court may commit an error of law, but the fact that such error has been committed does not oust the Court of its jurisdiction. An order which is erroneous in law is not necessarily an order made without jurisdiction.

Therefore, in an action brought by a Receiver for the recovery of a property claimed by him by virtue of his Receivership, the deft. cannot be permitted to question the propriety, regularity or necessity of his appointment. (*Mookerjee and Beachcroft, JJ.*) BHAIKAB CHANDRA DUTTA v. BENOT CHANDRA DUTTA. 22 C. W. N. 520=

27 C. L. J. 395=43 I. C. 304.

— Setting aside—Collusive—Decree on oath—Decree upholding fictitious sale-deed.

The mere fact that a decree is based on special oath does not make it a conclusive decree and the facts that a sale deed on the basis of which a decree is obtained is nominal, does not necessarily lead to the conclusion that the decree is a collusive one. (*Mitra, J.*) DEONIRAM MANGNIRAM v. RAMGOPAL KANIRAM. 43 I. C. 960.

— Setting aside—Fraud—Decision obtained by perjured evidence.

The mere fact that a decree has been obtained by false evidence is not a sufficient ground for setting it aside. (*Fletcher and, Huda, JJ.*) KASISWAB GOSWAMI v. AMIRUDDIN. 23 C. W. N. 133=47 I. C. 14.

— Setting aside of decree as against minor—Effect on its validity as against other defendants—Decree indivisible and liable to be set aside as a whole—Practice. *See* C. P. C.—Or. 32, R. 3 cl. 4. 4 Pat. L. W. 373.

— Setting aside—Ex parte decree—Fraud—Application to set aside ex parte decree—Dismissal of—Bar to suit.

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The decision on the question of fraud in a proceeding under O. 9, R. 13 of the C. P. Code for setting aside an *ex parte* decree will operate as *res judicata* on the question of fraud raised in a subsequent suit between the same parties for setting aside the *ex parte* decree only in so far as that fraud consisted in the suppression of the services of summons (*Chetty and Smither, JJ.*) CHANDRA KUMAR ROY CHOWDHURY v. ASWINI KUMAR DAS 45 I. C. 250.

— Setting aside — Forum—Fraud — Jurisdiction of inferior court to entertain suit — Test—Nature of reliefs inferior Court can grant—Revival of suit in which decree was passed—Application for, to be made to which Court — Superior Court if has concurrent jurisdiction to entertain suit—Consent decree obtained by fraud — Remedy of aggrieved party—Suit or review—Decree obtained by fraud if a nullity. *See* (1917) DIG. COL. 513; ARUNACHALA CHETTY v. SABAPATHY CHETTY. 41 Mad. 213=

33 M. L. J. 499=6 L. W. 368=41 I. C. 937.

— Setting aside—Fraud—Forum.

A suit to obtain a declaration that a decree passed by a court was obtained by fraud and was not binding on the plff. can be laid in a Court interior to that which passed the decree, provided the subject-matter is otherwise within the jurisdiction of that Court. (*Abdur Rahim and Bakewell, JJ.*) PILLA KAKKADU v. CHANDRAYYA CHANDARI. 24 M. L. T. 254=(1918) M. W. N. 562.

— Setting aside—Fraud—Non-service of summons, when amounts to.

For *Imam, J.* Non-service of summons by itself is not fraud. Its suppression on the other hand with intent to deceive and take advantage of the opposite party is. 24 Cal. 546 ref. (*Miller C. J. and Imam, J.*) RADHA KISHEN RAI v. NAURATAN LAL. 3 Pat. L. J. 522=

46 I. C. 627.

— Setting aside—Fraud—Non-service of summons — Knowledge of prior litigation — Effect of.

Where in a suit to set aside a decree on the ground of fraud, it is found that plff. was aware of the prior litigation and its result and acted in pursuance thereof, the decree is binding and cannot be set aside. (*Le Rossignol J.*) FINUN v. SHIBBO. 8 P. W. R. 1918=43 I. C. 169.

— Setting aside—Fraud and collusion—Failure to prove fraud and collusion—Effect of compromise being beyond scope of suit—Jurisdiction of successor to set aside decree on ground of admission in compromise — Proof. *See* (1917) DIG. COL. 514; MAHADEO PAHAN v. MUSSAMMAT ETWARIA. (1917) Pat. 181=43 I. C. 775

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——— *Setting aside—Fraud—Suppression of processes.*

In a suit for a declaration that a certain decree was obtained by fraud and is of no effect, a solid foundation is furnished, if the plff. establishes that the usual processes were suppressed by the deft. (*Richardson and Walmsley, JJ.*) **GENDU NASTA v. SADI BENIA.**

**44 I. C. 983.**

——— *Setting aside—Grounds for—Error of law, not a ground—Fraud.*

It is not open to a litigant, except on the ground of fraud, to maintain a suit to rescind or nullify a decree passed in a former suit to which he was a party and which was tried out by a competent court. (*Chitty and Walmsley, JJ.*) **DURGA CHARAN BOSE v. LAKHINARAIN BERA.**

**47 I. C. 917.**

——— *Setting aside—Minor—Decree against represented by guardian ad litem—Ex-parte decree—Fresh suit by minor, not maintainable, except on proof of negligence of guardian* See MINOR, DECREE AGAINST.

**43 I. C. 563.**

——— *Setting aside—Mistake—Money paid under decree—Separate suit to recover maintainability.* C P Code, S. 9.

A suit would lie to rectify an error in drawing up a decree obtained by mistake if proper facts are established to justify the Court in granting relief.

To warrant a court in granting relief on the ground of mistake it ought to have regard to the principles which guided the Courts of England prior to the Judicature Act 1876. Whether such relief should be granted depends upon the facts of each case and the equity, if any attaching to the rights of the parties. If a decree has been procured by some grave mistake so as to vitiate the whole character of the decree, and to permit its execution would amount to an abuse then a suit would lie to rectify the mistake upon which the decree was founded 2 Pat. L. J. 313 app

A mere irregularity or error in drawing up a decree does not, necessarily, justify a court in granting relief in a subsequent suit, though it might afford some ground for supporting an application for review.

A suit does not lie to cure a mere irregularity or error in a decree which has been acquiesced in by both the parties.

It is well settled that money paid under compulsion of legal process can only be recovered as money had and received unless it was realized by fraud or unconscionable dealing on the part of the decree holder but ordinarily money paid in obedience to a legal process is recoverable. *Marriot v. Hampton*, 7 T. R. 269; 23 C. L. J. 183 foll. (*Mullick and Atkinson, JJ.*) **BRENNATE DAS v. GHANASHYAM NAIK.**

**3 Pat. L. 465—46 I. C. 534.**

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——— *Setting aside—Mortgage decree—Application for decree absolute after expiry of limitation—Decree, validity of—Notice to judgment debtor—Omission to give, effect of—Suit to set aside decree—Maintainability—Limitation, question of jurisdiction, Lim. Act, Ss 4 and 28.*

A suit will not lie to set aside a decree absolute for sale merely on the ground that the application for such a decree was barred by limitation nor can such a suit succeed merely on the ground that no notice was given to the mortgagor of the mortgagee's application for a decree absolute. Failure to give notice does not affect the jurisdiction of the Court.

A question of limitation is not question of jurisdiction.

Per *Chapman, J.* If however, an application to set aside the decree absolute is made on the ground of want of notice within 30 days of the date on which the judgment-debtor becomes aware of the application for a decree absolute, then the Court has inherent power to allow such application. 11 Cal. 287 ref (*Chapman and Roe, JJ.*) **BHAIGA PARIDA v. GANNATH KHANDAI.**

**3 Pat. L. J. 478—**

**46 I. C. 569.**

——— *Time fixed by, for performance of an act—Provision for dismissal of suit on default of performance—No power to extend time of performance.* See C. P. CODE.—SS. 148, 151 AND 152.

**16 A. L. J. 625.**

——— *Validity—Death of defendant pending suit—Wrong legal representative brought on record—Decision in plaintiff's favour—Binding nature on real representative.* See RES JUDICATA, SUIT FOR.

**23 M. L. T. 280.**

——— *Validity of—Decree passed against a dead person—Right of representative to plead that decree is void, in execution proceedings.*

A decree made against a dead man is a nullity and cannot be executed by the executing Court. No question of the jurisdiction of the court arises in such a case. It is open to the representatives of a judgment-debtor to show that the judgment-debtor was dead at the time of the decree was made and that such a decree is void and incapable of execution as against the person so dead. 17 All. 478 foll. (*Richards, C. J. and Bannerji, J.*) **SRIPAT NARAIN RAI v. TIRBENI MISRA.**

**40 All. 423—16 A. L. J. 327—45 I. C. 21.**

DEED—Attestation—Essentials of — Direct evidence of execution required. See. T. P. ACT. S. 59.

**16 A. L. J. 409 (P. C.)**

——— *Construction—Ambiguity—Mortgage-deed—Ambiguity in the description of lands mortgaged—Other evidence to clear up ambiguity—Admissibility of, See EVIDENCE ACT. S. 27.*

**43 I. C. 721,**

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— Construction—Award—Term restricting alienation for indefinite period—Construed as binding on parties to the award only. *See* ARBITRATION, AWARD. 43 I. C. 674

— Construction—Contract — Offer kept open "to, and until" a day, meaning of. *See* EVIDENCE ACT, S. 91. 22 C. W. N. 461.

— Construction—Conveyance of a dwelling house—Compound and appurtenances also included. *See* PARTITION ACT, S. 4

22 C. W. N. 515.

— Construction—Conveyance, what is. *See* STAMP ACT, S. 2 (10). 1 P. W. R. 1918.

— Construction — Document not expressly made payable on land—No time fixed for payment—Payable on demand. *See* PAPER CURRENCY ACT, S. 25.

(1918) M. W. N. 177.

— Construction—Evidence of intention of parties not admissible — Privy Council—Practice—Fresh point. *See* (1917) DIG. COL. 517. MAHARAJAH MANINDRA CHANDRA NANDI v. DARGA PRASHAD. 32 M. L. J. 539 = 22 M. L. T. 202 = 21 C. W. N. 707 = (1917) M. N. 448 = 15 A. L. J. 432 = 38 I. C. 939 = 1 Pat. L. W. 627 = 19 Bom L R 493 = 6 L. W. 110 = 25 C. L. J. 567 = 10 Bur. L. T. 229. (P. C.)

— Construction—Gift to Hindu female — Malik—Absolute estate. *See* HINDU LAW, GIFT. 16 A. L. J. 564

— Construction — Heirs born of the womb—Not a description of an estate of ordinary inheritance—Disposition in favour of such persons. *See* WILL, CONSTRUCTION. 3 Pat. L. J. 199

— Construction—Gift of property by Hindu father to his daughters—Nature of estate conferred. *See* (1917) DIG. COL. 518: KANTHAMMAL v. MEENAKSHISUNDARAM IYER. (1917) M. W. N. 867 = 7 L. W. 32 = 43 I. C. 15

— Construction—Kabuliyat— Provision for payment of Company's Sicca rupees— Meaning of—Ambiguous expression.

A kabuliyat of 1850 by which a putni taluk was created, stated the rent to be so many "Company's Sicca rupees 96."

*Held*, on a construction of the kabuliyat that the Calcutta Sicca rupee, though coined by the Company, having never been known as the "Company's Sicca rupee" the expression "Company's Sicca rupees" used in the kabuliyat must be regarded as ambiguous. The intention of the parties must be re ascertained, having regard to the surrounding circumstances, such as the conduct of the parties, the date of the document, the stamp duty paid

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on the document, and a reference to the current coin in a portion of the kabuliyat.

The history and the origin of the term "sicca rupee" discussed. (*Temon and Richards, JJ.*) MAHARAJ BAHADUR SINGH v. JADAB CHANDRA GHOSH HAZRA

47 I. C. 109.

— Construction—Lease—Covenant for renewal—What amounts to. *See* LEASE.

27 C. L. J. 447.

— Construction — Lease or transfer of proprietary right—Grant by superior proprietor — Heritable interest—Provision for rent, etc.— Principles of construction.

The superior proprietors of a village granted certain property the grant reciting that it had been drawn up as a deed of perpetual lease and put the grantees in possession of a specified share in the village and of all the rights attaching thereto. The grant was expressed to endure generation after generation. In the line of the grantee if he deposited a certain amount of money every year to the Treasury for malguzari and in addition paid the lessors another sum every year by way of malikana. The grantee was to have mutation made in his favour by setting his name recorded "in khana Malikat." He was to have the powers of distraint, of suing for arrears of rents and of ejecting tenants.

*Held*, that the deed conferred upon the grantee the rights of a perpetual lessee and not of an under-proprietor.

In construing a deed the terms of which appear to be clear enough and which purports to be nothing more than a deed of lease, it is not permissible to attribute to the lessor an intention to confer rights of transfer unless there are express words to that effect or unless such an intention is necessarily implied in the language of the grant (*Lindsay, J. C.*) KALKA SINGH v. SURAJ BELI LAL.

5 O L. J. 80 = 45 I. C. 208.

— Construction—Mahomedan Law—Gift of absolute estate with invalid condition restricting powers of donee—Effect. *See* MAHOMEDAN LAW, GIFT. 27 C. L. J. 502.

— Construction—Minor—Guardian—Execution of mortgage by, without reciting execution on behalf of minor. *See* (1917) DIG COL. 522: KALI RAI v KARU SINGH.

3 Pat L. J. 78 = 3 Pat L. W. 210 = 42 I. C. 462.

— Construction—Mortgage and lease— No parts of the same transaction—Landlord and tenant—Relationship of — Right to evict.

*Held*, on a construction, of two documents executed on the same date, and styled one, a mortgage, and the other a lease, that the fact that there was no reference to the lease in the

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mortgage-deed was a strong indication of the separate nature of the two transactions and all that was intended by the lease was that such moneys as were payable thereunder were to be given credit for by the mortgagee.

As at the time of the execution of the rent-deed, the parties clearly intended to establish the relation of landlord and tenant between themselves, the mortgagees were entitled to evict the mortgagors at any time. (*Broadway, J.*) *MIANGIA RAM v. GANESH DAS.*

161 P. W. R 1918=47 I C. 351.

Construction—Mortgage or lease—Zurpeshgi ijara—Provision for annual *hagajiri* payable to executant—Mortgage or lease—Question of fact depending on circumstances. *See T. P. ACT S. 58 (b).* 4 Pat L. W. 146

Construction—Mortgage or lease—Test—Debt securing of, by the transaction—Mortgage. *See SP. Rel. ACT S. 21 (A)*

35 M. L. J. 439.

Construction—Mortgage or lease—Test of—Security for debt, Creation of, essential to constitute mortgage. *See SP. REL. ACT S. 21 (A).*

35 M. L. J. 439.

Construction—Mortgage or sale with a covenant to re-purchase—Test—Agreement seven days after sale deed—Delay. *See (1917) DIG. COL. 524; JHANDA SINGH v. SHEIKH WAHI-UD DIN.* 38 All. 570=14 A. L. J. 1189=10 Bom L. R. 1=10 Bur L. T. 131=31 M. L. J. 750=20 M. L. T. 529=(1916) 2 M. W. N. 570=5 L. W. 189=21 C. W. N. 66=25 C. L. J. 524=36 I. C. 38=43 I. A. 284. (P. C.)

Construction—Repugnancy, to be avoided—'Year', meaning of

It is not desirable to impute repugnancy to the terms of a document where a consistent intention can be found from the study of the document as a whole.

Though a year usually means a period of 12 months the context of a document may show that a particular year, ending with a specified month or season was intended. (*Stuart and Kanhaiya Lal, A. J. C.*) *PRAG v. MOHAN LAL* 47 I. C. 161.

Construction—Rule of—Failure of deed *ex-facie* a sale, for want of consideration—Deed if can be supported as gift. *See (1917) DIG. COL. 525; CHULHAI v. BALA BUKSH. SETH.* 3 Pat L. W. 206=(1917) Pat 369=45 I. C. 330.

Construction—Sale or mortgage—Non-payment of consideration, effect of.

Where a document is *ex-facie* an outright sale the executant is precluded from showing that it is in fact a mortgage but is entitled to show that the consideration has not been paid,

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and he is therefore entitled to retain possession until the consideration is paid. (*Tisomey, C. J. and Ormond, J.*) *HARDUM SINGH v. MG PO HTU.* 46 I. C. 931.

Construction—Sale and separate agreement for reconveyance—Effect—Question arising between Vendee and pre-emptor—Question arising between Vendor and Vendee—Distinction.

On 18th July 1911 plaintiff, Mussammat N. B. purchased a stamp paper which was endorsed by the stamp vendor as required for a deed of conditional sale. On 14th July a deed of sale was executed on the paper by Mussammat N. B. in favour of M. H. a relative of hers. The deed contained a distinct stipulation that the sale was an out and out one and that there is no agreement to reconvey the property. On 15th July this deed was registered and on the same day the vendee purchased another stamp paper on which he executed an agreement to reconvey the property sold by the deed of 14th *idem* provided Mussammat N. B. repaid the purchase money, etc. This agreement to reconvey was registered on the 17th July 1911. On sixth July 1911 one F. H. instituted a suit for pre-emption and on 12th *idem* Mussammat N. B. sued for possession on terms of the agreement of 15th July 1911.

*Held.* that as between the pre-emptor and Mussammat N. B. the transaction embodied in the deed of 14th July 1911 was an out and out sale and no oral evidence of a contemporaneous oral agreement varying the terms of the sale-deed was admissible and that the latter's suit must consequently be dismissed. 22 I. C. 4; 12 All. 387 (P. C.), 8 All. 369 (F. B.) and 22 All. 149 (P. C.) *dist.*

*Semle.* that if the litigation had been solely between the vendor and the vendee the Court might have held that the two transactions taken together amounted merely to a conditional sale or to an English mortgage. (*Scott-Smith and Le Rossignol, J.J.*) *MAHOMED MIR v. FAIZAL HASSAN.* 74 P. R. 1918. 163 P. W. R. 1918=47 I. C. 418.

Construction—Sale-deed—Bikri—Farokht—Kharidar—Bai—Kharidigi.

The words "Bikri" and "Farokht" mean sale and nothing else. The words "Kharidar" "Bai" and "Kharidigi" in a deed of sale all imply a sale. (*Chamier, C. J. and Sharfuddin, J.*) *RAMESWAR LAL BHAGAT v. RAJ KUMAR GIBWAR PRASAD SINGH.* 5 Pat. L. W. 316. (1918) Pat. 156=45 I. C. 888.

Construction—Surrounding circumstances—Evidence of—Admissibility—Conditions.

Where an instrument is ambiguous or contains a description which is imperfect or inaccurate as to existing facts, evidence is receivable

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of all the circumstances surrounding the instrument for the purpose of throwing light on its interpretation. (*Kanhaiya Lal, and Daniels, A. J. C.*) ADITYA PRASAD v. MUHAMMAD MUBARAK ALI SHAH.

21 O. C. 234=48 I. C. 257.

—Construction—"Pak saf" in deed of conveyance.—Meaning. See VENDOR AND VENDEE, VENDOR'S TITLE

3 Pat. L. J. 358.

—Construction—"Tanaka"—Mortgage.

The word "Tanaka" occurring in a document evidencing a loan means a mortgage and not merely an assignment of land revenue I. L. W. 96 97, 39 M. 1010 foll. (*Sadasiva Iyer and Napier, J.J.*) ZAMINDAR OF KARVETI-NAGAR v. SUBBARAYA PILLAI.

(1918) M. W. N. 146=7 L. W. 36=  
43 I. C. 871.

—Execution—Deed purporting to be executed by several but signed by only some of the intended executants—Deed if operative. See PENAL CODE, SS. 464 AND 467.

43 I. C. 593, 598.

—Execution—Signature by some only of the intended executants—Deed if operative as regards the actual signatories—Question of intention. See HINDU LAW, JOINT FAMILY PARTITION.

23 M. L. T. 307.

—Hypothecation bond—Construction—Provision for payment by instalments with option to sue for whole amount with enhanced interest in default—Effect—Rights of creditor. See LIMITATION ACT, ART. 132.

(1918) M. W. N. 586.

—Material alteration, what is.

It is wrong to say that because a man alters a figure in a document he thereby forges the document, or because there is something in a different ink to the rest of the document there must be a material alteration of the document. (*Maung Kin, J.*) BICHAY SIKUL v. BEHARI SIKUL.

11 Bur. L. T. 1=43 I. C. 488.

—Recitals—Value—Sale by Hindu widow—Necessity—Proof of.

Where a conveyance had been executed twenty-five years before the institution of the suit, recitals made at or about the time of the conveyance were accepted as proof of the existence of legal necessity. (*Chapman, Alkinson and Imam, J.J.*) RAM BAHADUR v. JAGER NATH PRASAD.

3 Pat. L. J. 199=  
4 Pat. L. W. 377=(1918) Pat. 181  
=45 I. C. 749.

—Setting aside—Fraud—Judgment obtained by perjured evidence—Suit to set aside if maintainable.

## DEFAMATION.

A suit does not lie to set aside a judgment in a previous suit on the ground that it was obtained by perjured evidence. 29 Mad. 19 overruled 38 M. 203; 16 C. W. N. 1002; 87 All 535 Rel. (*Wallis C. J. Seshagiri Aiyar and Spencer, J.J.*) KADIRVELU NAINAR v. KUPPUSWAMI NAICKER. 41 Mad. 743=  
34 M. L. J. 590=23 M. L. T. 372=  
(1918) M. W. N. 514=8 L. W. 103=45 I. C. 774 (F. B.)

DEFAMATION.—Privilege—Complaint to police—Charges contained in—Suit for damages if maintainable—Remedy of aggrieved party.

Where a person makes a charge against another the subject of a complaint to the Police or to the Court, he is protected from an action for defamation in respect of allegations contained in the charge. If the complaint is dismissed, the accused can get sanction for the prosecution of the complainant for bringing a false charge and if he has suffered loss or injury, he can sue for damages for false and malicious prosecution. (*Saunders, J. C.*) MAUNG MYO v. MAUNG KY WET, E.

47 I. C. 674

—Privilege—Libel in a judicial proceeding—Damages in civil action—Liability for.

Defamatory statements made by a party in a petition presented to a Criminal Court are absolutely privileged in a civil action for damages based on libel.

There is no statute in India dealing with civil liability for defamation. The rule to apply is that of justice, equity and good conscience. This has been interpreted by the Privy Council in 14 I. A. 89 to mean the rules of English Law if found applicable to Indian society and circumstances, and there is nothing in the circumstances and society of this country that would make it improper or inadmissible to apply to India the English Law of privilege which is well established in England. 3 All. 815, overruled. 23 Cal. 367, diss. (*Knor, Banerjee Tudball Rafiq and Walsh, J.J.*) CHUNNI LAL v. NABSINGH DAS.

40 All. 341=16 A. L. J. 360  
45 I. C. 540 (F. B.)

—Slander—Suit for damages—Privilege master and servant communication by servant to his co-employees, suspecting employer of having instigated the poisoning of the servant—Statement untrue but made bona fide and without malice—Privileged occasion—Statement made to protect interest—Imputation of a crime if actionable without proof of special damage—English and Indian law.

At Common Law it is not actionable to say of a man that you suspect him of a crime, at any rate, in the absence of special damages or unless the observation be made with reference to his business. (*Harrison v. King*) (1817) 4 Price 46 ref.

## DEFAMATION.

*Semble.*—The Common Law rule as to special damage being necessary to support an action for slander, except in certain cases, is inapplicable in India.

The defendant was employed by the plffs. as their general manager of their plantation estates. Almost from the commencement of the employment the parties were on bad terms and there were frequent disputes between them with the result that the plffs. wished to dispense with the defendant's services. The deft. suspected that rather than dismiss him and face an action for damages, his employers might endeavour to get rid of him by foul play. While he was on one of his planting tours a few days before the actual dismissal the defendant suffered from poisoning symptoms. He suspected that his employers had instigated his poisoning and communicated his suspicions to two of his co-employees in these words:—"I have been poisoned and I suspect that the Saits (plffs) are at the bottom of it." It was found as a fact that though the circumstances were not as such to give rise to a well founded suspicion of poisoning against the employers, the defts. acted *bona fide* and without malice in making the communication in order that the matter might be enquired into. In an action by the employers for damages for slander, *Held*, that the communication was made by the deft. in the conduct of his own affairs in matters where his interest was concerned and was therefore privileged in the absence of actual malice and that the defendant was not liable in damages. *Toogood v. Spyring* (1834) 1 C. M. and R. 181, 193. *rel. Wallis C. J. and Seshayiri Aiyar, J.* J. B. LESLIE ROGERS v. HAJEE FAKIR MUHAMMAD SAIT. 35 M. L. J. 673—24 M. L. T. 461—9 L. W. 104.

**DEFENCE OF INDIA ACT, (IV OF 1915) S. 1.**  
**Sub. S. (3)—"Part of the Act" in, meaning of—**  
*Rules framed under S. 2—Applicability to Madras Presidency—Notification under S. 1 Sub S. (3) applying rules not necessary—Offence created by rules made under S. 2—Jurisdiction to try in provinces to which S. 3-11 not extended—Dt. Magistrate in Rule 30—Meaning of Cr. P. Code Ss. 10, 29—General Clauses Act, Ss. 17 Cl. (1)—Effect—Statute-Interpretation—Section empowering making of rules—Rule so made if made of part of Act or of section.*

Where a section of a statute gives power to make rules, the rules so made are to be read as part of the section itself. *Held*, that a rule made by the Governor General in Council in pursuance of the power to do so conferred by S. 2 of the Defence of India Act must be read as part of that section itself and not as an addition to a section of the Act. *Institute of Patents v. Lockwood*. 1894 A. C. 360 *fol.*

The reference to "the rest of the Act" in S. 1 Sub. Sec. 3 is the subsequent sections of the Act and not to the rules framed under S. 2.

## DEFENCE OF INDIA ACT, S. 3.

In provinces in which Ss. 3-11 of the Defence of India Act are not in force, offences, created by the rules framed under S. 2 of the Act are triable by the Courts indicated by S. 29 of the Cr. P. Code.

*Held*, that by virtue of S. 10 of the Cr. P. Code read with S. 17 of the General Clauses Act, Rule 30 (a) of the rules framed under the Defence of India Act, must be read as if it contained after the words "Magistrate" the words "Acting Dt. Magistrate or magistrate executing the functions of a Dt. Magistrate." (*Sadasiva Aiyar and Napier, JJ.*) KANDASAMI PILLAI *in re*.

35 M. L. J. 736—1918 M. W. N. 856—  
 24 M. L. T. 505.

—S. 2—Rules 23 and 29—"Dissuade or attempt to dissuade" meaning of—No Reference to acts already done—Magistrate convicting accused without giving option under S. 191 Cr. P. C. to accused or proceeding under Ch. XVI—Irregularity—Revision.

A tenant of the accused was recruited for service in Mesopotamia on payment of R. 25 as advance and subsequently the accused sued him for arrears of rent amounting to Rs. 30-15-0. The tenant made a statement before the Dt. Magistrate of Mirzapur and it was not on oath nor was it signed by him. The Dt. Magistrate thereupon directing warrants without bail to issue for the arrest of the accused and an order for summoning certain witnesses. The Dt. Magistrate took up the case himself, framed a charge and convicted the accused under Rule 29 of the rules framed in accordance with S. 2 of the Defence of India Act. The accused were alleged to have contravened Rule 23. *Held*, that the proceedings in the Court of the Dt. Magistrate were irregular in their initiation because the Magistrate had not given the accused the option of being tried by another court, as he was bound to do if he was taking cognizance of the offence upon information received under S. 191 (c) of the Cr. P. Code, and if tenant's statement was a complaint the Magistrate ought to have taken from him a sworn declaration of its truth before issuing warrants; and (2) that rule 23 did not apply inasmuch as no person could dissuade or attempt to dissuade another from doing something which the latter had already done. (*Piggott, J.*) M. HADEO SINGH v. EMPEROR. 16 A. L. J. 895—48 I. C. 433.

—Ss 3 (1) and (2) 4, 8, and 11—  
*Provision for trial of offences by special Commissioners not ultra vires—Power of the Indian Legislature to constitute courts.*

The Defence of India Act (IV of 1915) in so far as it empowers Government to direct the trial of certain offences by special Commissioners is not *ultra vires* of the Governor-General in Council by virtue of S. 22 of the Indian Councils Act, 4 Cal. 17; 1 Bom. 363, 8 Cal. 68 at p. 143, 11 All. 409 *Ref.*

## DEFENCE OF INDIA ACT, S. 8.

The High Court has power in a proper proceeding to declare an enactment of the Governor-General's Executive Council, *ultra vires* and of no force and effect with all the consequences that may result therefrom (*Dawson, Miller, C. J., Chapman, Mullick, Rce and Atkinson, JJ.*) **PARMASWARA AHIR v. EMPEROR.** 3 Pat L. J. 537=(1918) Pat. 97=4 Pat. L. W. 157=44 I. C. 185=19 Cr. L. J. 231.

—Ss. 8 and 11—Validity of provisions—Commissioners appointed under the Act—Proceedings of—Jurisdiction of High Court to revise—Superintendence—High Courts Act, Ss. 9 and 15—Indian Councils Act, S. 22—Letters Patent Cal. cl. 44, if *ultra vires*—Statute—Interpretation—Ambiguity—Beneficial construction

Per *Dawson Miller, C. J.*—The Defence of India Act does not purport to take away any existing powers of superintendence of the High Court, but merely creates a new court which shall be independent of the High Court. The power of superintendence conferred on the High Court by S. 15 of the High Courts Act is confined to superintendence over those Courts which are subject to the appellate jurisdiction of the High Court. The special tribunals created under the Defence of India Act are, by the very Act which created them subject to no appellate jurisdiction whatever. Under the express provisions of S. 8 of the Defence of India Act the decision of the Commissioners appointed under the Act is final and conclusive and is not subject to interference either by way of appeal, revision or in any other way whatsoever by the High Court.

In so far as jurisdiction is directly conferred on the High Act it is subject to the legislative powers of the Indian Legislative Council, and in so far as it is left to be conferred by Letters Patent it is such as Her Majesty may thereby "grant and direct."

The Governor-General in Council had power to pass the Defence of India Act providing for the creation of new courts of criminal jurisdiction independent of the control or superintendence of the High Courts.

It is within the legislative powers of the Governor-General in Council to amend or alter the Letters Patent of a High Court and to direct that a particular court shall not be subject to the appellate jurisdiction of the High Court, thereby removing a condition which is essential in the exercise of the power of superintendence granted by S. 15 of the High Courts Act.

Per *Mullick, J.*—The Indian legislature, though it has no power to amend or modify or repeal S. 15 of the High Courts Act has power to affect the operation of that section by depriving the High Court of superintendence and appellate jurisdiction in regard to particular inferior courts.

## DEPOSIT.

Per *Imam, J.*—The words of exclusion contained in S. 8 of the Defence of India Act embrace not only the appellate and revisional jurisdiction of the High Court over the Commissioners appointed under the Act, but also powers of superintendence which is one of the ways in which the High Court exercises its jurisdiction over inferior Courts. (*Miller, C. J. Mullick and Imam, JJ.*) **SHEO NANDAN PRASAD SINGH v. EMPEROR.**

3 Pat L. J. 531=(1919) Pat. 1=5 Pat. L. W. 324=46 I. C. 977=19 Cr. L. J. 833

**DEKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), S. 13 (d)**—Mortgage—Suit for account—Mortgage bond taken in satisfaction of decree—Account of decretal debt cannot be taken a fresh under the accounts suit.

In satisfaction of a decree passed against him, the plff. executed a mortgage for Rs. 1,480 in debt's favour. At the plff.'s suit to take accounts of the mortgage under the Dekh. Agri. Rel. Act, the Lower Courts treated Rs. 866 out of the mortgage amount as representing the original principal under the earlier decree and allowed interest on that sum. The debt, having appealed.

*Held*, that interest should be calculated on the whole amount of Rs. 1,480, for in the present case the original interest had not been converted into principal and any statement on settlement of account, or by any contract made between the parties, but the conversion had taken place by means of a decree by the Court and by that decree a single integral sum was awarded to the debt. as a judgment debt. (*Batchelor, A. C. J. and Kemp, J.*) **MAREPPA v. GUNDO.** 20 Bom. L. R. 469=46 I. C. 166.

—S. 48—Conciliator's certificate—Exclusion of time taken up in obtaining conciliator's certificate—Decree—Execution—C. P. Code, S. 48.

Plff. obtained a decree on 28.10.1899, to execute which he gave three applications. He next applied on 1.7.1911, to obtain a conciliator's certificate under the Dekhan Agriculturists' Relief Act, 1879, which he obtained on 29.5.1913. The fourth application to execute the decree was accordingly made on 23.8.1913 and the debt. resisted it as being barred under S. 48 of the C. P. Code.

*Held*, that the application was within time, inasmuch as the plff. was entitled, under S. 48 of the Dek. Agri. Rel. Act, to exclude the interval of time occupied in obtaining the conciliator's certificate (*Batchelor, A. C. J. and Shah, J.*) **SHIDAYA v. SATAPPA.**

42 Bom. 367=20 Bom. L. R. 360=45 I. C. 494.

**DEPOSIT**—After institution of suit—Effect on running of interest. See T. P. ACT, Ss. 83 AND 84

35 M. L. J. 605

**DEPOSIT.**

———Forfeiture of—Lease—Agreement for 5 years—Deposit of half years's rental—Forfeiture on breach of condition—Not a penalty. See CONTRACT ACT, S 74.

(1918) M. W. N. 197.

———Money deposited on the understanding that it was to be paid on demand after a certain period—Whether a deposit within Art. 60 of the Lim. Act. See. LIM. ACT, ART. 60. 8 L. W. 221.

**DISTRICT JUDGE**—Whether has powers of a Kazi in respect of wakf property. See C. P. CODE, S. 92. 23 C. W. N. 138.

**DIVORCE**—Co-respondent, name not known—Leave of court not obtained—Jurisdiction of court in case of want of such leave. See JURISDICTION. 45 Cal. 525.

———Mahomedans—Post nuptial agreement by husband not to take second wife and delegation to wife of power of divorce on breach—Validity. See MAHOMEDAN LAW. 22 C. W. N. 924

**DIVORCE ACT (1Y OF 1869), Ss. 4, 18 and 19**—Divorce court—Jurisdiction—Question of—Validity of marriage under Christian Marriage Act—Fraud.

S. 4 of the Divorce Act which provides that the jurisdiction in matters matrimonial shall be exercised according to the provisions of this Act and not otherwise does not preclude the court from considering whether a marriage was duly solemnized under the provisions of the Christian Marriage Act, and the court can make a decree declaring a marriage null and void on grounds other than those contained in S. 18 of the Divorce Act.

Fraud as a ground for avoiding a marriage means such fraud upon the other party to the marriage as procures the appearance without the reality of consent. No degree of deception can avail to set aside a marriage knowingly made unless the party imposed upon has been deceived as to the person and thus has given no consent at all.

Fraud means fraud upon the other party to the marriage and does not include fraud upon a third party acting in granting the license.

The word "solemnized" in S. 5 of the Christian Marriage Act means "celebrated" and deals with the ceremony only.

The words "rules, rites, ceremonies and customs of the church" in S. 5 mean only the rules, etc. as to ritual, and do not include rules or customs as to the capacity of the parties.

In a suit for nullity of marriage the question is not whether the marriage is void under the law of the church but whether it is void by the law of the country. (Young, J.)

CONSTERDINE v. SMAINE, 11 Bur. L. T. 69= 47 I. C. 544.

**EASEMENT.**

———S. 10—Divorce—Judicial separation—Adultery and cruelty thereafter—Ground for dissolution.

A wife who has obtained judicial separation on the ground of her husband's adultery alone, is entitled to a dissolution of marriage on proof that her husband has again committed adultery after the separation and has in addition been guilty of cruelty to her after the separation. (Twomey, C. J, Ormond and Pratt, JJ) MA THIN KYU v. MG BA, THAIN. 45 I. C. 914.

———Ss. 10 and 22—Divorce—Judicial separation—Adultery—Desertion—Cruelty, degree of required for divorce. See (1916) DIG. COL. 604; MA CHO v. MAUNG SEIN. 10 Bur. L. T. 182=8 L. B. R. 385=36 I. C. 381.

———Ss. 10 and 22—Divorce suit for—Cruelty, repeated acts of, effect of. See (1917) DIG. COL. 581; MA PAN NYUN v. MAUNG AUNG THE 10 Bur. L. T. 228=36 I. C. 982.

———S. 16—Decree nisi—Power of High Court to pronounce.

Under S. 16 of the Divorce Act a decree nisi can be pronounced only by a High Court. (Ormond, Parlett and Robinson, JJ) MA WAING v. EBRAHIM. 43 I. C. 519.

**EASEMENT**—Acquisition by prescription—Servient tenement owned by Govt.—Exercise of easement in respect of, for 30 or 40 years—Assignment of property by Govt. to private individual—Effect of, on rights of parties. See EASEMENTS ACT, S. 15. 34 M. L. J. 396.

———Light and air—Obstruction when actionable.

To constitute an actionable obstruction of light and air it is not enough that the light is less than before. There must be such a diminution of light as to constitute a nuisance, and to render the occupation of the house uncomfortable according to the ordinary notions of mankind and in the case of business premises to prevent the plff. from carrying on his business as before. (Maung Kin, J.)

BALTHAZAR AND SONS v. PATAIL 11 Bur. L. T. 109.

———Natural right—Surface water—Right of owner of higher land to discharge Surface water over adjacent lower land—Inutility of the owner of servient tenement to discharge same owing to rise of bed of adjacent stream by silting—Remedy—Dominant owner's right not affected. See EASEMENTS ACT, S. 7 b). ILL. (i). 22 C. W. N. 666.

———Right of way—Proof or—Evidence necessary to prove. See EASEMENTS ACT, Ss. 22, and 23.

22 C. W. N. 922.

## EASEMENT.

———Right to water—River water taken through the field of another, in an undefined channel for irrigation—Enjoyment of right from time immemorial—Presumption of lost grant. See EASEMENTS ACT, SS. 2 (c) AND 17 (c) 20 Bom. L. R. 398.

**EASEMENTS ACT (V of 1882,) Ss. 2 (c) and 17—(C).—Right to water—River water taken through the field of another in an undefined channel for irrigation—Enjoyment of rights from time immemorial.**

The plff. who owned non-riparian lands, used from time immemorial to irrigate his lands by river water which he took through the paddy fields belonging to defts. The water did not flow in a definite channel but spread over the whole of the deft's lands till it overflowed into the plff's lands. The defts. having obstructed the passage of water through their lands the plff. sued to establish his right to the enjoyment of the river water.

*Held*, that the plff. having acquired the right and enjoyed it from time immemorial, was not prevented from enforcing it by any provision of the Easements Act or by virtue of S. 2 (c) of the Act.

*Beaman, J.*—Even if it were a right that could not be acquired by an easement, there was nothing intrinsically unreasonable in it; but on the contrary it was compatible with the usages and sentiments of the agricultural population in many parts of India.

*Marten, J.*—S. 17 (c) of the Easements Act did not apply, for the plff's claim was to river water and not to mere surface water on the deft's lands.

The presumption of a lost grant is one which may be made in India as well as in England. It arises out of the strong desire of the Courts to find a legal origin for an ancient and uninterrupted user. The presumption may be rebutted like other presumptions. It also requires certain conditions and one is that the right could have been the subject of a grant. (*Beaman and Marten, JJ*) JANARDAN GANESH KHADILKAR v. RAVJI BHUKAJI BHONDEKAR 42 Bom. 288=20 Bom. L. R. 398=45 I. C. 448.

———S. 3—Effect of—Limitation Act, Ss. 26 and 27—Central Provinces.

S. 3 of the Easements Act repeals, so far as the Central Provinces are concerned, Ss. 26 and 27 of the Limitation Act and the definition of easement contained in that Act. (*Mitra, A. J. C.*) SITARAM v. PETIA. 14 N. L. R. 35=43 I. C. 982.

———S. 4—Easement—Land meaning of—Roof of shop—Right to dry clothes over—Acquisition of, as easement.

Artificial structures such as flat masonry and roofs or shops, are (land) within the meaning of that expression as used in S. 4 of Act V of 1882 and easements such as the right of

## EASEMENTS ACT, S. 7.

drying clothes can be acquired over them. (*Lindsay, J. C.*) GANESH PRASAD v. KRUDA BAKHSH. 21 O. C. 73=45 I. C. 585.

———S. 4—Easement—Windows—Right to open and shut—Acquisition by prescription.

A right to open and shut the windows of a person's house is an easement within the meaning of S. 4 of the Easements Act for it is a right, which the owner of the house has, as such, for the beneficial enjoyment of his house to do something, i. e., to swing the shutters upon certain other land not his own and such a right can be acquired as an easement by prescription. (*Wallis, C. J. and Phillips, J.*) RANGA ROW v. RAMATHILAKAMMA. 7 L. W. 332=45 I. C. 435.

———S. 7 Illn. (h)—Riparian right—Irrigation—User for—Right by prescription acquired by lower owner—Duty of higher owner, not to interfere with.

Riparian owners have a natural right to use the water of a natural streamlet for the purposes of irrigation so long as that use is reasonable. It is not competent to a higher riparian owner to use the water for irrigation in such a way as to interfere with an easement acquired by a lower riparian owner. (*Imam, J.*) MAHABIR SAHU v. RAM SARAN SAHU. 44 I. C. 19.

———S. 7 (b) Illn. (i)—Water—Right—Surface-water—Right of owner of higher land to discharge surface water over adjacent lower land—Inability of the owner of servient tenement to discharge same owing to rise of bed of adjacent streams by silting—Remedy—Dominant owner's right if affected.

It is well settled in this country that the owner of higher land is entitled to discharge surface water over adjacent lower land.

Where owing to the silting up of a stream into which the water thus discharged ultimately flowed the level of the bed of the stream became higher than the adjacent lower land, to the inconvenience thereof.

*Held*, that the increase of burden to the servient owners not being due to anything done by the dominant owners the latter were still entitled to exercise their rights and it was for the servient owners to take such steps as might be advisable to deal with the difficulties created by the rise in the bed of the stream. (*Walmsley and Greaves, JJ*) KASISWAR MUKHERJEE v. JYOTI KUMAR. 22 C. W. N. 666=41 I. C. 863.

———S. 7 Illn. (i)—Natural right—Right of lower landowner to insist on water flowing on to his land.

For many years water accumulating on higher land used to find its way down across the lands of the defts. on to the land of the plff. which lay below. On the defts. having stopped the flow on to the plff's land and

## EASEMENTS ACT, S. 7.

diverted it in another direction the plff. brought a suit to restrain the defts on the allegation that by their so doing the productive powers of his land had been lessened.

*Held*, that the plaintiff had no right which he could enforce at law, as his case was really the case of the owner of a servient tenement endeavouring to retaliate by claiming an easement against the owner of the dominant tenement; that the defts. may have acquired a right by prescription to discharge surplus water from their land on to that of the plff but this would not give the plff. the right to insist that they should continue to do so for all time (*Chatur and Walmsley, JJ.*). **BAL-LAVE MANDA v. BEPIND BEHARI MANDAL.**

46 I. C. 24.

—Ss. 7, 111. (i) and 22—*Natural right—Water brought down on land for cultivation—Right to discharge on the land of lower proprietor—Natural right or easement—Infringement—Injunction—Form of decree.*

*Per. Sadasiva Iyer, J.*—The term, "natural right" of drainage strictly so-called covers only the right to allow rainwater falling on land of a naturally higher level to drain off by surface flow wherever and along whatever lines the water could find its way on the neighbouring land. The right to drain off water brought according to the custom and usages of the country along irrigation channels upon the land may also be said to be a natural right.

*Per Phillips, J.*—An owner of land can have no natural right to pass the water, which has come upon his land artificially to his adjoining land. Where the upper field is watered by an irrigation source, a right to pass such water away from the field cannot be a natural right but only a prescriptive or customary right.

*Per Curiam.* Under S. 22 of the Easements Act the easement must be exercised in the way least onerous to the servient owner and must at his request be confined to a determinate part of the servient heritage.

Form of injunction decrees, when rights or easements are interferred with considered. (*Sadaswa Aigar and Phillips, JJ.*) **DORAISAMI MUTTIRIYAN v. NAMBIAPPA MUTTIRIYAN.**

23 M. L. T. 210= (1918) M. W. N. 167= 44 I. C. 500.

—S. 7, 111 (j)—*Right of riparian owner to utilise water for irrigation—Natural right—Exercise of right not to interfere with easement acquired by lower proprietors. See RIPARIAN RIGHTS.* 44 I. C. 19.

—S. 7, cl. (h) 111 (j)—*Riparian rights—Extent of, in India—Person exercising riparian rights not liable to pay water-cess to Govt. See MAD. IRRIGN. CESS. ACT, S. 1* 43 I. C. 113.

—S. 12—*Easement—Enjoyment of, by tenants of dominant owner—Landlord entitled to benefit of.*

## EASEMENTS ACT, S. 15.

User of the servient tenement by the tenant of the dominant owner who occupied the premises is for the purpose of acquisition of an easement as good as user by the dominant owner himself. (*Lindsay, J. C.*) **GANESH PRASAD v. KHUDA BAKHS.** 21 O. C. 78= 45 I. C. 885.

—S. 13—*Easement of necessity—Origin of—Acquisition of title by prescription.*

An easement of necessity cannot arise in any other way than on severance of tenements.

Where the plff. claimed a right of way over the deft's garden, and it was found that the deft's holding was distinct from the plff's and that although they adjoined there was no suggestion that they had ever belonged to the same owner, and it appeared that they had been brought by the plff and deft. at different times.

*Held*, that under the circumstances, no question of easement of necessity could arise, and that the only question was whether the plff. had made out that he had peaceably and openly enjoyed the right to go through the deft's garden as an easement for twenty years up to a date within two years of the suit. (*Saunders, J. C.*) **MAUNG SEWE DAING v. MA THET SU.** 3 U. E. R. (1918) 65= 46 I. C. 327.

—S. 15—"Belongs to Government" in last para. meaning of—*Acquisition of easement by prescription—Servient tenement owned by Government—Exercise of easement right in respect of, for 30 and 40 years—Assignment by Govt. of property to private individual—Effect on rights of parties.*

The words "belongs to Government" in the last paragraph of S. 15 of the Easements Act refer, not to the time of suit, but to the time during which the easement is enjoyed.

Where, property belonging to Government and in respect of which an easement had been exercised by A only for 30 or 40 years, was assigned by Government to B, a private individual, *held*, that the assignment had not the effect of rendering the easement absolute as against B on the ground that the 30 or 40 years' enjoyment would be sufficient as against him under S. 15 of the Act.

*Semble.*—Where the 60 years' period has nearly expired during Government ownership of the land, and the land is then transferred by Government to a private party, the acquisition of the easement might be held to be completed when the deficiency was made up by subsequent enjoyment against the transferee (*Ayling and Phillips, JJ.*) **SBINIVASA UPAHYA v. RANGANNA BHATT.**

41. Mad. 622=34 M. L. J. 396=45 I. C. 99

—S. 15—*Easement—Acquisition of, by prescription—Evidence of prior possession.*

## EASEMENTS ACT, S. 15.

The user of an easement without any one's permission and without interference on behalf of the servient owner is "as of right." In disputes relating to acquisition of easements evidence of user prior to the statutory period is admissible. (*Lindsay, J. C.*) GANESH PRASAD v. KRUDA BAKSH. 21 O. C. 78 = 45 I. C. 585.

———S. 15—*Right of fishing—Prescription—Implied grant from 40 years' user.*

Under S. 15 of the Easements Act, a right of fishing cannot be acquired by prescription but from uninterrupted user such a grant may be presumed. The Easements Act does not exclude or interfere with other titles or modes of acquiring easements. (*Mitra, J. C.*) SITARAM v. PETIA. 14 N. L. R. 35 = 43 I. C. 962.

———S. 17 (c)—*Right to water—River water taken through the field of another in an undefined channel for irrigation—Enjoyment of right from time immemorial.* See EASEMENT ACT, SS. 2 (c) AND 17 (c). 20 Bom. L. R. 398.

———S. 22—*Easement or customary right to discharge water brought for purposes of irrigation on to the land of lower proprietor—Right of lower proprietor to have the enjoyment confined to a specific part of the land.* See EASEMENTS ACT, SS. 7 AND 22. (1918) M. W. N. 167.

———SS. 22 and 23—*Wright of way Suit for declaration of plff's right—Things necessary for plff to prove.*

In a suit for a declaration of the plff's right of way it is not necessary to locate the exact position in which the way was enjoyed over the compound of defts, nor is it necessary to show that any definite marked pathway over the compound was always used. If the plffs. establish the termini from which and to which the way runs the plffs. would be entitled to have the right of way; that right would be enjoyed in the way that the owners of the servient tenement point out as being the tract over which the way should be enjoyed; and if not then the plff. would be entitled to enjoy the way by the nearest route. *Wimbledon and Putney Commons Conservators v. Dixon*. 1 Ch. D. 352 foll. (*Fletcher and Huda, JJ.*) LAKHI KANTA RAI v. RAJ CHANDRA SAHA. 22 C. W. N. 922 = 46 I. C. 375.

———S. 23—*Re-construction involving change in the situation of roshandans if fresh easement—Building up wall as to block roshandans.*

A re-construction of a house involving a change in the situation of the roshandans does not mean a fresh easement requiring a fresh period of 20 years for its acquisition.

## EASEMENTS ACT, S. 28.

Plff sued for the issue of a mandatory injunction to the defts. that they should demolish a wall built by them. It appeared that the plff. had re-constructed his house and had changed the position of his *paranals and roshandans*. Defts. had therefore built up their wall so as to block these *paranals and roshandans*.

Held, that the plff. was entitled to the relief claimed, 26 Bom. 374 diss. (*Chevis, J.*) DHARM DAS v. PIYARE LAL. 98 P. W. R. 1918 = 45 I. C. 985.

———S. 24—*Accessory easement—Discharging rain water from projecting eaves—Accessory easement of going over the servient tenement to repair the wall, not allowed.*

The plff. who had acquired an easement of discharging rain water upon deft's land from projecting eaves, sued for an injunction restraining the deft. from building upon his land in such a way as to prevent the plff. from going upon it for all the purposes of repairing the wall which supported the eaves.

Held, dismissing the suit, that to grant any relief with regard to the wall was an illegitimate extension of the doctrine of accessory easement for the wall was not an absolute necessity for the support of the eaves. (*Beaman and Heaton, JJ.*) HIMATLAL v. BHIKABHAI. 42 Bom. 529 = 20 Bom. L. R. 403 = 45 I. C. 422.

———S. 26—*Easement—Right to use water course—Enjoyment for 19 years, effect of—Obstruction within one year of suit.*

Plffs. began to use a water-course in 1896 and continued to use it until 1915 when deft's interfered. The present suit was instituted before the expiry of one year from the date of such interference.

Held, that as it was not pleaded that the water-course had been used by plffs. with deft's permission, it must be taken that plffs. enjoyment was *nec vi nec clam nec precario*.

Though the period of actual enjoyment was in this case only 19 years 6 months and 19 days the obstruction by defts. not having been acquiesced in for one year must be ignored for the purpose of calculating the period of 20 years laid down in S. 26 of the Lim. Act.

As the period of actual enjoyment and the period after obstruction up to the date of institution of suit together made up the full period of 20 years and this period ended within two years next before institution of suit, the plffs. had established their right of easement. (*Shadi Lal, J.*) SAWAN SINGH v. CHATTAR SINGH. 48 P. R. 1918 = 46 I. C. 17.

———S. 28—*Easement—Limits of—Small space—Definite egress and ingress.*

Where the area over which an easement of way has been acquired is small and the points of egress and ingress are fixed it is not necessary

**EASEMENTS ACT, S. 47.**

for the Court to delineate the particular portion of the ground which persons enjoying the easement are entitled to use. (*Lindsay, J. C.*)  
**GANESH PRASAD v. KHUDA BAKSH.**  
 21 O. C. 78=45 I. C. 585.

— **S. 47—Easement—Extinction—Cessation in pursuance of agreement—Effect.**

*Held*, following the principles laid down in S. 47 of Act V of 1882, that an easement is not extinguished when the cessation is in pursuance of a contract between the dominant and servient owners. (*Shadi Lal, J.*) **FATEH CHAND v. PARAS RAM.**  
 34 P. L. R. 1918=  
 56 P. W. R. 1918=45 I. C. 618.

— **S. 60—Licensee—Notice to quit before institution of suit for ejectment, unnecessary.**  
*See* EJECTMENT. 27 C. L. J. 523=  
 45 I. C. 347.

— **S. 60—License—Revocation of—Execution of costly and permanent works by licensee on land of licensor—No right to revoke license.**

Under an oral arrangement plff. allowed deft. to execute on the plff.'s land an irrigation scheme of considerable expense and permanent benefit to a very large number of villages.

*Held*, that the agreement created a license which could not be revoked at the instance of the plff. (*Jwala Prasad and Imam, JJ.*) **THE SECRETARY OF STATE FOR INDIA v. HIRA NAND OJHA.**  
 47 I. C. 166.

**EASTERN BENGAL AND ASSAM DISORDERLY HOUSES ACT (II OF 1907), S. 3—Order by inquiring magistrate—District Magistrate if can modify.**

A Dt. Magistrate has no jurisdiction to interfere with an order passed by a Criminal Court in the exercise of its jurisdiction under S. 3 of the Eastern Bengal and Assam Disorderly Houses Act. 14 C. W. N. 404 *ref.* (*Teunon and Richardson, JJ.*) **LALIT MOHAN CHAKRAVARTY v. HARENDRA KUMAR DE.**  
 45 Cal. 301=21 C. W. N. 1125=  
 27 C. L. J. 89=40 I. C. 736.

**ECCLESIASTICAL LAW—Established church, meaning of whether subject to the ordinary courts of law—Roman Catholic Church, if an established church—Voluntary association—Rules of—Rules of Branch association different from parent body, departure from—Custom—Proof of—Status of association.**

The Church of England is an established church and is therefore subject to the ordinary courts of law not only as to matters temporal but even as to matters of doctrine.

The Roman Catholic Church is not an established church but a voluntary association and any member who joins that church will be

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bound by any rules which it has framed for its internal discipline and for the management of its affairs.

If a branch voluntary association has adopted rules which materially differ from those of the parent body, but the members of that association will not be members of the parent body but will be an independent organisation with their own rules.

The Canon Law recognises no distinction between the spiritual and temporal powers of the Papacy, and the Episcopate and a member of any church which is part and parcel of the universal catholic church would be bound by the Canon Law and the control of the temporalities vested in the bishop.

If a church while adopting in the main the doctrines of the Catholic Church has yet erected certain rules different from the rules of the Catholic Church in matters of discipline and management, those rules must be proved in the same way in which a custom would have to be proved in a Court of law.

Questions of custom though they may in the end become questions of law are at the outset necessarily questions of fact.

Where an appointment as manager of a Vicar in a Roman Catholic Church by the bishop was questioned on the ground that he was not appointed by the *junta* composed of the heads of the houses in a village as was the custom and that the delegation of any authority by the bishop was only permissive.

*Held*, (1) that whether the church is viewed as a breach of the Roman Catholic church or as a voluntary association the appointment was valid.

(2) that whether the custom was for the *junta* to appoint was one of fact on which the finding of the Lower Appellate Court cannot be interfered with in Second Appeal (*Ayling and Coutts Trotter, JJ.*) **GASPARI LOUIS v. REV. FR. C. P. GONSALVES.** 35 M. L. J. 407=  
 (1918) M. W. N. 842=8 L. W. 268=  
 47 I. C. 941.

**EJECTMENT—Benamidar—Fictitious suit—Fictitious sale—Court, if can enforce unreal title** *See* (1917) DIG. COL. 537; **SURENDRA NATH GHOSH v. KALI GOPAL MAJUMDAR**  
 45 Cal. 920=22 C. W. N. 367=  
 26 C. L. J. 333=42 I. C. 431.

— **Co-owners—Right of one to eject trespasser.**

A person who has been wrongfully, dispossessed from property is entitled to sue for its possession, and it is not a defence to the suit to say that the plff. is not the sole owner of the property (*Mitra, A. J. C.*) **BHAGWANSA v. MAROTI.** 43 I. C. 395.

— **Co-sharer landlords—Right of one to eject—Partial ejectment, if recognised.**

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No co-sharer landlord can put an end to a tenancy unless he represents the entire proprietary body. Any co-sharer can sue to eject a trespasser from the entire area covered by a trespass, but only the full landlord can sue to eject a tenant.

A man who is put on the land as a tenant by a co-sharer and who remains with his status undisputed for many years, is *prima facie* a tenant who has been accepted as such by the proprietary body.

There can be no such thing as a partial ejectment of a tenant to the extent of the share of the co-sharer claiming joint possession, nor there can be joint possession by the landlord with the tenant S. N. L. R. 163 foll. (*Stanyon A. J. C.*) DHANOMAL v. RAMLAL.

45 I. C. 496.

—Determination of tenancy—Allegation of—Burden of proof.

In a suit in ejectment based on a terminated tenancy ordinarily the plaintiff landlord has to prove not only that the defendants were tenants but also his right to eject. He must show that the tenancy is a terminable one and has been terminated validly. This is not affected by any defence of permanent tenancy.

Presumption as to the nature of tenancy considered and discussed. (*Spencer and Krishnan, J.J.*) MUTHUSWAMI IYER v. NAINAR AMMAL.

(1918) M. W. N. 219—  
7 L. W. 194—43 I. C. 977.

—Jus tertii—Suit against Joint trespassers—One trespasser setting up title in another.

It is open to a defendant who is sued as a trespasser to rely upon the title of his co-defendant if both are alleged to have been acting in concert, even though his own derivative title is not proved. (*Mitra, A. J. C.*) BHAI SINGH v. MAHIPAT.

47 I. C. 550.

—Lambardar—No right to eject tenant or trespasser, except as agent of the whole body of co-sharers. See CO SHARER

3 Pat L J. 88

—Licensee—Notice to quit—Necessity.

A licensee in possession of lands is not entitled to a notice to quit (*Richardson and Walmsley, J.J.*) GOBINDA CHANDRA GHOSE BISWAS v. NANDA DULAL SUT.

27 C. L. J. 523—45 I. C. 317.

—Notice to quit—Proof of service of on tenant—Production of postal cover with endorsement of refusal to receive—Proof insufficient. See LANDLORD AND TENANT.

45 I. C. 917.

—Possessory title—Suit on the strength of, against trespasser—Maintainability.

## ELECTION

Possession is not merely evidence of ownership but is also the foundation of a right to possession and is sufficient in point of law to maintain a suit for possession as against a mere trespasser 8 Bom. L. R. 96; 41 C. 294; 39 I. C. 458 Ref. (*Mullick and Atkinson, J.J.*) SHAIKH MIRZA v. ABDUL GANI.

4 Pat. L. W. 130—43 I. C. 333.

—Termination of tenancy—Denial of tenancy by defendant—Onus on plaintiff of proving right to eject.

In a suit for recovery of arrears of rent and for ejectment on ground of determination of tenancy if the defendant denies the plaintiff's title and pleads that a third person is the landlord the plaintiff in order to succeed must prove the existence of the relationship of landlord and tenant between himself and the defendant. (*Mullick and Thornhill, J.J.*) KUBER NATH SINGH v. GOPAL NARSIN RAM.

46 I. C. 238.

—Title, proof of—Onus on plaintiff.—Proof of possession within 12 years not enough. See BURDEN OF PROOF

20 Bom. L. R. 346

—Title, strict proof of, necessary—Title by heirship

A person claiming to recover possession of the property of a deceased Mahomedan as a distant kindred must establish by evidence that all persons having a prior or better title than him have been exhausted, or do not exist. (*Mullick and Atkinson, J.J.*) SHEIKH MIRZA v. ABDUL GANI

4 Pat. L. W. 130—  
43 I. C. 333.

—Trespass by tenant—Right of permanent lessee from landlord to eject.

A perpetual lessee is competent to maintain a suit against a ryot with regard to a trespass committed by the latter, e.g., the planting of new trees in a grove without permission on any portion of the land comprised in the lease (*Lindsay, J. C.*) RAGUBAR v. SURAJ BAKSH

5 O. L. J. 237—46 I. C. 357.

ELECTION—Municipal Commissioner Requisites of valid nomination paper—Irregularities in nomination, proposal, and approval of candidate—Election void. See CALCUTTA MUNICIPAL ACT. SCH. 5, R. 2.

22 C. W. N. 943 also.

22 C. W. N. 951

—Objections to—Corrupt practices—Impersonation, essence of Mens rea—Intimidation and undue influence—Proof of.

Mens rea is an essential ingredient to constitute impersonation. In this case there was nothing to show that the elected candidate or his agent fraudulently and wrongfully caused improper personification and so the charge of impersonation could not stand.

## ELECTRICITY ACT, S. 24.

In order to avoid an election on the ground of intimidation and undue influence it must be shown either that (1) the rioting or violence was instigated by the candidate or his agents for whom he is responsible, or that (2) it prevailed to such an extent as to prevent the election from being an entirely free election. (*Chaudhuri, J.*) **MONORANJAN MUKHERJEE v. BROJO GOPAL GOSWAMI.**  
22 C. W. N. 578=46 I. C. 729.

**ELECTRICITY ACT (IK of 1910), S. 24--Schedule Cl. (vi) sub C. (3)—Fuse or cut out if a part of the service line—Consumer, liability of, to maintain service line at his cost—Defective installation—Dispute as to—Reference to Electric Inspector—Liability of consumer to pay for new fuse.**

A fuse or cut-out is a necessary part of the service line and is kept under the licensee's seal.

The licensee has to bear the cost of the maintenance of the service-line whether or not it has been initially paid for by the consumer. If the consumer's installation is defective, the licensee is entitled to discontinue the supply of the energy to him.

In case of a dispute as to any alleged defect, the licensee can take action under clause VI sub-clause (3) of the Schedule to the Electricity Act and refer the matter to an Electric Inspector who shall decide it.

If the licensee continues to supply energy to a consumer when he knows or has reason to believe that the latter's installation is defective, he does so at his own risk and the consumer is not liable to pay for a new fuse or cut-out if the old one melts owing to a defect in his installation. (*Scott, Smith, J.*) **THE LARORE ELECTRIC SUPPLY CO. v. DUBAI DAS.**  
85 P. R. 1918=

77 P. L. R. 1918=79 P. W. R. 1918=  
45 I. C. 171.

**ENGLISH RULES OF EQUITY—Applicability of to India. See CONTRACT ACT, S. 16.**  
35 M. L. J. 614 (P. C.)

**EQUITABLE ASSIGNMENT—What constitutes—Authorisation to collect amount of decree and pay himself out of collections.**

Where the debt, authorised plff. to collect, certain decrees and pay himself out of the proceeds.

*Held*, that this amounted to an equitable assignment of the decrees in plff's favour.

An agreement between an assignor and an assignee that a debt shall be paid out of the specified fund or an undertaking to pay over to another moneys to be received from a particular source amounts to an equitable assignment. (*Abdur Rahim O. C. J. Seshagiri Iyer and Phillips, JJ.*) **RAMA AIYAR v. PARTHASARATHY CHETTY.**  
43 I. C. 385.

## ESTOPPEL.

**ESCHEAT—Crown and Zemindar—Right of Zemindar—Residents in house on the abadi—Death without legal heirs.**

Two persons D and M, Sahukars by profession, were owners and occupiers of a house situated within the limits of a village known as Mauza Sakitra and also within the limits of the town of Gobardhan. D and M died in that house without leaving any heirs. The Collector of Muttra representing the Secretary of State for India took possession of the house and its site as the ultimate heirs of the property of a deceased person. The plff., the Bharatpur State, claimed the site as zemindar and asserted that D and M were owners of only the materials of the house with a right of residence therein, but had no right to transfer the site or the right of residence. The deft., on the other hand, contended that the house being situated in a town the owners of it were also owners of the site and subsequently the house escheated to him. The plff's case rested on two sets of documents namely, the Settlement Papers prepared in 1850 A. D. and the wajib-ul-arz of 1877 A. D. The wajib-ul-arz provided that residents in houses of mauza Sakitra, though their houses might form part of the town of Gobardhan had no proprietary rights therein except the materials thereof, and they could not sell the site or the right of residence on the site; and that in the event of the death of the occupier of such house without legal heirs the proprietor of mauza Sakitra, would be entitled to possession of the house along with the site. Under the documents of 1850 A. D., the Government conferred on the Bharatpur State revenue proprietary rights over the soil of the five Biswas of mauza Sakitra:—*Held*, upon the facts and the evidence in the case that D and M were limited owners of the house and that the effect of the settlement of 1850 A. D. was to grant the Bharatpur State proprietary rights in the abadi of mauza Sakitra, and that therefore the Bharatpur State was entitled to the house and the site of the house. 81 All. 111 appl. (*Piggott and Walsh, JJ.*) **THE BHARATPUR STATE v THE SECRETARY OF STATE FOR INDIA.** 16 A. L. J. 653=47 I. C. 823.

**ESTOPPEL — "Approbate and reprobate"—Parties not entitled to—Execution, sale—Judgment-debtor estopped from impeaching.**

A party cannot take the benefit of a transaction and at the same time repudiate it when the transaction is one and indivisible. Where the property of a judgment debtor is sold in execution of the decree and the proceeds go in satisfaction of the decree, and the judgment-debtor accepts the payment of the decree, he cannot impeach a part of the sale. (*Mitra, A. J. C.*) **ANNAPURNABAI v. RAMA CHANDRA.**  
43 I. C. 178.

————— **Benamidar—Transfer by — Right of transferee—Notice of benami nature—Effect: See BENAMI.** 73 P. R. 1918.

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—Both parties affected by — Duty of Court to try the case on the merits.

In a case of one estoppel against another the parties are set free and the Court has to see what their original rights are. (*Scott-Smith, J.*) **JIWAN LAL v. BEHARI LAL.** 152 P. W. R. 1918=45 I. C. 63

—Change of position—Withdrawal of suit as a result of compromise.

Held, that by his admission of compromise before the Revenue Court the plff. having induced the deft to withdraw his suit in that Court, he was now estopped from bringing the present suit. (*La Rossingot and Wilberforce, JJ.*) **GULAB v. BADHAWA.** 45 I. C. 331

—By conduct—Ambiguous act, insufficiency of.

Just as an estoppel cannot be created by an ambiguous document so too it cannot be created by an ambiguous act (*Young, J.*) **MANSA v. SALLAJEE.** 46 I. C. 609.

—By conduct — Omission to speak — Agreement between co-mortgagees to pay off prior mortgage— Failure of one mortgagee to inform the other of a prior charge in his favour.

Where two persons embark upon a joint adventure for the purpose of extinguishing a prior mortgage and taking a first charge on the property, it is the legal duty of each to inform his co-mortgagee within a reasonable time that he had still an outstanding claim under the prior mortgage and the omission to give the information amounts to such an omission as is contemplated by S. 115 of the Evidence Act and operates as an estoppel. (*Mitra, A. J. C.*) **PANDURANG v. NARAYAN RAO.** 44 I. C. 547.

—By record—Res-judicata—Estoppel outside the doctrine of res-judicata—Judicial estoppel—Party precluded from raising inconsistent pleas in successive litigations. See RES JUDICATA, REPRESENTATIVE SUIT. (1918) M. W. N. 175.

—By representation, when arises—Plea of, to be specifically raised.

Estoppel by representation only arises where the representation is as to a matter of fact. It is absolutely necessary to plead estoppel if it is intended to rely upon it. (*Mookerjee, and Beachcroft, JJ.*) **CHANDI CHARAN NATH v. SOMLA BIBI.** 22 C. W. N. 179=28 C. L. J. 31=44 I. C. 254.

—Deed—Approbate and Reprobate—Person not entitled to—Person adopted under will, not entitled to question its other provisions. See HINDU LAW, ADOPTION.

5 Pat. L. W. 167.

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—Doctrine—Applicability — No prejudices acting on faith of representation—Effect. See EVIDENCE ACT, S 115 75 P. W. R. 1918.

—Execution of decree — Judgment-debtors admission of liability—Subsequent repudiation of liability—Permissibility

Where a person against whom execution is taken out admits his liability he cannot subsequently repudiate it.

It is not necessary, according to law as at present accepted, that there should be any fraudulent intention established in connection with the misrepresentation which is the subject of estoppel (*Mullick and Thornhill, JJ.*) **BALBIE PRASAD v. JUGUL KISHORE.** 3 Pat. L. J. 454=45 I. C. 473.

—Execution of decree—Sale in execution of house of agriculturist—Suit by purchaser for possession—Objection by judgment-debtor that property not saleable under S. 60 (c) of the C. P. Code, not maintainable. See C. P. CODE S. 60 (c) ETC. 15 A. L. J. 691.

—Execution *scilicet* — application by judgment-debtor for postponement of sale promising to waive objections—Raising of objections after conclusion of sale.

A judgment-debtor got an execution sale postponed on undertaking that he would not raise any objection on the ground of illegality or irregularity. After the sale took place on the postponed date he applied to set it aside on the ground of an illegality or irregularity of which he was cognisant at the time he gave his undertaking. Held, that he could not be allowed to impeach the sale. (*Fletcher and Huda, JJ.*) **LAKSHMI PRASANNA MOJUMDAR v. RAJINDAR PODDAR.** 47 I. C. 331

—Foundation of the rule—Representatives bound by estoppel.

The doctrine of estoppel is based upon the change of position brought about by the representation or actings of the person bound by the estoppel.

Estoppel applies not only in favour of the person induced to change his or her position, but of a transferee from such person, and it binds not only the person whose representations or actings have created it, but all claiming under him by gratuitous title. (*Lord Dunedin.*) **JAGANNATH PRASAD SINGH v. SYED ABDULLAH.** 16 A. L. J. 576=

35 M. L. J. 46=24 M. L. T. 62=  
20 Bom. L. R. 851=28 C. L. J. 162=  
22 C. W. N. 891=(1918) M. W. N. 436=  
8 L. W. 163=5 Pat. L. W. 83=  
45 I. C. 770 (P. C.)

—Hindu reversioner—Compromise with widow—Reversioner getting benefit and renouncing right to estate—Reversioner estopped

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from claiming estate when succession opens.  
See HINDU LAW, WIDOW.

22 C. W. N. 914 (P. C.)

—Hindu Reversioner—Mortgage by widow—Legal necessity—Reversioners joining in the mortgage—Reversioners if can subsequently maintain that recitals were untrue—Evidence Act, S 115.

Where some of the sons of a Hindu widow who had only a limited interest in the property joined in the mortgage executed by her and thus represented that the property was being mortgaged by their mother for legal necessity. *Held*, that the sons would not be allowed to go back upon those representations when dealing with a party who had changed his position relying on the representations of fact and as such estopped from denying the validity of the mortgage to which they were parties. *Pickard v. Sears*, 6 A and E 465; *Carr v. L.* and *N. W. Ry. Co.* L. R. 10 C. P. 307; 42 C. 56; 20 C. 296; 29 All. 184 ref.

A reversioner who has voluntarily signed the deed executed by a widow cannot legally claim in opposition thereto; 8 All. 362; 10 All. 407 foll. (*Sanderson, C. J. Woodroffe and Mukherjee, JJ*) *SHIB CHANDRA KAR v. DULCKEN*. 28 C. L. J. 123=48 I. C. 78.

—Hindu widow and reversioner—Relinquishment by reversioner—Taking advantage from widow—Reversioner and his heirs estopped from disputing validity of transaction.

A Hindu reversioner relinquished his rights to a portion of the inheritance in favour of the widow in consideration of receiving a relinquishment from the widow of all her interest in the remaining portion of the inheritance:

*Held*, that neither the reversioner nor any person claiming through him, could set up that the relinquishment was not binding on him and did not operate on the portion of the inheritance relinquished in favour of the widow. (*Fletcher and Huda, JJ.*) *JOGENDBA NATH BUNYA v. MOHINDRA CHORA*. 47 I. C. 978.

—Inconsistent positions—Party to proceeding—Taking up of inconsistent positions—Permissibility—Proceeding in execution for suit

Where a suit to enforce a security bond filed in a Privy Council appeal was dismissed on the grounds (1) that the necessary parties had not been impleaded and (2) that the claim was barred by S. 47 of the C. P. Code and on an application for execution to enforce the said security being made the decree-holder was met with the plea that the order passed before the institution of the above suit in a previous execution proceeding, referring him to seek his remedy by suit operated as a bar to a fresh application for execution, *held*, that the order passed in the suit had the effect of nullifying

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the previous order passed in the execution proceeding.

*Held*, that a party should not be allowed to take up a position inconsistent with that on which he has succeeded in defeating a claim in a previous proceeding brought to enforce it. (*Kanhaiya Lal and Daniels, J C.*) *BASTI BEGAM v. SAJJAD MIRZA*. 21 O C. 188=47 I. C. 558.

—Inconsistent positions—Execution sale of holding—Deposit by transferee of holding—under S. 310-A. C. P. Code—Withdrawal of deposit by landlord—Landlord if can dispute title of transferee.

A landlord who withdraws the amount deposited by the transferee of a non-transferable holding to set aside its sale under S 310 A of the C. P. Code of 1882 without raising any objection, cannot plead subsequently that the transferee did not, by his purchase, acquire a valid title to the holding, 6 C L J. 601 foll. (*Mockerjee and Beauchroft, JJ*) *GHADADHAR GHOSH v. MIDNAPUR ZEMINDARY CO. LTD.* 27 C. L. J. 385=43 I. C. 742.

—Jurisdiction—Objection to want of—No waiver of. See JURISDICTION, COURT OF. 4 Pat. L. W. 445.

—Kanomdar, assignee of—Acknowledging title of mortgagor by accepting fresh kanom if can question title. See MALABAR LAW, KANOM. 24 M. L. T. 742.

—Landlord and tenant—Co sharer—Landlord—Purchase of holding of the tenancy by one of the landlords in rent sale held in execution of decree for his share of the rent—Settlement with defaulter—Tenant not put in possession of the entire holding not liable to pay 16 annas as rent to purchaser. See LAND LORD AND TENANT, RENT. 43 I. C. 47.

—Landlord and Tenant—Denial of title of landlord—Right of tenant—Adverse action of third party—Effect. See EVIDENCE ACT, S. 116. (1918) M. W. N. 376.

—Landlord and tenant—Holding out—Acquiescence—Creation of tenancy by implication—Reclamation of waste land at great expense by landlord—Ejectment.

Where a plea of acquiescence or of standing by has been raised by a tenant in order to resist the claim of the landlord to eject him and it is proved that the tenant has been encouraged to spend money, he can claim the protection given by a Court of Equity. In the absence of such a plea "standing by" or acquiescence, a Court of fact may, if the circumstances of the case justify, come to the conclusion that the landlord had expressly or impliedly contracted to lease the land to a tenant whose reclamation of waste land has

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not been objected to for some years. This however, is not a presumption of law but a presumption of fact which may or may not arise in a case. (*Mitra, A. J. C.*) SAWAI SINGHAI NATHURAM v KALLOO.

44 I. C. 517.

———Landlord and tenant—Raiyati holding recorded as Zeraiyat by collector—Co-sharers estopped. See (1917) DIG. COL. 546; BALDEO SAHAI v. BRAJNANDAN SAHAY.

3 Pat. L. W. 266=(1915) Pat. 164=  
43 I. C. 359.

———Minor—Ratification of transaction after majority. See LETTERS OF ADMINISTRATION. 3 Pat. L. J. 415=46 I. C. 117.

———Minor—Sale by—Suit to set aside after majority—Silence as to age, does not amount to false representation—Suit to set aside sale—Maintainable—Equities—Refund of benefit. See MINOR, SALE

7 L. W. 214=43 I. C. 903.

———Mortgage—Transfer of mortgaged property on the representation that it is free from encumbrances—Some of mortgagee's parties to representation—Effect as against them and against others.

Where some of the mortgagees led a subsequent purchaser of a portion of the mortgaged property and a puisne mortgagee of the remainder to believe that the whole property was unencumbered.

Held, that they were precluded by the doctrine of estoppel from setting up their rights under the prior mortgage as against the subsequent transferees, and the effect of the estoppel was to postpone them in respect of their share of the original debt to the puisne mortgagees.

Held, also, it is open to the Court to sever their interests from those of the mortgagees who were under no disability or disqualification and to make a decree in favour of the latter in proportion to their interest in the debt. (*Richardson and Beachcroft, JJ.*) SAKHIUDDIN SAHA v. SONAULLA SARKAR.

27 C. L. J. 453=22 C. W. N. 641=  
45 I. C. 986.

———Mortgagor and mortgagee—Right of mortgagor to transfer property mortgaged, not to be questioned by his heir—Ghatwali Tenure. See LAND TENURE, GHATWALI.

(1918) Pat. 305.

———None where truth known to parties.

There cannot be a case of estoppel, where the person pleading the estoppel was put on notice and could by reasonable diligence have discovered what the true facts were. (*Fletcher and Hudd, JJ.*) SABADA PROSAD ROY v. ANANDA MOY DUTTA.

46 I. C. 228.

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———Not to be invoked the defeat the plain provisions of a statute—Registration Act See BURDEN OF PROOF

22 C. W. N. 894.

———Occupancy holding not transferable by custom—Execution sale of—Objection to—Attachment before judgment by consent in execution of money-decree against holder—Effect—Attachment—Object and Effect of.

Where a judgment debtor who had appealed for reversal of an *ex-parte* money decree against him has consented to the attachment of an occupancy holding of his, pending the rehearing proceeding, and did subsequently on the decree being confirmed object to the sale on the ground of non transferability of the holding without the landlord's consent.

Held, the attachment by consent did not estop the judgment debtor from objecting to the sale.

The primary object of an attachment is that pending the sale, the right of the judgment-debtor in the property attached shall be maintained in tact for the benefit of any possible purchaser.

On judgment-debtor objecting to the sale on the ground that the holding attached was not transferable by custom without the landlord's consent, the primary Court held that the judgment-debtor was estopped from resisting the objection as he had consented to the attachment and his decision was affirmed on appeal by the Dt. Judge and the sale was held and confirmed pending second appeal to the High Court.

Held, that there was no question of estoppel involved the judgment-debtor was entitled to object to the sale, and to prefer a second appeal to the High Court against the appellate order affirming the primary courts' decision. (*Roe and Jwala Prasad, JJ.*) BOCHAI MAHTON v. ISRI JAJI. 5 Pat. L. W. 185=  
47 I. C. 29.

———Parties and privies—Doctrine, applicable to persons claiming under those whose conduct has led to a change of position.

Upon the sale of a village by the manager of an encumbered estate it was purchased *benami* on behalf of the Zemindar of the estate, but no transfer to the benamidar was made. After the discontinuance of the management the benamidar, upon the instructions of the zemindar, purported to transfer the village by a deed of sale to the zemindar's illegitimate daughter, who, however, paid no consideration. The zemindar by petition supported an application by the daughter for mutation of names whereupon she became the registered proprietrix.

Held, that the zemindar and those claiming under him were estopped from denying the title of the grantee, since as a result of the

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zemindar's acts her position had been changed in that she became liable for the revenue assessed upon the village. (*Lord Dunsin.*) **RAJAH OF DEO v. ABDULLAH.**

45 Cal. 909=45 I. A 97 (P. C.)

———*Parties and privies—Liability of—Intermediate arrangement between original parties, effect of*

An estoppel can be availed of by parties and their privies. "The privy cannot be deprived of such benefit by the fact that since the time the representation was made and the privity of estate commenced, the person to whom the representation was made and the person who made the representation have come to an arrangement contrary to the representation." (*Lindsay J. C. : and Karhaiya Lal, A. J. C.*) **BADRI BISHAL v. BAIJ NATH**  
5 O. L. J. 458=47 I. C. 934

———*Plea of—Elements necessary to establish.* See (1917) DIG. COL. 517; **BASIRUL HUQ v. MUHAMMED AJIMUDDIN.**  
3 Pat. L. W. 213=43 I. C. 857.

———*Plea of—Pleading and proof.*

A person invoking the plea of estoppel must clearly plead precise facts which led him to believe that his transferor was the real owner and must show the precise nature of the enquiries he relied on. (*Shadi Lal, J.*) **RAM SARUP v. MAYA SHANKAR.** 46 P. R. 1918=  
45 P. L. R. 1918=33 P. W. R. 1918=  
43 I. C. 556.

———*Pleadings—Plea of estoppel to be proved by production of the pleadings.*

A plff. who wants to show that defts. are estopped from raising a certain plea by reason of their pleadings in a previous suit between the parties, cannot do so by merely producing a copy of the Court's judgment in the previous suit containing a summary of the pleadings in that suit, but must produce the written statement filed by the defendants in that suit. (*Walmsley and Panton, J.J.*) **ANNADA, PRASANNA LAHIRI v. BADULLA MANDAL.**  
47 I. C. 985

———*Relinquishment of rights—Subsequent assertion of title—Bar.*

Where the plff. had in a prior suit brought against him by the present deft., agreed to give up possession of the land in dispute to the deft. (the then plff.) by a deed of compromise.

*Held*, that the deed of compromise executed by the plff. in the earlier suit operated as a relinquishment of his right, title and interest in the land, and that he was estopped from alleging that he had a subsisting title to it. (*Shah Din, J.*) **CHHANGA v. PHUMMAN SHAH.**  
46 I. C. 7.

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●———*Representation—Effect of on innocent parties.* See (1917) DIG. COL. 543. **RAMASWAMI SASTRI v. KALI RAGHAVA IYENGAR.**  
(1917) M. W. N. 868=43 I. C. 124.

———*Title—Acquisition of, impossible without registered transfer.* See T. P. ACT, S. 54.  
44 I. C. 978.

———*Title by—Exchange of land—Unregistered instrument—Erection of costly buildings—Acting of the parties—Part performance—Acquiescence—Equitable estoppel—Invalid transfer—Ejectment—Right to compensation—T. P. Act, SS. 51, 54 and 118.* See (1917) DIG. COL. 544: **RAMANATHAN CHETTY v. RANGANATHAN CHETTY.**  
40 Mad. 1134=33 M. L. J. 253=6 L. W. 300=  
22 M. L. T. 173=(1917) M. W. N. 757=  
43 I. C. 138.

———*Title by—Unregistered deed of exchange—Actings of parties—Part performance—Cure of defect in title.* See T. P. ACT, SS. 54 AND 118.  
43 I. C. 645.

**EVICTION**-- Suit by landlord—Land in possession of tenant—General Law of Limitation—Applicability. See **MAD. LAND ENCROACHMENT ACT, S. 14.** 35 M. L. J. 410.

**EVIDENCE**—Admissibility—Objection as to, of document in evidence, when to be taken. See (1917) DIG. COL. 550. **AMBAR ALI v. LUTTE ALI.** 45 Cal. 159=21 C. W. N. 996=  
25 C. L. J. 619=41 I. C. 116.

———*Admissibility—Objection to, not to be allowed in appellate court when document was admitted by consent in the trial court.*

The Appellate Court has no jurisdiction to reject a copy of the document exhibited in the Court below with the consent of both the parties, at any rate, without giving the parties an opportunity of producing the original. (*Seshagiri Aiyar and Napier, JJ.*) **KAMULAMMAL v. ATHIKARI SANGARI SUBBA PILLAI.** 35 M. L. J. 11=48 I. C. 615.

———*Admissibility—Objection to, on the ground of want of formal proof—Not to be taken on appeal for the first time.* See **EVIDENCE ACT, S. 32.** 4 Pat. L. W. 213.

———*Admissibility of—Thak map and statement—Konungo Register—Fergannah Register—Omissions in not of much value.* See **EVIDENCE ACT, S. 35.**

22 C. W. N. 396.

———*Appreciation of—Oral and documentary evidence—Probability, considerations of, if and when may outweigh positive evidence, where some found untrustworthy.*

Where some of the verbal evidence was untrustworthy whilst the documents recorded

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a state of affairs which was often hard to reconcile with probabilities.

*Held*, that unless the facts evidenced by documentary and oral testimony were so much at variance with known conditions as to be incapable of reasonable explanation, it was to those facts and those facts alone, that the Court must trust to reach a safe conclusion upon the matter in controversy. (*Lord Buckmaster*.) *IRSHAD ALI v. MUSSAMMAT KARI-MAN*.  
22 G. W. N. 53C=

28 G. L. J. 173=20 Bom. L. R. 750=  
24 M. L. T. 136=(1918) M. W. N. 394=  
46 I. C. 217=21 O. C. 86 (P. C.)

—Appreciation of—Story of—Witness unbelievable in essential particulars—Witness if can be believed.

It is recognised principle that where a party comes into Court with a story, which cannot be believed in its essential details it is impossible to rely on a part of the story for the purpose of convicting the accused. (*Mullick and Thornhill, J.J.*) *PRATALI SINGH v. EMPEROR*.  
5 Pat L. W. 157=(1918) Pat. 258=  
47 I. C. 73=19 Cr. L. J. 877.

—Confession—Retracted value of—Corroboration if necessary.

There is no rule of law requiring a retracted confession to be supported by independent reliable evidence corroborating it in material particulars. The use to be made of such a confession is a matter of prudence rather than of law. (*Drake Broekman, J.C.*) *BHADDU v. EMPEROR*.  
46 I. C. 1005=  
19 Cr. L. J. 861.

—Duty of court to record evidence as adduced—No right to limit number of witnesses. See CR. P. CODE, S. 110.  
22 G. W. N. 408.

—Non production of material witness—No comment in trial Court—Appellate Court not to attach much weight to omission.

No inference should be drawn against a party for not producing a material witness where the question of the absence of such witness was not raised at the trial. (*Lord Phillimore*.) *BANWARI LAL v. MOHESH*.  
21 O. C. 228=  
45 I. C. 284 (P. C.)

—Pedigree filed by general agent of deceased person—Admissibility in subsequent litigation.

It is valid to presume after the death of a person that a pedigree filed by his general agent in a suit to which the deceased was a party was filed under his instructions, and such pedigree if other conditions be satisfied would be admissible in evidence in subsequent litigation. (*Kankaya Lal, J.C.*) *BALBEAD DAB SINGH v. SRIPAL SINGH*.  
21 O. C. 251=48 I. C. 308.

## EVIDENCE ACT, S. 11.

—Police Diaries—Use of, to discredit hostile Crown witness. See EVIDENCE ACT, SS. 155 and 157. (1918) Pat. 95.

—Secondary evidence of document—Admissibility—Proof of execution of document—Necessity. See (1917) DIG. COL. 552; IN THE MATTER OF AMRITA BAZAAR PATRIKA.  
45 Cal 169=21 C. W. N. 1161=  
26 C. L. J. 459=45 I. C. 338.

EVIDENCE ACT (I OF 1873) S. 3—Court Bengal Land Registration Act (VII of 1876 Deputy Collector holding enquiry under it a court.

A Deputy Collector holding an enquiry under the Bengal Land Registration Act for the purpose of registering the names of rival claimants is a Court within the meaning of S. 3 of the Evidence Act and the enquiry held by him is a judicial enquiry. (*Jwala Prasad and Goutis, J.J.*) *RAMA SINGH v. HARAKHD-HARI SINGH*.  
47 I. C. 710.

—S. 6—Offence of rape—Statement by complainant after the occurrence, if admissible.

In a case of rape the statement made by the complainant immediately after the occurrence to another woman is admissible, not as evidence of the truth of the charge alleged, but as corroborating the credibility of the complainant and of the evidence of the consistency of her conduct. (*Maung Kin, J.*) *NGA SAN PU v. EMPEROR*.  
43 I. C. 443=19  
Cr. L. J. 155.

—S. 6—Statements by testator before registering officer—Admissibility of.

Statements made by a testator at the registration of the will are admissible in evidence. (*Aldur Rahim and Seshayari Aiyar, J.J.*) *MUTHURISHNA NAICKEN v. RAMCHANDRA NAICKEN*.  
47 I. C. 611.

—S. 8—Statements accompanying conduct—Relevancy of.

Under S. 8 of the Evidence Act statements accompanying conduct and explaining such conduct are relevant. (*Mitra, A. J. C.*) *TUKARAM v. ARJUNA*.  
45 I. C. 904.

—S. 11—Entry in hospital register, if admissible.

An entry made in a register of In-door-patients in a hospital is admissible in evidence to prove that the person mentioned in the entry was in the hospital on a certain date. (*Chevis, J.*) *AMOLAK RAM v. EMPEROR*.  
65 P. L. R. 1918=13 P. W. R. (Cr.) 1918=  
43 I. C. 429=19 Cr. L. J. 141.

—Ss. 11 (b) and 13—Recitals in documents not inter partes—Admissibility of.

Documents containing recitals that a particular plot of land belongs to a particular well are admissible in evidence under S. 11 (b) or

## EVIDENCE ACT, S. 13.

S. 13 of the Evidence Act, though not between parties to the suit 5 C. L. J. 55 foll. 19 I. C. 615 not foll. (*Shadi Lal and Wilberforce, J.J.*) FARZAND ALI v. ZAFAR ALI. 46 I. C. 119

———S. 13—Tenant, status of—Decree in favour of stranger, if evidence *See* (1917) DIG. COL. 554; BYOMKESH CHAKRAVARTHY v. JAGADISVAR RAI.

22 C. W. N. 304=40 I. C. 442

———S. 13 (a)—Custom, omission to plead in pending litigation—Effect of.

The fact that a custom was not pleaded in litigations between members of the community where it might have been pleaded, is relevant evidence, and the question of its relevancy is not affected by the circumstance that some of those suits were still pending in Courts at the time of the trial. (*Sanderson, C. J., Woodroffe and Mookerjee J.J.*) MARIAM BIBEE v. SHAIKH MAHOMED IBRAHIM.

28 C. L. J. 306=48 I. C. 561.

———Ss. 14 and 15—Ill-will—Relevancy of facts going to prove—Similar occurrences—Charge under S. 209, I. P. C.

The appellant was convicted under S. 209 I. P. C. of having made false claims in three suits brought against certain persons. Two other persons besides the appellant were similarly prosecuted and convicted for bringing other false suits against the same defts.

*Held* that evidence relating to suits brought by the appellant other than those specified in the charges was properly admitted under Ss. 14 and 15 of the Evidence Act for the purpose of showing the ill-will or enmity of the Appellant towards defts. in those suits as a body, but the evidence relating to suits brought by other persons, when no case of a conspiracy between them and the appellant was alleged or established, was inadmissible. (*Richardson and Beachcroft, J.J.*) RAGHUNATH LAL v. EMPEROR.

22 C. W. N. 494=46 I. C. 696=19 Cr. L. J. 776.

———S. 17—Admissions in a document—Value of.

A statement in a document should *prima facie* be accepted as true as against the executant unless it can be shown by independent evidence to be false. (*Lord Buckmaster.*) IRSEAD ALI v. MT KARIMAN.

22 C. W. N. 530=28 C. L. J. 173=20 Bom. L. R. 790=24 M. L. T. 86=(1913) M. W. N. 394=46 I. C. 217=21 O. C. 86 (P. C.)

———Ss. 18 and 32 (3)—Admission—Persons jointly interested in the subject-matter of suit—Identity in legal interest—Co-party in litigation. *See* (1917) DIG. COL. 556; AMBAR ALI v. LUTFE ALI.

45 Cal. 189=24 C. W. N. 896=28 C. L. J. 619=41 I. C. 116.

## EVIDENCE ACT, S. 24.

———S. 18—Statement by alleged agent—Proof of agency essential.

In order that a statement made by a person alleged to be an agent of the accused can be admitted as binding the master, the relationship of master and servant must be strictly proved. (*Atkinson and Imam, J.J.*) EMPEROR v. RITBARAN SINGH. 4 Pat. L. W. 120=46 I. C. 709=19 Cr. L. J. 789.

———Ss. 21, 24, 25, 26 and 91—Oral Confession to a Magistrate admissible in evidence—Criminal Procedure Code, S. 164.

An oral confession by an accused person, not being open to exception under Ss. 24, 25, or 26 of the Evidence Act is, as an admission by an accused person, a relevant fact and may be proved at his trial under S. 21 and therefore such a confession made to a Magistrate is relevant and may be proved by the evidence of the Magistrate. 21 P. L. (Cr.) 1881 and 52 P. R. (Cr.) 1837, ref. 9 Mad. 224 dist. (*Scott Smith and Shadi Lal, J.J.*) FERDZ v. EMPEROR.

11 P. R. (Cr.) 1918=45 I. C. 843=19 Cr. L. J. 651.

———S. 24—Confession by accused—Retracted—Corroboration, necessity for.

A confessing prisoner should not be condemned upon a retracted confession unless it is corroborated in material particulars.

Where it is a question of using a confession against a co-accused and the Court is not prepared to accept the confession *per se* as sufficient. The corroboration ought to be of the kind that not only confirms the general story of the crime but also unmistakably connects the co-accused with the crime. (*Scott Smith and Shadi Lal, J.J.*) EMPEROR v. MUSSAMMAT JAWAI. 70 P. L. R. 1:48=19 P. W. R. (Cr.) 1918=44 I. C. 179=19 Cr. L. J. 275.

———Ss. 24, 25, and 26—'Confession' meaning of—'Person in authority'—Statements leading to direct inference of guilt made to military officer assisting in police investigation—Statements made at police search and before arrest if made 'in custody.'

The accused a tailor was suspected of having received stolen goods from the Army Clothing Factory and his shop was searched by the police assisted by a Captain holding a subordinate rank in the army. The captain told the accused to make a clean breast of the thing and the accused replied "If I do, I shall implicate clerks Mahomedans etc" and also asked the Captain if he had never had thefts reported to him from the goods station. *Held*, that the statements of the accused were confessions within S. 24 of the Evidence Act. *Per Aylmer, J.* (*Phillips, J.* dissenting). The statements in question were made to a person in authority and the potential prosecutor and they were inadmissible in evidence though

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the accused was not formally arrested. To constitute a 'confession' under the Evidence Act, it is not necessary that the person confessing should make a full and explicit admission of his guilt so clean as to leave no other hypothesis tenable. The 'word accused person' in Ss 24 to 26 includes any person who subsequently becomes accused, provided that at the time of making the statement criminal proceedings were in prospect. The expression "person in authority" has a wider meaning than the actual prosecutor and the test is, has the person authority to interfere in the matter and any concern or interest in it is sufficient to give him authority. *R. V. Warrington*. 2 Den. C. C. 447; *R. V. Taylor* 8 C. and P. 773; *R. V. Croydon* 2 Cox. C. C. 67; 8 B. H. C. R. 258; 8 Bom. L. R. 597. 26 I. L. C. 161. Ref. (*Ayling and Phillips, J. J.*) SMITH v. EMPEROR

43 I. C. 605= 19 Cr. L. J. 189.

—S. 24—Confession to Excise Superintendent—No threat or inducement—Admissibility.

In the absence of any threat, inducement or promise, the confession to the Superintendent of the Excise is not shut out under S. 24 of the Evidence Act in a prosecution for illicit possession of opium. (*Chitty and Smither, J.J.*) RUKMALI v. EMPEROR. 22 C. W. N. 451= 45 I. C. 284=19 Cr. L. J. 524.

—S. 24—Incriminating statement to headman—Advice to speak out the truth—Statement inadmissible. See (1917) DIG. COL. 557. ZATA v. EMPEROR.

10 Bur. L. T. 270=37 I. C. 814.

—Ss. 24, 25, 26 and 91—Oral confession to a magistrate—Admissibility of, in evidence—Proof of, by evidence of Magistrate. See EVIDENCE ACT, SS. 21, 24, 15 AND 26.

11 P. R. (Gr.) 1918.

—Ss. 24 and 27—Scope of.

S. 27 of the Evidence Act, qualifies not only Ss. 25 and 26 but also S. 24, all three of which lay down general rules excluding confessions and the same broad grounds underlies all the three. (*Teunon and Shamsul Huda, J.J.*) AMIRUDDIN v. EMPEROR. 45 Cal 557=

22 C. W. N. 213= 27 C. L. J. 148=

44 I. C. 321=19 Cr. L. J. 305

—S. 25—Confession to Excise Inspector—Admissibility of, in evidence.

A Statement by the accused to the Excise Inspector that the opium found in his (accused's) almirah was his, although in the nature of a confession in this case, was admissible in evidence, the Excise Inspector not being a Police Officer. (*Shah Din and Chevs, J.J.*) EMPEROR v. WAZIR SINGH.

3 P. R. (Cr.) 1918=44 I. C. 588=

19 Cr. L. J. 384.

## EVIDENCE ACT, S. 25.

—S. 25—"Confession"—Meaning of—Statement suggesting inference of guilt if a confession See (1917) DIG. COL. 558; PAN GANG v. EMPEROR.

42 I. C. 1002=

19 Cr. L. J. 42.

—Ss. 25 and 30—Confessional statement to excise officers—Self-exculpatory statements, use of.

The appellant with two other persons was prosecuted under the Opium Act. The co-accused made some statements to Excise officers which the Magistrate used against the Appellant.

Held, that the statements could not be rejected under S. 25 of the Evidence Act, for it could not be said that the Excise officers were Police officers.

In order to determine whether the statements were confessions the whole of the statements must be taken into consideration and the statements in question being self-exculpatory were inadmissible against the appellant. (*Sanderson, C. J. and Beachcroft, J.*) AN POONG v. EMPEROR. 22 C. W. N. 834= 28 C. L. J. 165=43 I. C. 504.

—Ss. 25 and 26—Incriminating statements to Police Officers—Statements of one accused against another. See (1917) DIG. COL. 558; ZATA v. EMPEROR. 10 Bur. L. T. 270= 37 I. C. 814.

—Ss. 25 and 27—Police officer, who is—Native states, police officer of—Confession—Discovery of fact in pursuance includes discovery of offender.

The expression "Police officer" in S. 25 of the Evidence Act is used in its usual and more comprehensive meaning, and includes police officers of the Native States as those of British India. A confession made to a police officer in H. H. Nizam's Dominions is not therefore, admissible in evidence. 23 Bom 285 foll.

The discovery of a person who is afterwards proved to be a dacoit is not the discovery of a fact within the meaning of S. 27 of the Evidence Act. The test of admissibility, under S. 27 of the Evidence Act, of an information received from an accused person in the custody of a police officer is whether the fact so discovered was a direct, natural and necessary consequence of the information so received. (*Mitra, O. A. J. C.*) SALAN v. EMPEROR. 14 N. L. R. 192=43 I. C. 111=19 Cr. L. J. 79.

—S. 25—Police officer—meaning—Village officer in Punjab—Confession to—Admissibility in evidence. See (1917) DIG. COL. 558; KHUDA BAKSH v. EMPEROR.

42 P. R. (Gr) 1917=43 I. C. 84=

19 Cr. L. J. 52.

—Ss. 25 and 27—Statement of accused to police—Discovery by reason of the statement—Admissibility of the document in evidence.

## EVIDENCE ACT, S. 26.

The accused charged with having caused the death of his wife by strangulation, presented himself at a Kotwali police station and made a report, a record of which was entered in the police register. In consequence of the report a police officer proceeded to the house of the accused and discovered in a room a corpse of a woman.

*Held*, that the provisions of Ss. 25 and 27 of the Evidence Act apply to the circumstances of the case. Under S. 27 of the Evidence Act the Kotwal was entitled to depose that the accused came to him at the time and place stated and said "I have killed my wife; her corpse is lying in my house," and that in consequence of this statement the woman's corpse was discovered as indicated, but thereafter the defence were entitled to require the production of the whole record and to insist upon the proof of it. (*Piggott and Walsh JJ.*) SURENDRA NATH MUKERJEE v. EMPEROR. 16 A. L. J. 478=47 I. C. 659=19 Cr. L. J. 935.

—S. 26—Confession—Accused in the custody of the police—Extrajudicial confession. See (1917) DIG. COL. 558; EMPEROR v. MALLAN GOWDA. 42 Bom. 1=19 Bom. L. R. 683=42 I. C. 597.

—S. 27—Accused—Admissions—Admissibility in evidence.

Under S. 27 it is legitimate to record evidence that an accused person said "I will point out certain property" if such statement leads to a discovery; but it is not legitimate to record as evidence that an accused said "I will point out certain property which I obtained as my share of the booty in the dacoity." (*Leslie Jones, J.*) GURDIT SINGH v. EMPEROR. 52 P. L. R. 1918=9 P. W. R. (Cr) 1918=44 I. C. 967=19 C. L. J. 439

—S. 27—Confession not leading to discovery of anything if admissible. See (1917) DIG. COL. 559; PAN GANG v. EMPEROR. 42 I. C. 1002=19 Cr. L. J. 42.

—S. 27—Confession—Fact discovered in pursuance of—Discovery of offender—Confession inadmissible. See EVIDENCE ACT, SS. 25 AND 27. 43 I. C. 111

—Ss. 27, 26, 25 and 24—Scope of—Discovery in pursuance of confession made before police officer—Statement, how far admissible.

When a confession as a whole is excluded whether by reason of S. 26 or 25 or 24 so much of the information given by the person making the confession when the accused was in custody as distinctly relates to a relevant fact thereby is covered becomes admissible. When the accused himself produced the articles said to be discovered so much of the information as

## EVIDENCE ACT, S. 30.

set the police in motion and led to the discovery is admissible.

Per *Shamsul Huda, J.*—Under S. 27 only so much of the information whether amounting to a confession or not as relates distinctly to the fact thereby discovered may be proved. Even if a single statement contains more information than what is contemplated in S. 27 the statement is not to go in as a whole nor is it to go in as a statement at all, but what is admissible is the particular information given by the statement which led to the discovery (*Teunon and Huda, JJ.*) AMIEUDDIN AHMED v. EMPEROR

45 Cal. 557=22 C. W. N. 213=27 C. L. J. 148=44 I. C. 321=19 Cr. L. J. 305.

—S. 27—Statement of accused to police—Discovery by reason of the statement—Admissibility of the document. See EVIDENCE ACT, SS. 25 AND 27. 16 A. L. J. 478.

—S. 28—Confession—Admission of part of confession by Court, if proper.

Although a confession must be taken as a whole and considered along with the admitted facts of the case, the accused being judged by his whole conduct, the Court is at liberty to disregard any statement contained in the confession which it disbelieves. (*Drake Brokerman, J. C.*) RAMODA v. EMPEROR. 46 I. C. 708=19 Cr. L. J. 785.

—Ss. 30 and 114 (b)—Confession of co-accused, whether constitutes sufficient basis for conviction—Retracted confession, value of—Object of examination of accused. See (1917) DIG. COL. 559; NGAHAN NYM v. EMPEROR. 11 Bur. L. T. 140=41 I. C. 180.

—S. 30—Confession of—Conviction based solely on—Legality confession subsequently retracted—Confession not *pari delicto*—Effect.

It is not safe to support the conviction of persons based solely on a retracted confession of a co-accused which does not implicate the confessor to the same extent as the co-prisoners. (*Roe and Imam, JJ.*) UPENDRA NATH DAS v. EMPEROR (1918) Pat. 175. 46 I. C. 842=19 Cr. L. J. 826.

—S. 30—Confession—Proceedings under S. 110 of the Cr. P. Code—Confession of one of the persons, if admissible against the other.

In a proceeding against several persons under S. 110 of the Cr. P. Code the confession of one is inadmissible against the other co-accused, the provisions of S. 30 of the Evidence Act not being applicable to a case like the present. (*Teunon and Newbould, JJ.*) AMIRULLA PRAMANIK v. EMPEROR. 22 C. W. N. 403.

## EVIDENCE ACT, S. 32.

—S. 32—Document, admissible under—Independent and not merely corroborative evidence—Appar—Objection to admissibility of evidence for want of formal proof if competent.

Where the document can be brought under S. 32 of the Evidence Act by proof of the death of the person who prepared it or other facts contemplated by that section, it can be used not only as corroborative but as independent evidence.

Where a document is admitted without proof but without objection in the trial court, no objection to its admissibility on the ground of want of formal proof can be taken in appeal. (*Dawson Miller, C. J. and Mullick, J.*)

CHARITTE RAI v. KAILASH BEHARI.  
4 Pat. L. W. 213=(1918) Pat. 145=  
3 Pat. L. J. 306=44 I. C. 422.

—S. 32—Previous statement of witness—Admissibility of witness examined and cross-examined dying before termination of suit

S. 32 of the Evidence Act has no application to the case of a witness who has been fully examined and cross-examined but who happens to die before the termination of the suit. In such a case it is not open to either party to apply under S. 32 for the admission of the previous statement made by the witness. (*Chapman and Atkinson, J.J.*) SARDEO NARAIN DEO v. KUSUM KUMARI. 48 I. C. 929.

—Ss. 32, cl. (2) and 34—Zemindari papers—Admissibility of—Independent evidence.

Although zemindari papers cannot be admitted under S. 34 of the Evidence Act as corroborative evidence without independent evidence of the fact of collection at certain rates, they can be used as independent evidence if they are relevant under S. 32 cl. (2) of that Act. (*Dawson Miller, C. J. and Mullick, J.*)

CHARITTE RAI v. KAILASH BEHARI.  
4 Pat. L. W. 213=(1918) Pat. 145=  
3 Pat. L. J. 306=44 I. C. 422.

—S. 33—Evidence of witness in enquiry by sub-registrar under S. 41 (2) of registration Act—Admissibility in evidence in subsequent suit between the same parties when witnesses are dead English and Indian Law.

The evidence of witnesses examined in an enquiry held by a Sub-Registrar under S. 41 (2) of the Registration Act as to the genuineness of a will is inadmissible in evidence in a subsequent suit between the same parties raising an issue as to the genuineness of the will, if it is to be proved that the witnesses are dead at the time of the suit and that the adverse party at the enquiry before the Sub-Registrar had an opportunity of cross examining the witnesses.

English and Indian Law on the subject compared. (*Wallis, C. J. and Seshagiri Aiyar J.*) LANKA LAKSHMANNA v. LANKA VARDHAN AMMA. 35 M. L. J. 657=(1918) M. W. N. 931.

## EVIDENCE ACT, S. 35.

—Ss. 33 and 165—Suit to enforce registration of a will—Judgment based on evidence adduced before the registering officer and treated as evidence in the suit by consent of parties—Judgment unsustainable.

In a suit under S. 77 of the Registration Act to enforce registration of a will which the Registrar had declined to register, the Court below based its judgment solely on the evidence adduced before the registering authorities, but which was treated as evidence in the suit by the consent of both the parties. There was nothing to show that the conditions prescribed by S. 33 of the Evidence Act existed so as to justify the reception of the evidence. Nor was it shown that the evidence was relevant under any other section of the Evidence Act.

Held, that having regard to the stringent provision of S. 165 of the Evidence Act, the judgment of the Court below was unsustainable as it was based on irrelevant evidence 33 Mad. 160 diss. (*Ayling and Seshagiri Iyer, J.J.*) PONNUSAMI PILLAI v. SINGARAM PILLAI.

41 Mad. 731=34 M. L. J. 526  
=(1918) M. W. N. 788=46 I. C. 849.

—S. 34—Zemindari papers—Evidence as to rates of rent—Inadmissible in evidence. See EVIDENCE ACT, SS. 32 (2) and 34.

3 Pat. L. J. 308.

—S. 35—Batawara Papers—Khesra—Evidentiary value of—Procedure of Amin in preparing record.

The Batawara khesra is generally prepared by the Amin on the admission of both the landlord and tenants regarding the latter's holdings and in cases of difference on the basis of summary decisions by the Batawara Deputy Collector, and as such is very valuable evidence in subsequent disputes.

But a khesra prepared not on the basis of admissions of all parties but on information supplied by one of them and without inquiry as to whether the rent resulting therefrom is that which is at the time payable is absolutely valueless in evidence, if not inadmissible. (*Shirfuddin and Roe, J.J.*) RAI BABU GOLAB CHAND SAHEB v. SYED SALKA HUSSAIN.

5 Pat. L. W. 6=36 I. C. 513.

—S. 35—Draft record of right, entry in, if admissible—Entry in draft record of rights. See (1917) DIG. COL. 562 AMBAR ALI v. LUTFE ALI.

45 Cal. 159=  
21 C. W. N. 996=25 C. L. J. 619=  
41 I. C. 116.

—S. 35—Evidence—Certified copies of partition papers in collectorate under Regulation XIX of 1834, if admissible.

Certified copies of papers in the collectorate which *prima facie* appear to be the record of a partition made in a proceeding under Reg. XIX of 1834 between the predecessors of the

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parties to a suit, are good and admissible evidence, quite apart from anything contained in S. 35 of the Evidence Act. (*Richardson and Watson v. J. J. Khetra Nath Mondal v. Mahomed Aida Fakir*)

22 C. W. N. 48=25 I. C. 521.

— S. 35—Madras Act III of 1899 (Registration of Births and deaths) Ss. 4, 5 and 17—Death Register kept by village Karam or Reddi—Admissibility thereof and of public extract—Board's proceedings dated 5-2-1874—Effect. See (1917) DIG. COL. 563, RAMA LINGA REDDI v. KOTAYVA. 41 Ind. 23=23 M. L. J. 50=22 M. L. T. 17=9 L. W. 245=(1917) M. W. R. 338=41 I. C. 237.

— S. 35—Official document—Admissibility in evidence—Portion of document in excess of official duty—Effect.

Where a register is clearly an official document it is admissible in evidence under S. 35 of the Evidence Act. It may be possible that in the case of such a document if it could be shown that any particular part was in excess of the official duty by reason of which it came into existence that part might not be admissible. (*Lord Parker of Waddington, LIAIYA DIRGAL DEO v. LUNI MAHTO*)

22 I. W. N. 433=23 M. L. T. 332=

20 Bom. L. R. 712=23 O. L. J. 1=

(1912) M. W. R. 368=17 I. C. 1 (P. C.)

— S. 35—Pergana register—Konungo register—Thak map and statement—Admissibility of, in evidence.

The Pergana and Konungo Registers are not kept punctually and are not admissible in evidence to prove an omission of an entry therein as to lakherajas.

The Konungo account and the General and Mauzawar Registers being intended to facilitate the collection of the Government dues, there was no authority to enter therein lakherajas less than 100 bighas in area or lakherajas not the subject-matter of resumption proceedings.

The Thak officers not being empowered to measure and record lakherajas of less than 50 bighas in area, the omission of lakherajas in the Thak statement was not of any probative value. (*Mookerjee and Watson, J.J.*) BIPRA DAS PAL CHOUHURY v. MONORAMA DEBI.

45 Cal. 574=22 C. W. N. 330=

47 I. C. 42.

— S. 35—Register of Minhaidari villages, admissibility of, in evidence.

On the question of the admissibility in evidence of the contents of a register of Minhaidari villages.

Held, that the register being clearly an official document, in the absence of anything to show that any particular part of it was in

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excess of the official duty by reason of which it came into existence and that, in consequence thereof, it might not be admissible, was admissible in evidence under S. 35 of the Evidence Act. (*Lord Parker, LAL BHAI TAIRGAL DEO SAPADUR v. BENI MAHTO*)

22 C. W. N. 436=(1913) M. W. R. 305=

28 M. L. T. 322=20 Bom. L. R. 712=

29 O. L. J. 1=47 I. C. 1 (P. C.)

— S. 35—Register of births and deaths kept at police stations if a public document.

A Register of Births and Deaths kept at the Police Station is a public document within the meaning of S. 35 of the Evidence Act and a certified copy of an extract therefrom is admissible in evidence. (*Tennan and Richardson, J.J.*) SURESH TANGUEDIN SARKAR v. SURESH TAZU.

22 C. W. N. 522=

46 I. C. 237.

— Ss. 35 and 35—Register of previous conviction—Entry in, admissibility of—Proof. See (1917) DIG. COL. 563, M. ONG TEA CAN v. PRABHON.

22 I. C. 522=

19 Cr. L. J. 11.

— S. 35—Revenue papers—Entries in—Value of.

Where a person is entered in the revenue papers as an under-proprietor, but it appears from other evidence that he does not hold such a status the entry in the revenue papers is of no avail to him for the purpose of establishing his title as an under-proprietor. (*Lindsay, J. C.*) RAM RUP SINGH v. DEBI PERSHAD SINGH.

5 O. L. J. 513=

47 I. C. 755.

— S. 35—Survey proceedings—Parcha dip granted to individuals—Inadmissibility of—Not a public document. See CR. P. CODE, S. 298.

47 I. C. 32.

— S. 43—Order of Board of Revenue—Irrelevant in Civil Court.

An order of the Board of Revenue is not evidence in a case before the High Court, but the latter should not make a decree in dissonance with a decision of the Board without fully considering and giving all weight to the reasons advanced in the making of that decision. (*Roe and Imam, J.J.*) MANNO CHAUDHURY v. MUNSHI CHAUDHURY.

3 Pat. L. J. 103=5 Pat. L. W. 97=

43 I. C. 333.

— S. 55—Custom—Judicial Notice of—Repeated instances where custom proved. See CUSTOM, PROOF OF. 48 I. A. 118 (P. C.)

— S. 57—Matter of public history—Historical works, admissibility of.

The question of title between the trustee of a mosque, though an old and historical institution, and a private cannot be deemed a "matter of public history" within the meaning

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of S. 57 of the Evidence Act, and historical works cannot be used to establish the ownership property. *Shankar Lal and Wadhwanji, JJ.* *PABZAND ALI v. ZAFAR ALI*

33 I. C. 118.

—Ss. 57 and 60—Reliance on text books without expert evidence—Property of—Conviction based on.

The accused was prosecuted and convicted under S. 495 A (1) of the Calcutta Municipal Act for selling adulterated ghee. The Assistant analyst to the Corporation applied certain processes of analysis to the sample of ghee in question and obtained certain results from which he made the deduction that the ghee had been adulterated with certain percentage of foreign fat. No other expert witness was examined on either side and the defence contended that according to the standard works on the subject no such deduction could be made. Some of these works were put to the analyst in cross-examination by the defence. The Magistrate allowed the defence to rely on this evidence, held with it as being in evidence as in the judgment.

*Held. Per Woodroffe, J.* The Magistrate was not wrong in making use of the text books but the use of scientific treatises may lead to error if either those who use them are themselves not experts in the matter dealt with or not assisted by experts to whom passages relied upon may be put.

In the circumstances of the present case it would not be safe to rely on the books alone without the aid of an expert and there should be a re-trial.

*Per Chitty, J.*—The procedure adopted by the Magistrate was incorrect if it were intended thereby to make these books and all their contents evidence in the case. The use of such books by the Court was regulated by Ss. 57 and 60 of the Evidence Act. Books of reference may be used by the Court on matters (*inter alia*) of science to aid in coming to a right understanding and conclusion upon the evidence given, while treatises may be referred to in order to ascertain the opinions of experts who cannot be called and the grounds on which such opinions are held. Courts should be careful to avoid introducing into the case extraneous facts culled from text books and also to refrain from basing a decision on opinions the precise applicability of which to the subject matter of the prosecution it was impossible to gauge. The books may be usefully referred to in order to comprehend and appraise correctly the evidence of the expert who has made the analysis and has given his opinion on oath as to the result of such analysis, but it would be dangerous to base the decision of the Court solely on the evidence of books whether for a conviction or an acquittal.

## EVIDENCE ACT S. 58.

*Per Sankar, J.*—The Magistrate was right under S. 58 of the Evidence Act to admit the evidence of the text books. (*Chitty and S. J. J.*) *GRINADE VENKATA RATNAM v. THE CORPORATION OF CALCUTTA.*

22 G. W. N. 745=26 C. L. J. 32=

46 I. C. 583=18 Cr. L. J. 753.

—S. 58—Admission of a mortgage—Admission of signature to a bond—Proof of attestation of bond if essential—Inferences of fact, not based on evidence—Improperly of.

In a mortgage suit, which was brought on almost the last day allowed by the law of limitation, the debtors, who were the sons of the mortgagor, pleaded that they knew nothing of the mortgage transaction. One of the debtors, who had attained majority, when examined as a witness and shown the mortgage deed, admitted that the signature was his father's. On the day fixed for hearing the suit, the plaintiff was not present, as he was ill and the attesting witnesses were absent. The lower Court dismissed the suit on the ground that the plaintiff had failed to prove the mortgage deed. The Court inferred from the fact that the plaintiff had delayed in bringing his suit until almost the last day allowed him by the law of limitation, that he must have been receiving interest all that time at the rate stipulated for in the deed and on that calculation it reached the conclusion that the debt had been fully satisfied.

*Held. that*, so far as the adult debtor was concerned his admission would, under S. 58 of the Evidence Act, relieve the plaintiff from any further responsibility of proving the document and that there was no trial of the suit at all since the inference in question was not drawn from any evidence; and the drawing of such inferences from matters, not in evidence before the Court was an error of law. (*Beaman and Heaton, JJ.*) *LAKECHAND v. LALCHAND.*

42 Bom. 352=20 Bom. L. R. 354=

45 I. C. 555.

—S. 58—Mortgage bond—Execution—Attestation before execution—Admission in pleadings of execution of bond—Power of court to require proof of due execution. See T. P. ACT, S. 50. 1913 M. W. N. 853.

—Ss. 58 and 92 Proviso 4—Registered mortgage—Oral agreement to take less than what is due—Proof of—Admission in pleadings, effect of.

A subsequent agreement by the mortgagee to take less than is due under a registered mortgage is an agreement modifying the terms of a written contract and if it has to be proved, oral evidence is inadmissible under proviso, (4) to S. 92 of the Evidence Act. Where however such an oral agreement is admitted in the pleadings of the parties, proof of the agreement is dispensed with by S. 58 of the Evidence Act and the court is bound to recognise and give effect to such agreement. (*Wallis*

## EVIDENCE ACT, S. 60.

*C. J., Oldfield and Seshagiri Aiyar, JJ.) MAL-  
LAPPA v. NAGA CHETTY.*

42 Mad. 41=35 M. L. J. 555=  
8 L. W. 522=24 M. L. T. 400=  
(1918) M. W. N. 719=48 I. C. 158.

—S. 60—Reliance on text books with-  
out expert evidence—Scope of their utility in  
a criminal case. See EVIDENCE ACT, SS. 57  
AND 60. 22 C. W. N. 745

—S. 65—Secondary evidence—Admis-  
sion of, by Appellate Court, when proper.

It is primarily one for the trial Court to  
decide whether a case has been made out for  
the reception of secondary evidence. The  
Appellate Court however is justified in holding  
that secondary evidence of a lost deed is ad-  
missible when the Lower Court has rejected it.  
(*Chamier, C. J. and Sharfuddin, J.*) RAMES-  
WAR LAL BHAGAT v. RAJ KUMAR GIRWAR-  
PRASAD SINGH. 5 Pat. L. W. 316=  
(1918) Pat. 156=45 I. C. 888.

—S. 65 (e)—Robokari—Certified copy  
of, admissible.

A certified copy of a Robokari is admissible  
in evidence. (*Teunon and Huda, JJ.*) RADHA-  
NATH KAIBARTA v. EMPEROR.

22 C. W. N. 742=46 I. C. 689=  
19 Cr. L. J. 769.

—S. 67—Proof of execution of document  
—Registration endorsement, value of—Dis-  
cretion of Court.

Although under S. 67 of the Evidence Act  
no particular kind of proof is required for  
purpose of establishing the fact of execution,  
it must nevertheless be shown to the satis-  
faction of the Court that the mark or signature  
denoting execution was actually fixed to the  
document by the person who professed to  
execute it.

A Court is not bound to treat the registra-  
tion endorsement as conclusive proof of the  
fact of execution. If there are suspicious  
circumstances attending the execution of the  
document such endorsement cannot be re-  
sorted to for the purpose of holding that the  
execution has been proved. (*Lindsay, J. C.*)  
JAGANNATH v. DHIRAJA. 5 O. L. J. 191=  
46 I. C. 279.

—Ss. 68 and 70—Attested document—  
Proof of—Admission of execution by executant  
—Proof as against third parties necessary.

Admission of execution of an attested docu-  
ment by the executant or by a person repre-  
senting his interest is sufficient proof of its  
execution against the person making such  
admission. As against other parties the  
document must be proved in accordance with  
S. 68 of the Evidence Act. (*N. R. Chatterjee  
and Richardson, JJ.*) NIBABAN CHANDRA  
SEN v. RAM CHANDRA SEN.

22 C. W. N. 444=41 I. C. 884.

## EVIDENCE ACT, S. 73.

—S. 68—Mortgage—Attestation—  
Scribe if and when an attester—Scribe  
deposing to execution of deed—Proof of attes-  
tation. See T. P. ACT, S. 59.

7 L. W. 241.

—S. 68—Mortgagee—Attestor merely  
signing on acknowledgment of execution by  
executant—Mortgage invalid and not merely  
inadmissible. See T. P. ACT, S. 59.

43 I. C. 918.

—S. 68—Mortgage deed—Proof—Attestator  
called but not examined—Document admis-  
sible independently of proof of a mortgage  
transaction—Collateral purpose—Admissibility.

A duly registered mortgage deed was sued  
on but owing to the failure of the plaintiff to  
examine the attestors, the document was  
rejected as inadmissible in evidence. Held,  
that it was admissible in evidence for the  
purpose of interpreting the rights and obli-  
gations of parties even though as an independ-  
ent legal document was itself inadmissible.

By the terms of S. 68 of the Evidence Act  
when its provisions are not complied with a  
document cannot be used as evidence at all  
as a document either requiring attestation or  
in fact attested; but this does not prevent it  
from being used in evidence as something else  
or for any other purpose. S. 68 is subject to  
the limitation, viz., that if the document were  
tendered in some other proceeding for the  
purpose of proving the handwriting of the  
scribe, it could not be objected to upon the  
ground that no attesting witness being called  
to prove it, it could not be used in evidence at  
all. (*Piggott and Walsh, JJ.*) MOTI CHAND  
v. LALTA PRASAD. 40 All. 256=  
16 A. L. J. 121=44 I. C. 596.

—S. 70—Document required by law to  
be attested—Proof of as against third parties  
essential—Admission of execution by execut-  
ant not enough. See EVIDENCE ACT, SS. 68  
AND 70. 22 C. W. N. 444.

—S. 70—Execution—Admission of—  
Attestation if to be proved—Admission of exe-  
cution by one of two mortgagors—Effect of as  
against the other.

Where there are two executants to a mort-  
gage-deed attestation may be according to law  
in respect of one of them but not in respect of  
the other.

Where execution is admitted and due  
attestation not denied, the question of attes-  
tation does not arise or if it does arise, the  
maxim *omnia praesumuntur rite esse acta*  
comes in, unless there is evidence that  
attestation is not according to law. 42 I. C.  
299 foll. (*Batten, A. J. C.*) DHANNA LAL v.  
SHAMBU. 47 I. C. 9.

—S. 78—Purport meaning of—Com-  
parison of handwriting

## EVIDENCE ACT, S. 74.

The word 'purports' in S. 73 of the Evidence Act does not limit the scope of the section to such documents only as are signed or contain some intrinsic statements of the identity of the writer. Any document alleged by a party to be in the handwriting of a particular person may for purposes of proof be compared with other writing or signature admitted or proved to the satisfaction of the Court to have been made or written by that person. 37 C. 467 diss 14 Bom L. R. 310 appr. (*Ayling and Krishnan, JJ.*) *VEERARAGHAVA AYYANGAR v. SOURI AYYANGAR* 35 M. L. J. 608=(1913) M. W. N. 715=24 M. L. T. 477=8 L. W. 625=48 I. C. 68.

—S. 74—Robokari determining boundaries—Public document. See EVIDENCE ACT, S. 65 (e). 22 C. W. N. 742.

—Ss. 80 and 91—Deposition of witness not read over to deponent—Evidence, admissibility of—C. P. Code, O. 18 Rr. 5 and 6.

A provision requiring a deposition to be read over to a witness is in its nature directory and it were not complied with in a particular case, the deposition while it may lose the benefit of S. 80 of the Evidence Act may be proved in some other way.

Per *Beachcroft, J.*—The object of the provision in O. 18, R. 5 of the C. P. Code requiring a deposition to be read over to a witness, is to ensure accuracy. (*Richardson and Beachcroft, JJ.*) *ELAHI BAKSHA KAZI v. EMPEROB.* 45 Cal. 825=270 L. J. 377=22 C. W. N. 646=45 I. C. 258=19 Gr. L. J. 498.

—S. 83—Survey maps—Evidentiary value of.

Survey maps are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence as to the state of things at the time they were prepared. They are not conclusive and may be shown to be wrong, but in the absence of evidence to the contrary they may be judicially received in evidence as correct when made. 30 Cal. 291, 5 Bom. L. R. 1 foll. (*Rigg, J. C.*) *MAUNG THIN v. MA ZI ZAN.* 44 I. C. 247.

—S. 87—Custom—Evidence of—Reference to books recording custom.

Reference may legitimately be made to the work of Mr. Crokes on Castes and Tribes of the North-Western Provinces and Oudh as an authoritative statement of customs prevalent among the Eraki sect of Mahomedans (*Sanderson, C. J. Woodroffe and Mookerjee, JJ.*) *MARIAM BIBEE v. SHAIKH MAHOMED IBRAHIM.* 28 C. L. J. 306=43 I. C. 561.

—S. 90—Ancient document—Presumption as to genuineness of, raised by first Court—Appellate Court not to easily upset conclusions of first Court.

## EVIDENCE ACT, S. 91.

The question of making a presumption with regard to the genuineness of a document under S. 90 of the Evidence Act is one in which the Court has to exercise its discretion and when that discretion has been exercised with due care and the presumption allowed by law has been made an appellate court should be slow to interfere with such discretion. (*Chavis, J.*) *MAHOMED USMAN v. RAHIM BAKSH.*

57 P. W. R. 1918=44 I. C. 559.

—S. 90—Ancient document—Proof of—Document not purporting to show who prepared it—Document, inadmissible without proof.

S. 90 of the Evidence Act says that a document which is more than 30 years old and purports to have been prepared or signed by a particular person was in fact prepared or signed by such person. But where a party producing such a document cannot show and the document itself does not purport to show who prepared or signed it the mere fact of the document being more than 30 years old does not make it admissible without proof under S. 90 of the Evidence Act. (*Dawson Miller, C. J. and Mullick, J.*) *CHARITTAI RAI v. KAILASH BEHARI* 3 Pat. L. J. 306=4 Pat. L. W. 213=(1918) Pat. 143=44 I. C. 422.

—S. 90—Original lost—Presumption as regards certified copy.

Where the production of the original document is a physical impossibility, the Court is entitled to raise a presumption under S. 90 of the Evidence Act regarding the same on the production of a certified copy. (*Lindsay, J. C.*) *RAJ BAHADUR LAL v. BINDESHRI.* 50 L. J. 219=46 I. C. 344.

—S. 91—Contract—Construction—"Up to" and "until," meaning of—Oral evidence to prove what was meant if admissible.

The context and subject matter have to be taken into account in determining whether the word "up to" is to be taken as exclusive or inclusive of the day to which it is applied.

Deft. offered to sell the plff. his Motor Car in these words:—"Nevertheless I am quite willing to hand over the Motor Car to you against a cheque for Rs. 3,120, Rs. 3,000 being the cost of the Car, and Rs. 120 interest. As I intend advertising the Car unless you wish to have it, please understand that my offer only holds good up to Wednesday next, as the time I have is limited." The plff. tendered Rs. 3,120 sometime on Wednesday next and asked for delivery of the car. The deft. refused the tender contending that the offer expired at midnight on Tuesday.

Held, that the offer remained open until midnight on Wednesday.

Oral evidence to prove what the deft. meant by the words, was inadmissible under S. 91.

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of the Evidence Act. *Green v. J. M. M. R. O. POLITAN ENGINEERING WORKS v. WALTER ELORNE DESBUNNEN*. 22 C. W. N. 443-45 L. J. 304.

—S. 91—Deposition of witness not read over to him—Effect of—Proof of deposition in other ways competent. See EVIDENCE ACT, SS 50 AND 91. 27 C. L. J. 27.

—S. 91—Police diary—Entries in—Oral evidence admissible to prove. See (1917) DIG. COL. 569, NOOR MAHOMED v. EMPEROR. 1. EMP. L. T. 152-421 C. L. J. 181.

—S. 91—Unregistered mortgage—Loss of document—Admissibility of secondary evidence to prove oral agreement not affecting land. See REGISTRATION ACT, S. 17. 44 L. J. 54.

—SS. 93 and 99—Construction—Absolute conveyance alleged to be transfers of mortgages—Whether evidence in proof of such allegation may be given—Dealings with a third person's property—Evidence of notice of third person's title. See (1917) DIG. COL. 570; MAUNG KYIN v. MA SPWE LIA. 45 Cal. 220-26 Bom. L. R. 278-22 C. W. N. 257-4215.

K. W. N. 366-27 C. L. J. 175.  
—23 M. L. T. 28-53 M. L. J. 842-25  
A. L. J. 828-5 L. W. 777-3 Pat.  
L. W. 185-11 EMP. L. T. 21-  
42 I. C. 642 (P. C.)

—S. 92—Document not inter partes—Oral evidence—Admissibility of.

The provisions of S. 92 of the Evidence Act excluding oral evidence in regard to the question whether a certain plot of land was or was not covered by a sale deed executed by one of the parties to a suit do not apply when the other party to the suit was not a party to the document. (*Tehnon and Newbold, J.J.*) SUNDARI DEBI v. KALIPADA MUKHERJEE. 45 I. C. 13.

—S. 92—Instalment bond—Oral undertaking by creditor to waive provision for payment of whole on default—Inadmissible.

An instalment bond provided that on default in payment of two consecutive instalments the creditor would be entitled to sue for the whole amount due under the bond.

Held, that a subsequent oral undertaking on the part of the creditor to waive his right to enforce the payment of the whole amount on two successive defaults was a variation of the contract and was, therefore, inadmissible in evidence under S. 92 of the Evidence Act. (*Chitty and Walmsley, J.J.*) MARI KUMAR SABA v. RAM CHANDRA PAL. 47 I. C. 943.

—S. 92—Kadavayal—Proof of its acceptance by landlord—Oral evidence, admissibility of.

## EVIDENCE ACT, S. 92.

Where a kadiyat executed and registered by a person is proved by a tenant in a suit to be authentic, the Evidence Act to prohibit a landlord from showing that he never assented to or accepted the kadiyat. (*Pleather and Hindu, J.J.*) HEMANTA KUMAR KAR v. BIRENDRA NATH ROY CROWDHURY. 47 I. C. 1003.

—S. 92—Oral evidence, admissibility of document or sale—Evidence to prove mortgage—Fraud, effect of.

Oral evidence is not admissible to show that a transaction which is in fact a sale is really a mortgage, except to prove fraud on the part of the party taking benefit under the deed. (*Chitty and Hindu, J.J.*) VENKATACHELUM v. M. G. TUN. 43 L. J. 520.

—S. 92—Oral evidence—Inadmissibility of to prove that interest specified in promissory note is not payable.

Under S. 92 of the Evidence Act oral evidence is inadmissible to evidence to prove that the interest mentioned in a promissory note is not payable either by custom or by agreement. (*How, J. J. and Twomey, J.*) M. S. PILLAY v. V. T. MAISTRY. 40 EMP. L. T. 252.

—S. 92—Oral evidence to contradict terms of document in writing—Plea of fraud—Sale or mortgage—Section applies only to partners or their representatives.

The plaintiff and his divided brother purported, to sell certain properties to S. in 1892. Portions of the property were sold by S. to debt No. 1 (who was the plaintiff's sister's son) on the 18th August 1898; and on the 17th September 1904, the remaining portions were sold to the same person. The plaintiff sued in 1913 to have it declared that the transaction of 1892 was a mortgage. The trial Court held that the transaction of 1892 was a mortgage and that it was so known to debt No. 1 both in 1898 and 1904; and decreed that on payment the plaintiff was entitled to recover certain portions of the property from debt No. 1. The lower appellate Court dismissed the suit on the ground that evidence to show that the conveyance of 1892 was a mortgage was inadmissible. On appeal.

Held, that S. 92 of the Evidence Act had no application to the transactions of 1898 and 1904 as the plaintiff was not a party to either of them.

Held per *Stich, J.* That the plaintiff was entitled to show the real nature of the transaction of 1892 under proviso to S. 92, his allegation in substance being one of fraud, namely that though debt No. 1 entered into the transactions of 1898 and 1904 with the full knowledge of the fact that S. was really mortgagor and not the owner of the property, he



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was actually covered by the deed. (*Cox and Chatterjee, JJ.*) *RAM CHARAN DAS v. ARSAD ALI.* 43 I. C. 721.

—S. 105—Private defence—Onus of proof—Criminal trial—Alternative pleas.

The right of the accused to defend himself upon a criminal charge can only be limited; the provisions of the statute law and the provision to be considered are those of S. 105 of the Evidence Act. The law does not prevent a man on his trial on a charge of culpable homicide from setting up the defence in the alternative, viz. either that he was not present at the occurrence or that he was acting in the exercise of right of the private defence. (*Piggott, J.*) *YUSUF HUSAIN v. EMPEROR.* 40 All 284=16 A. L. J. 169=44 I. C. 678=19 Cr. L. J. 371.

—S. 106—Bailment—Loss—Duty of bailee to produce available evidence—Onus on plff. to prove want of due diligence or negligence on the part of the bailee or his servants, not affected. See CONTRACT ACT, SS 151 AND 152. 27 C. L. J. 615=46 I. C. 319 (P. C.)

—S. 106—Burden of proof—Question as to whether an act is within the scope of an agent's authority.

In a case where the question is whether a particular act was or was not within the scope of an agent's employment, the burden of proving the limit of the agent's authority is on the principal, inasmuch as the character of the authority is a matter specially within the knowledge of the latter. (*Twomey, C. J. and Maung Kim, J.*) *DAVID M. BRUCE v. MG. KZAW ZIN.* 45 I. C. 822.

—S. 106—Criminal trial—Absence of explanation from accused—Effect of.

An accused person is always entitled to hold his tongue; but where the only alternative theory to his guilt is a remote possibility, which, if correct, he is in a position to explain, the absence of any explanation must be considered in determining whether the possibility should be disregarded or taken into account. (*Alying and Phillips, JJ.*) *SMITH v. EMPEROR.* 43 I. C. 605=19 Cr. L. J. 189

—S. 108—Presumption—Presumption that a person not heard of for seven years is dead—But not of precise period of death.

The provisions of section 108 of the Evidence Act only raise a presumption that a person, who has not been heard of for seven years, is dead at the time when the question whether he is alive or dead is raised, but there is no presumption as to the time of his death and if any one seeks to establish the precise period at which such person died, he must do so by actual evidence. 34 All. 86 and 37 Cal. 180 ref. (*Shah Lal, J.*) *RASHARAT v. NAJIB*

## EVIDENCE ACT, S. 114.

*KHAN.* 38 P. R. 1918=68 P. W. R. 1918=46 I. C. 70.

—S. 108—Presumption under—None as to particular time of death.

Under S. 108 of the Evidence Act it is not permissible to a Court to raise a presumption that a certain person died at a particular time anterior to the proceedings in which the question of his death was in issue. The presumption can arise only in respect of the fact of his being dead or alive at the time of those proceedings (*Lindsay, J. C.*) *FAQIR BAKSH v. DAN BAHADUR SINGH* 21 O. C. 143=46 I. C. 808.

—S. 110—Possession—Presumption of title, from.

Where nothing else is known, the person in possession of property is presumed to be the owner. (*Stanyon, J. C.*) *RAGHOBA v. PALHOBA.* 42 A. 45 I. C. 217

—S. 112—Go. Legitimacy—Presumption—Admission of plea.

Where a party admits the legal paternity of the other party but alleges that he is of illegitimate descent, the presumption being in favour of legitimacy, the party alleging illegitimacy must prove it. (*Lindsay, J. C.*) *DULAREY CH. GH v. SUBAJ DARI SINGH.* 43 I. C. 478.

—S. 112—Legitimacy—Proof—Onus—Wife living apart from husband receiving maintenance under S. 488, Cr. P. Code—Proof of access.

In the Buddhist Law there is no such thing as judicial separation, but an order under S. 488 of the Cr. P. Code, until it is rescinded is for all practical purposes the same thing as an order for judicial separation and if, while the order is in force, a child is born to the wife the onus is shifted on to her of proving access. The rule laid down in S. 112 of the Evidence Act is inapplicable to such a case, inasmuch as the order under S. 488 of the Cr. P. Code, practically puts an end to the continuance of a valid marriage (*Rigg, J.*) *MA MYA v. MA SHWE BAN.* 46 I. C. 620.

—S. 112—Principle of, inapplicable to Mohamedans—Child begotten by Zina cannot be made legitimate by subsequent marriage of parents. See MAHOMEDAN LAW LEGITIMACY. 43 I. C. 883.

—S. 114—Discharge—Plea of—Onus Shifting. See BURDEN OF PROOF. 22 C. W. N. 937.

—S. 114—Discharge—Presumption as to—Delay in enforcing rights.

Under a possessory mortgage of 1876 it was found that possession was not transferred to

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the mortgagee and no steps had been taken by the latter or his heirs to recover the amount.

*Held*, that under the circumstances it was reasonable to presume that the mortgage of 1876 had been satisfied and that the onus was on the plff. to prove that it was still in force in 1909 (*Stanyon, A. J. C.*) *AMRITABAI v. JADBANBI*. 46 I. C. 676.

———S. 114—Legitimacy—Presumption of — General presumption — Not confined to cases within S. 112 of the Evidence Act. See EVIDENCE ACT, SS. 112 AND 114. 43 I. C. 478.

———S. 114—Mortgage—Absence of demand for 30 years—Burden of proving existing liability under, on plff.

In a suit of 1908 to enforce a mortgage of 1872, it was found that the consideration for the deed was Rs. 3,335.40 on account of money due on past dealings and a certain amount of wheat. The money was to carry interest at 12 per cent. per annum and the grain at 25 per cent. The mortgaged property was the agricultural estate, moveable and immoveable, of the mortgagors. No time was fixed for payment and no demand for payment was made before suit.

*Held*, that under the circumstances the ordinary presumption that the deed evidenced a genuine transaction for consideration and that the debt which it purported to secure was a real debt existing at the date of suit did not apply and that the onus was on the plff to prove these facts against the defendants'. (*Batten and Stanyon, A. J. C.*) *MEGHRAJ v. MUKUNDRAM*. 46 I. C. 865.

———S. 114—Presumption—Official acts—Regularity of.

The presumption arising under S. 114 of the Evidence Act as to the legality and correctness of a court's proceedings can only be overturned by exceptionally strong evidence. (*Lindsay, J. J.*) *SHEODARSHAN LAL v. ASSESAR SINGH*. 5 O. L. J. 179=46 I. C. 52.

———S. 114—Presumption—Official acts, regularity of—Duty of Court.

Under S. 114 of the Evidence Act there is a presumption that an official act has been regularly performed; but where an applicant before the court is attempting to rebut that presumption it is not for the Court itself to give assistance to the other side or to deal with the matter otherwise than impartially. (*Roe and Jwala Prasad, JJ.*) *MUSSAMMAT SOHAGBATI v. BABU SURENDRA MOHAN SINGH*. 4 Pat. L. W. 296=44 I. C. 661.

———S. 114—Shifting of onus of proof—Mortgage, suit on, plea of payment. See BURDEN OF PROOF. 22 C. W. N. 937 (P. C.)

## EVIDENCE ACT, S. 115.

———S. 114 Ill (a)—Lapse of time, effect to be given to.

S. 114 Ill (a) of the Evidence Act is merely illustrative of the manner in which inferences can be drawn from the common course of events, human conduct, etc. In a prosecution for receipt of stolen goods, lapse of time after the theft is usually an important factor in determining the guilt of the accused but the importance to be attached to it must vary with the circumstances of the individual case and depends on the frequency with which the property is likely to have changed hands. No maximum period is suggested as that beyond which no inference of guilt can be drawn. 6 A 234; (1912) M. W. N. 528, dist. (*Ayling and Phillips, JJ.*) *SMITH v. EMPEROR*. 43 I. C. 605=19 Cr. L. J. 189.

———S. 114 Ill (a)—Receiving stolen property—Possession after the lapse of 3 months from date of theft—No presumption. See PENAL CODE, S. 411. 22 C. W. N. 597.

———Ss. 114 (b) and 133—Accomplice testimony—Conviction on, bad in the absence of corroboration. See (1917) DIG. COL. 573; *PAN GANG v. EMPEROR*. 42 I. C. 1002=19 Cr. L. J. 47.

———S. 114, Illn (e)—Accounts filed by guardian—Acceptance of, by court—Presumption of correctness.

After a guardian appointed by Court has filed his accounts and they have been accepted by the Court as correct, a presumption as to their accuracy does certainly arise and it is open to parties to rely on them in subsequent proceedings between the guardian and his ward. (*Lindsay, J. C.*) *GOPAL v. SARJU*. 21 O. C. 74=44 I. C. 699.

———S. 114 Illn. (e)—Judicial Acts—Presumption of regularity of—Attachment warrant signed by *sheristadar* and not by Judge issuing warrant—Onus on person impeaching validity of warrant, to show that *sheristadar* had no authority. See PENAL CODE, SS. 147 and 114. 3 Pat. L. J. 636.

———S. 115—Estoppel—Doctrine of Applicability—No prejudicial acting on faith of representation—Effect. (*Scott Smith, J.*) *HAR LAL v. BASANT SINGH*. 75 P. W. R. 1918.

———S. 115—Estoppel—Parties and privies—Doctrine applicable to representatives of person estopped. See ESTOPPEL. 45 I. A. 97.

———S. 115—Estoppel—Relinquishment of rights of inheritance—Person releasing not estopped from claiming property when succession opens. See (1917) DIG. COL. 579; *ASA BEEVI v. KARUPPAN CHETTY*.

41 Mad. 365=34 M. L. J. 460=7 L. W. 215=41 I. C. 361=45 I. C. 35

## EVIDENCE ACT, S. 116.

—S. 116—Landlord and tenant—Denial of landlord's title—Estoppel—Adverse action of third party—Effect.

An adverse action taken by a third party, whether that third party be the Government or some other rival claimant cannot have the effect of terminating the relationship of landlord and tenant and the tenant will be estopped by S. 116 of the Evidence Act from denying the landlord's title (*Seshagiri Aiyar and Napier, JJ.*) KUNHUNNI MENON v. KANNAN THAVA (1918) M. W. N. 375=7 L. W. 574 =24 M. L. T. 79=8 L. W. 44=45 I. C. 656.

—S. 118—Deposition of boys of tender years—No oath on affirmation administered—Deposition under a promise to speak the truth—Duty of Court to record facts as to the capacity of witness to understand the nature of oath or affirmation, etc. See OATHS ACT, S. 18. 20 Bom. L. R. 365.

—S. 115—Minor—Sale by—Suit to set aside maintainable—Equities—Refund of benefit. See MINOR. 7 L. W. 124=43 I. C. 908.

—S. 115—"Thing" meaning of—Estoppel—Proposition of law—Mere intention to make a gift does not create—*Quinqué Plantation Solo, Solo Cedit*, applicability of to India. See (1917) DIG. COL. 580. MA PRU v. MAUNG PO CHET. 11 Bur. L. T. 14= (1916) II U. B. R. 148=39 I. C. 385.

—Ss. 123 and 124—Confidential state communications—Objection to production—Opinion of Govt officer, if final.

An officer's refusal to disclose a document on grounds of public policy, is final. It is not competent to the court to call for and examine the secret archives of the state in order to satisfy itself of their confidential nature. 39 M. 204. 6 Bom. L. R. 131, 160. Ref. (*Stuart and Kankhya Lal, A. J. C.*) LAL TRIBHAWAN NATH SINGH v. DEPUTY COMMISSIONER, FYZABAD. 47 I. C. 225.

—Ss. 124 and 162—Privilege claimed by witness—Official communication—Entries in a register.

The appellant was prosecuted by the Excise authorities and convicted of being in possession of opium without a license. It was stated that the Appellant made a confession to the Superintendent of the Excise. At the trial the defence called the Inspector of the Customs Preventive Service and asked to corroborate his statements from the posting register to show that the Preventive Officers were stationed at a particular place at the time of the Appellant's arrest. The defence also examined the Superintendent of the Preventive Service and asked whether an Excise Inspector made an admission to him in the presence of the Excise Superintendent.

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Held, that the question of privilege could not arise in respect of the posting register, the entry in question being merely a note of the times when particular Preventive Officers were ordered to be at their stations.

that the Customs Superintendent could not claim privilege as to the admission made to him by the Inspector although what took place between the two Superintendents might possibly be privileged. (*Chetty and Smither, JJ.*) RUKUMALI v. EMPEROR.

22 C. W. N. 451=45 I. C. 284=19 Cr. L. J. 524.

—S. 126—Vakil and client—Communication made to and knowledge of Vakil in the course of his employment—Whether admissible—Privilege

A suit was brought by one firm for the revocation of a patent granted to another firm. The question was the formation and the process of the working of a certain stove owned and used by the firm to which the letters patent had been granted for the purpose of manufacturing banslochan. A vakil was cited as witness by the applicant for revocation. This vakil has been employed by the other firm to defend them against a charge of creating nuisance by smell in the preparation of banslochan. In his capacity as vakil the witness at their invitation visited the premises in order to make himself acquainted with the stove which it was alleged created a nuisance. The knowledge which the witness had acquired as to the formation and process of the working of the stove was acquired in the course of the employment. Held, that the evidence was not admissible. It is immaterial that a communication is verbal, that is to say, by word of mouth or by demonstration and it is excluded by rule of professional privilege (*Piggot and Walsh, JJ.*) GOPI LAL v. LAKHPAT RAI.

16 A. L. J. 987=48 I. C. 605.

—S. 129—Privilege—Statements of witnesses for taking opinion of legal adviser as to merits of the case.

Statements of witnesses recorded for the special purpose of being shown to a legal adviser with a view to ascertaining whether there is a good case to go to the Court are privileged under S. 129 of the Evidence Act (*Batten, A. J. C.*) DINBAI v. FROMROZ.

43 I. C. 71.

—S. 132—Privilege—Claim of, by witness.

A witness must claim the benefit of the protection afforded by S. 132 of the Evidence Act before he makes the statement in respect of which a question is subsequently raised. (*Piggot, J.*) KALLU v. SITAL.

40 All. 271=16 A. L. J. 201=43 I. C. 823=19 Cr. L. J. 231.

## EVIDENCE ACT, S. 134.

—S. 134—Court not empowered to limit the number of witnesses. See CR. P. CODE, S. 110. 22 C. W. N. 468.

—S. 138—Criminal trial—Cross-examination by accused—Postponement of, till all witnesses for prosecution are examined in chief—Procedure improper. See CR. P. CODE, S. 208 (2). 44 I. C. 343.

—S. 153, Expln.—Previous conviction—Proof by finger prints—Nature of proof required. See (1917) DIG. COL. 591; RAMDAS SINGH v. EMPEROR. 21 C. W. N. 469= 39 I. C. 302=10 Cr. L. R. 75.

—Ss 155, 156 and 157—Statements made before police—Use of, by prosecution to discredit the witness in Court in case he tells a different story—Cr. P. Code, S. 162.

Statements of a witness made before a Police Officer may be used in Court by the prosecution for discrediting the witness if he tells a different story in Court under S. 155 of the Evidence Act, and S. 162 of the Cr. P. Code does not bar such a course. It provides only for facilities to the accused to obtain copies of police papers.

Statements of witnesses made to the police should not be used to corroborate them except in very special circumstances. 31 B. 599 ref. (Roe and Imam, JJ.) RAM CHARITRA SINGH v. EMPEROR. 3 Pat. L. J. 568=

4 Pat. L. W. 325=(1918) Pat. 95= 45 I. C. 272=19 Cr. L. J. 512.

—Ss 155 and 157—Witness for the Crown—Hostile witness—Contradiction of, by reference to police diaries—Cr. P. Code S. 162.

The evidence of a witness who is hostile to the Crown may be impeached by reference to the police diary. If in the course of a trial a witness is called upon to say that he saw the offence committed by the accused and when called upon says that offence was committed by an entirely different person it is only fair that the Crown should be allowed to use the diaries under S. 155 Evidence Act, to disabuse the jury of the effect of a wilfully false statement.

There is nothing in S. 162 of the Cr. P. Code to prevent the course adopted. 34 Bom. 599 ref. (Roe and Imam, JJ.) RAMCHARITRA SINGH v. EMPEROR. 3 Pat. L. J. 568=

4 Pat. L. W. 325=(1918) Pat. 95= 45 I. C. 272=19 Cr. L. J. 512.

—S. 162—Summons to Govt. servant to produce document—Duty of court in ordering issue of summons.

If a Court decides to summon a Government Official for the production of certain documents, it should only do so after careful consideration and once the summons had been issued, production should ordinarily be insisted

## EXCISE ACT, S. 60.

on if the party who obtained the summons so desires. (Drake Brinkman, J. C.) LAXMAN RAO v. VITHOBA. 45 I. C. 898;

—S. 165—Judgment—Presumptions and suspicions not a ground for judicial decision. See SECOND APPEAL, GROUNDS FOR. 44 I. C. 433.

—S. 165—Judicial decision—Based on Judge's knowledge of the character of parties and witnesses—Procedure.

A Judge is justified in using his knowledge about the character of the parties in a suit to come to a decision upon the credit to be attached to their evidence on the case set up by them.

Where a District Judge declined to believe in the bona fides of a suit brought by the plff., unless it was supported by evidence that left no doubt in the mind of the Judge about its credibility, on the ground that many of the suits launched by the plff. in his Court had been found to be false.

Held, that the Judge was justified in alluding to his experience of the plff's. litigation in this Court. (Rigg, J.) SAN HLA BAW v. MI. KHOROU NISSA. 11 Bur. L. T. 98= 9 L. B. R. 160=45 I. C. 734.

—S. 165—Suit to enforce registration of a will—Judgment based on evidence adduced before the registering officer and treated as evidence by consent of parties—Evidence irrelevant—Judgment unsustainable. See EVIDENCE ACT, S. 33. 34 M. L. J. 526.

EXCISE—Mrita Sanjivini Sudha—Manufacture and sale of—Excise Act, S. 2 (14). See (1917) DIG. COL. 532; GANESH CHANDRA SIKDAR v. EMPEROR.

45 Cal. 82=22 C. W. N. 328= 26 C. L. J. 342=40 I. C. 740.

EXCISE ACT, (XII of 1896). S. 50—Liquor license—Drunkenness of servant—Liability.

A liquor licensee under the Excise Act is responsible under S. 50 of the Act for the default of his servants in permitting drunkenness in his shop in spite of want of knowledge. (Ormond, O. C. J., Perlett and Young, JJ.) SHIN GYI v. EMPEROR.

10 Bur. L. T. 262=43 I. C. 81= 19 Cr. L. J. 49 (F. B.)

—S. 60—Selling liquor without license—What amounts to—Assistant handing up bottles to licensed vendor if guilty of offence.

Where one S was authorized by the Collector to sell liquor in a shop and his assistant was handing over the bottles to him.

Held, that the act of the assistant does not amount to selling of liquor without a license and he was not guilty of any offence.

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Rule 86 (6), of the Excise Manual does not render the mere handling up of a bottle of liquor by an assistant, not authorized by the Collector, an offence (*Tudball, J.*) JANKI DAS v. EMPEROR. 19 Cr. L. R. 57.

**EXECUTING COURT**—Decree, objection to validity of—Decree against alleged lunatic without proper representation—Objection, not tenable in execution. See EXECUTION-DECREE. 45 I. C. 243.

—Duty of, to execute decree as it stands or to refuse execution if decree cannot be executed literally. See EXECUTION. 44 I. C. 530.

—Jurisdiction—Mortgage—Decree for sale—Transmission for execution—Power to pass supplementary decree—Jurisdiction of executing court and of court which passed decree. See C. P. C. S. 39, Or 21, Rr. 6 and 9. (1918) M. W. N. 4.

—Jurisdiction—Objection that decree is nullity or one passed without jurisdiction not maintainable. (*Scott-Smith, J.*) SHEOPAT RAI v. WARAK CHAND. 42 P. L. R. 1918=93 P. W. R. 1918=46 I. C. 419.

—Relief not granted by decree—No power to grant in execution.

The jurisdiction of a Court conducting execution proceedings must be determined with reference to the directions contained in the decree, including any direction which the Court may give regarding the manner in which the relief granted by the decree is to be secured to the person entitled to it. The powers of the executing Court are circumscribed by the directions set out in the decree and has no jurisdiction to award relief in any other manner than the decree allows. It has no power to go behind the decree so as to question its legality and correctness. (*Lindsay, J. C.*) SHEODARSHAN LAL v. ASSESAR SINGH. 50 L. J. 179=46 I. C. 52.

**EXECUTION**—Appellate decree—Assignment of original decree pending appeal—Appellate decree in favour of assignor—Right of assignee to execute. See C. P. CODE, O. 21, R. 16. (1918) M. W. N. 194.

—Application—Dismissal of, for default—Fresh application cannot be treated as a continuation of the old application. See B. T. ACT, SCH. III. CL. 6. 22 C. W. N. 766.

—Application—Dismissal of—Notice to parties—Dismissal of application without notice to parties—Restoration.

An execution case cannot be struck off or dismissed without giving notice to the parties. The mere fact that an order dismissing an execution case was made without any notice to the decree-holder is sufficient to set aside

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the order so passed (*Fletcher and Huda, JJ.*) KIRTI CHANDRA DAW v. BEPIN BEHARI PAL CHAUDHURI. 46 I. C. 721.

—Fresh application—Application to attach properties not mentioned in original application—Treated as a continuance of the old application. See LIM. ACT, ART. 182. 47 I. C. 911.

—Application in accordance with law—Prior application complying with provisions of the code—Time given for filing, decree—Non compliance—Subsequent application. See LIM. ACT, ART. 182. 16 A. L. J. 87.

—Arrest—Refusal to issue warrant for—Judgment-debtor residing outside territorial jurisdiction not a ground for. See C. P. CODE, O. 21, R. 37. 3 Pat. L. J. 95.

—Step-in-aid—Relief not granted by the decree—Application for, not a step-in-aid. See LIM. ACT, ART. 182 (5) AND (6). 43 I. C. 537.

—Attachment of decree for maintenance—Right to execute the attached decree against original judgment-debtors or to purchase the decree and bring a suit under O. 34, R. 14, C. P. C. See C. P. CODE, O. 21, R. 53. 23 M. L. T. 355.

—Attachment—Sale pursuant to—Sale set aside on ground other than decree-holder's default—Effect on attachment—Fresh attachment—Necessity. See ATTACHMENT. 3 Pat. L. J. 310.

—Decree—Appellate decree, the only executable decree, when there has been an appeal. See C. P. CODE, O. 21, Rr. 18 AND 19. 45 I. C. 245.

—Decree—Benamidar assignee of decree—Right to execute decree. See C. P. CODE, O. 21, R. 16. 7 L. W. 201.

—Decree—Executing court—Duty of to execute decree as it stands or to refuse execution, if that is not possible.

An executing Court cannot tamper with decrees which must be executed literally; when a decree cannot be executed literally it cannot be executed at all.

Pfiff. obtained a decree that he was entitled to share the water flowing through a certain rajabaha equally with the deft. Subsequently the canal authorities made certain alterations, as a result of which the volume of water flowing through the rajabaha was increased and many other persons besides the pfiff. and the deft. became entitled to a share in the water.

Held, that the decree in favour of the pfiff. was no longer capable of execution. (*Cheris, J.*) KHUWAJA MAHMUD v. GHULAM RASUL. 59 P. W. R. 1918=44 I. C. 530.

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—Decree, objection to—Mortgage decree—Objection to execution on the ground that application for final decree was barred.

A decree absolute in a mortgage suit made by a court in the presence of both the parties and on proper adjudication cannot be challenged in execution on the ground that the Court ought not to have gone and made the decree absolute inasmuch as the application of it was barred by limitation. (*Fletcher, J.*) SYAM CHAND MAITI v. BAIKUNTA NATH MANDAL. 47 I. C. 143.

—Decree, objection to, validity of—Decree against alleged lunatic without proper representation—Objection not tenable in execution.

In a suit against a person of unsound mind the Court though asked to appoint a guardian of the lunatic for the purposes of the suit, refused to do so and passed a decree against the lunatic. The representative of the lunatic after his death cannot raise an objection in execution Court that the decree was null and void and could not be executed. (*Chamier, C. J. and Rice, J.*) JANG BAHADUR LAL v. PALTU TEWARI. (1917) Pat. 166=45 I. C. 213.

—Decree—Objection to, validity of—Objection by representative of judgment-debtor in execution that decree is void as having been passed against a dead man. See DECREE.

16 A. L. J. 327.

—Decree—Sale of revenue paying land—Auction of Collector—Necessity. See C. P. CODE, SS. 63 and 70.

69 F. L. R. 1918.

—Decree to be executed according to its terms—Final decree in mortgage suit—Appointment of receiver.

The method provided in a final decree for execution cannot be altered at the instance of the judgment-debtor and to the prejudice of the decree-holder. The rights of the mortgagee under the decree cannot be interfered with by the Court in any way either by intercepting the rents and profits or by restraining the sale of the property by the appointment of a receiver. (*Fletcher and N. R. Chatterjee, JJ.*) SITA NATH SAHA v. MADAN MOHAN DAS. 43 I. C. 22.

—Decree—Transfer of, in favour of pleader of judgment debtors—Execution not barred. See C. F. CODE, O. 21, R. 16.

44 I. C. 13.

—Transferred from one court to another—First attempt to execute unsuccessful—Jurisdiction of the court to persevere with execution. See OUDH CIVIL DIGEST, S. 172.

21 O. C. 261.

—Deposit of portion of decree amount—Liability of judgment-debtor for interest, cessation of. See C. P. CODE, O. 24, RR. 1, 2 and 3.

16 A. L. J. 15.

## EXECUTION SALE.

—Injunction decree—Mode of execution—Directing police interference, improper—Mode of execution prescribed by O. 21 R. 32. See C. P. CODE, O. 21, R. 32.

16 A. L. J. 700.

—Instalment decree—When decree becoming payable on failure to pay two instalments—Failure to pay—Acceptance after due date—Waiver.

An instalment decree fixed the dates on which the several instalments were to be paid and provided that on failure to pay any two instalments on the fixed dates, the whole of the decree become payable at once. The first of the instalments was not paid on the due date but was paid off before the second instalment fell due. There was a further default in paying the amount of the second instalment on the due date. The decree-holder then applied to recover the whole amount of his debt remaining unpaid.

Held rejecting the application, that the real intention of the parties was that before the penalty could be enforced two instalments must be in arrears together, whereas in the present case, only one instalment was in arrear, the other month's arrear having been waived. (*Deaman and Henton, JJ.*) SUBBARAYA VENKAPPA HEGDE v. SOMBAYA HEGDE.

42 Bom. 304=20 Bom. L. R. 335=45 I. C. 561.

—Mortgage decree—Execution against some of the owners of the equity of redemption incompetent.

A mortgage decree cannot be executed against some of the owners of the equity of redemption. (*Fletcher and Huda JJ.*) SATISH MOHINI DEBYA v. PABNA BANK LTD. 47 I. C. 907.

—Right to—Security for performance of obligation under decree—Right of decree-holder to proceed in execution against the other properties of the judgment-debtor not affected. See C. P. CODE, S. 145 and O. 41, R. 5 (3) (c).

43 I. C. 454.

EXECUTION SALE—Application by purchaser for possession—Limitation—Order on such application—Further application for carrying out order—Limitation. See LIM. ACT, ARTS. 180 AND 181.

7 L. W. 16.

—Award pending attachment—Decree in terms of award—Subsequent purchase by attaching creditor good only subject to decree. See C. P. CODE, S. 64.

35 M. L. J. 444.

—Bids—Bid of one person not to be treated as that of another in spite of consent.

It is not competent to one person to avail himself of the bid of another at

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a Court auction and constitute himself the purchaser by depositing the purchase-money, nor can the consent of the bidder improve his position in this matter. (*Stuart, A. J. C.*) *SHAHZADI v. AHMAD ALI SHAH*. 21 O. C. 212=47 I. C. 993.

—Certificate—Construction of—*Mauza asli mai dakhili*, meaning of—Omission to specify appurtenant villages by name, effect of—Beng. Rent recovery Act (VIII of 1865 Chota Nag. Landlord and Procedure Act S. 123 —Rent decree—Execution—Part of tenure, whether can be sold. See (1917) DIG. COL. 590. *GOBIND DAS v. DURHAM WAITE*. (1918) Pat. 333=38 I. C. 451.

—Claimants—Proclamation of sale—Notifying claims to bidders—Practice of—Condemned. See C. P. CODE, O. 21, R. 63. 35 M. L. J. 335 (F. B).

—Confirmation—Right of purchaser prior to. See C. P. C. O. 21, R. 71. 23 M. L. T. 9.

—Confirmation—Sale subsequently held to have passed no title—Right of auction-purchaser to refund of purchase money—Remedy. See C. P. CODE, O. 21, Rr. 91, AND 93. (1918) M. W. N. 655.

—Construction of—*What passes under—Sale of sixteen-annas zemindari in execution of mortgage decree—Groves if pass to purchaser.*

Where in execution of a mortgage decree against the mortgagor who had mortgaged the entire 16 annas zemindari with all appurtenances the entire sixteen-annas were sold and were purchased by the plff.—*Held*, that the sale was not exclusive of the shares in the groves (*Richards, C.J. and Tudball J.*) *HASAN ALI KHAN v. AZHARUL HASAN*. 16 A. L. J. 900=48 I. C. 367.

—Decree for rent in Revenue Court—Encumbrances—Extinguishment of. See MADRAS ESTATES LAND ACT, SS. 5, 125 and 132. 35 M. L. J. 443.

—Default of purchaser—Re sale in consequence—Deficiency in price—Liability of purchaser for—Nature and extent. See C. P. C. O. 21, R. 71. 23 M. L. T. 9.

—Executor—Promissory note by, in his capacity as, whether personally liable or charge on the estate—Whether executor can be treated as guardian of minor to make estate liable—Power of the Hindu testator to appoint guardian of the minor to joint family property. See (1917) DIG. COL. 595. *CHIDAMBARA PILLAI v. VEERAPPA CHETTIAR*. 22 M. L. T. 380=(1917) M. W. N. 743=6 L. W. 640=43 I. C. 865

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—Ghatwali land—Inalienable tenure—Enfranchisement after date of sale—No right to purchaser. See LAND TENURE, GHATWALI. 28 C. L. J. 283.

—Hindu Joint Family—Decree against father—Son's interest also saleable in the absence of proof that debt was immoral. See HINDU LAW, JOINT FAMILY. 43 I. C. 678.

—Hindu Joint Family—Decree against manager—What passes by the sale, question of fact, depending on circumstances. See HINDU LAW, JOINT FAMILY: MANAGER. (1918) Pat. 71.

—Purchase by decree-holder with leave of court—Suit by him for possession of property purchased—Maintainability—Failure to seek remedy under O. 21, R. 95 on failure in proceeding under that rule—Effect. See CR. P. CODE, S. 47. 8 P. R. 1918.

—Purchase-money—Sale set aside by execution Court—Purchase-money withdrawn by auction-purchaser—Sale subsequently confirmed—Refund of purchase-money—Duty of Court to order refund. See C. P. CODE, S. 151. 46 I. C. 275.

—Purchase subject to prior lien—Purchaser if can dispute lien.

Property passing in execution of a mortgage decree is dependent upon the terms of the plaint.

Where in a mortgage suit the plff. prays for the sale of the property subject to the prior lien, it is not open to the auction-purchaser in execution of the decree obtained in that suit to dispute the subsistence of the lien. (*Roe and Coutts, J.J.*) *BASAWAN SINGH v. GAN-GAPHAL RAI*. 47 I. C. 224.

—Purchaser rights of—Right, title and interest of judgment-debtor—Rights of decree-holder in a different capacity—Purchaser not entitled to.

An auction-purchaser in execution of a money decree derives his title from the judgment-debtor, and not from the decree-holder:

A purchaser at an auction sale purchases only the right, title and interest of the judgment-debtor and not any right which the judgment-creditor might have to set aside or question the validity of any deed which had been previously made by the judgment-debtor himself. (*Mitra A. J. C.*) *NARAINRAO v. PATELAL*. 43 I. C. 907.

—Rent sale—Property passing under—Rent sale for whole tenure—*"Aslihot"* only named in proclamation sale-certificate—Effect.

Where a suit was brought for the recovery of the entire rent due in respect of the whole tenure which comprised five villages, of which the village "Bijulia" only was mentioned in

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the plaint and the names of other villages' were omitted and in execution of the rent decree obtained the property was attached under the description of "Bijulia asli maidakhri, and in the sale proclamation and in the certificate for sale the property was described as two annas eight pies "Bijulia a-limi dakhilk".

*Held*, that the whole tenure passed by the execution sale and not the village Bijulia only. (*Chamier, C. J. and Sharfuddin, J.*) DURGA-PRASAD NATH MISSEK v DINESHWAR NATH MISSEK. 4 Pat L. W. 347=

(1918) Pat. 5=43, I. C. 534.

—Right, title and interest of judgment debtor—Decree against manager of joint Hindu family—Decree passed under S. 93 of the T. P. Act—Whole property passes under sale, if debt incurred for necessity. See HINDU LAW, JOINT FAMILY, MANAGER.

(1918) Pat. 71.

—Rights of purchaser—Property subject to a mortgage at the date of sale—Effect of on purchaser's rights.

An auction-purchaser of a property mortgaged to a person under a registered deed, executed prior to the attachment of the property, is bound by the mortgage even if he had no notice of the mortgage and the mortgagee failed to have his lien notified at the time of the sale. (*Kanhaiya Lal, A. J. J.*) BHAIKON PRASAD v SHEO DARSHAN. 5 O. L. J. 114=

45 I. C. 877.

—Sale—proclamation—Valuation of property.

To order property which is to be put up for sale in execution of a decree, to be valued at twenty times the Government revenue, is merely a colourable pretence of making the valuation required by law, and such an order cannot be sustained. (*Roe and Lucia Prasad, JJ.*) JAGGARNATH PRASAD v. CHITRAGUP-THA NARAIN SINGH.

3 Pat L. J. 530=43 I. C. 141.

—Sale-certificate—Particulars in, if can be corrected by reference to plaint.

The particulars given in a sale certificate cannot be corrected by reference to the boundaries given in the plaint. (*Chetty and Smithe, JJ.*) KRISHNA GOPAL BHOWMICK v. HEM CHANDRA BAIBAGI. 46 I. C. 993.

—Set aside by subordinate court—appeal to High Court—Auction-purchaser not party—Sale confirmed after purchase money withdrawn by auction purchaser—Order for refund—Legality—C. P. Code S. 151—Benamidar auction-purchaser, whether beneficiary liable to refund.

Where an auction-sale being set aside by a Subordinate Judge the decree-holder applied to

## EXECUTION SALE.

the High Court without making the auction-purchasers parties to the appeal and the High Court set aside the order of the Subordinate Judge and remanded the case to him for disposal and the lower Court thereafter confirmed the sale and directed two of the auction-purchasers and an alleged beneficiary of another auction-purchaser to refund the purchase-money withdrawn meanwhile by the auction-purchasers on the sale being set aside by the Subordinate Judge.

*Held*, that the auction-purchasers were bound by the order of confirmation, although they were not joined as parties in the High Court appeal, as under the Code of 1882, which was applicable to the appeal, when it was filed the auction-purchaser was not a necessary party.

The Subordinate Judge had power in exercise of his inherent jurisdiction under S. 151 of the C. P. Code to direct a refund and he was right in correcting what amounts to an abuse of the process of the Court.

It does not seem to be in accordance with justice, equity and good conscience that in a summary miscellaneous proceeding for refund of money taken out by an auction-purchaser the court should enter into an adjudication whether the auction purchaser is a benamidar of some other person and the lower Court assumed a jurisdiction which he did not possess in directing a stranger to refund the money. (*Mallik and Thornhill JJ.*) RAI DALIP NARAIN SINGH RAHADUR v. RAI BAIJNATH GOENKA RAHADUR.

(1918) Pat. 281=3 Pat. L. W. 132=

46 I. C. 275.

—Setting aside—Attachment, revival of—Fresh attachment unnecessary on subsequent application for sale. See ATTACHMENT. 3 Pat. L. J. 130.

—Setting aside of by executing court to withdrawal of purchase money by auction-purchaser—Sale ultimately confirmed order for refund—Jurisdiction—Liability of persons not party to proceedings. See C. P. CODE, S. 151. 5 Pat. L. W. 132.

—Setting aside, for reason other than decree-holder's default—Effect on attachment—Fresh attachment—Necessity. See ATTACHMENT. 3 Pat. L. J. 310.

—Setting aside—Ex parte decree—Sale in pursuance of—Ex parte decree set aside on appeal—Right of judgment-debtor to set aside sale. See C. P. CODE, SS. 47, 144 AND 151. 20 Bom. L. R. 925.

—Setting aside—Fraud—Omission to issue notice under O. 21, R. 23 C. P. C. Application to set aside sale—Limitation—Lim. Act S. 18 and art. 181 applicable—Knowledge of fraud—Onus. See C. P. CODE, S. 47 AND O. 21, R. 23. 27 C. L. J. 528.

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—Setting aside of—Property sold and purchased by one decree-holder—Application by judgment debtor with consent of decree-holder to set aside sale—Refusal—Power of Court to set aside.

In execution of a decree certain property belonging to the judgment-debtor was sold and purchased by one of the decree holders. The judgment-debtor and the decree-holders (one of whom was also the purchaser) applied to get the sale set aside on the ground of inadequacy of price. The court refused to set aside on the ground that it had no power in law to set it aside when the judgment-debtors and the decree holders consented:—*Held*, that the court had power to set aside the sale as there was no opposition on the part of the decree-holders or the purchaser. (*Richards, C. J. and Tudball, J.*) MAHOMED ABDUL RASHID and TUDBALL, J. MAHOMED ABDUL RASHID v. AM KHAN v. BUDDH SEN 16 A. L. J. 750—47 I. C. 385.

—Setting aside—Publication of sale proclamation—Defect in—Sale of fishery in river of 20 miles in length—Mode of publication See C. P. CODE, O. 21 R. 90. (1918) Pat. 33.

—Setting aside—Sale of properties after decree satisfied—Execution purchaser without notice not affected. See C. P. CODE, O. 21, R. 17. 45 I. C. 699.

—Validity of—C. P. Code, O. 21, R. 22—Omission to issue notice under—Sale if void as against all the judgment-debtors. See C. P. CODE, O. 21, R. 22. 45 I. C. 699.

—Validity of—Omission to give notice under O. 21 R. 22—Sale void for want of jurisdiction. See C. P. CODE S. 47 and O. 21 R. 22. 27 C. L. J. 523.

—Validity of—Sale held after ex parte—Stay order subsequently cancelled—Fraud.

An ex parte order for stay of an auction sale was obtained by fraud, and it was subsequently discharged by the Judge who passed it. Before the ex parte order was set aside the sale was held and the property sold. *Held*, that the sale was not void (*Richards, C. J. and Banerjee, J.*) THE GANGES FLOUR MILLS COMPANY, LTD. v. SHADI RAM. 16 A. L. J. 46—43 I. C. 636.

—What passes under—Accretion to property before date of sale.

Plff. sued for declaration of title to some lands, alleging that they had accreted to the ryoti jamai lands which he had purchased at an execution sale. It was found that the lands had reformed many years before the plff's purchase. *Held*, that the plff. was not entitled to a decree declaring his rights to the lands. (*Chitty and Smither, JJ.*) KRISHNA GOPAL BHOWMICK v. HEM CHANDRA BAI-  
EAGI. 46 I. C. 908.

## EXPLOSIVES ACT.

EXECUTOR—Carrying on family business—Debts incurred therein—Creditor's remedy against executor personally—Executor's right to indemnity—Executor if sufficiently represented estate when his interests adverse to beneficiary's—Minor represented by nominee of party having adverse interests See (1917) DIG. COL 594; SUDHIR CHANDRA DAS v. GOBINDA CHANDRA RAY 45 Cal. 538—21 C. W. N. 102—41 I. C. 503.

—Duties of—Administration of estate.

The duties of an executor are to administer the estate of the deceased only so far and so long as to enable him to carry out the terms of the will of which he is the executor. After the property has ceased to be estate of the deceased and has become the property of the residuary legatees under the will, the executor as such has no authority to manage the estate on his behalf. 21 Cal. 89 foll. (*N. R. Chatterjee and Smither, JJ.*) SANKAR NATH MUKHERJEE v. BIDDUTLATA DEBI. 28 C. L. J. 271—48 I. C. 295.

—Interest—Delay in accounting—Executor not liable to pay interest on unpaid arrears of income. See PROB. AND ADMN ACT, S. 128. 23 M. L. T. 353.

—Power of—Executor's assent to legacy—Effect of—Power to dispose of property Succession Act. Ss. 269, 293.

After the executor has given his assent to the legacy, he is not competent under S. 293 of the Indian Succession Act, to deal further with the property.

An executor, although he has the power to dispose of the property of the deceased in such manner as he thinks fit under S. 269 of the Indian Succession Act, must be able to give reasons for doing so. (*Walmsley and Pantor, JJ.*) MARIE PENHEIRO v. JOTINDRA MOHAN SEN. 23 C. L. J. 141—47 I. C. 289.

EXPERTS—Evidence of—Conviction based on text books without aid of experts, propriety. See EVIDENCE ACT, Ss. 57, and 60. 22 C. W. N. 745.

EXPLOSIVES ACT (IV OF 1834) S. 4, Cl. (1) and (2)—Explosives, meaning of—China crackers—Toy fire-works—Onus of proof—License to possess explosives—License to import explosives during a particular period—Difference between—Possession of more explosives than is permitted—Offence.

The terms of S. 4, Cls. 1 and 2 of the Indian Explosives Act are wide enough to include crackers but it is open to the accused to show (the onus of proving which lies on him) that the fireworks in his possession are within the description of toy fireworks which are excluded from the operation of the Act by Rule 8 of the rules framed under the Act.

# **FACTORIES ACT, S. 41.**

Where a license permitted possession of a limited quantity at a specified period of time, the general permission to import a larger quantity during a longer period must be read subject to the quantity in actual possession being reduced below the maximum for which possession is so permitted by the said license and that possession of more than the quantity covered by the former license is an offence.

The whole scheme of the rules framed under the Act is to require a separate license for possession at any one time and place of explosives in addition to a license to import during a particular period (*Kumaraswami Sastri, J.*) **GURUMURTHI CHETTI, In re.**

3 L. W. 626.

**FACTORIES ACT (XII OF 1911) Ss. 41 and 42—Imposition of separate fines on occupier and manager—Exemption by charging the actual offender—Meaning of "occupier" explained.**

Section 41 of the Factories Act authorises the Magistrate to impose on the occupier and manager jointly and severally a fine not exceeding Rs. 200. There could consequently be only one fine and for the whole sum each delinquent being liable jointly and severally.

Before the occupier or manager can get exemption under section 42 of the Act, he must take a certain step to assure the real culprit's conviction and not merely attempt to exculpate himself.

The word "occupier" as used in the Act means the person who has control of the factory. He may be the owner and, on the other hand, he may be only a lessee or a mortgagee with possession, but it is he who decides whether the factory is to work or to close down. (*Le Rossignol, J.*) **NIRANJAN LAL v. EM-PEROR.**

13 P. R. (Cr.) 1918=  
21 P. W. R. (Cr.) 1918=45 I. C. 159=  
19 Cr. L. J. 495.

**FACTUM VALET**—Doctrine of—Applicability to service of summons—Omission of process-server to obtain signature. See C. P. CODE, O. 5 Rr. 10 AND 17. 46 I. C. 277.

**FAMILY ARRANGEMENT**—Binding nature of agreement executed under a wrong view of acts and law, not binding.

N. and P. were brothers. N. died leaving a widow L. Subsequently P. died leaving a widow D. Upon P's death the two widows apportioned the whole property in equal shares between themselves. In the document which was executed for the purpose it was stated that the two brothers were "joint in food, business and everything," but it was followed by the recital that the two widows were entitled to the property in equal shares. Disputes having broken out between the two widows, two cross suits were filed, one on behalf of L. and the other on behalf of D. L.

# **FAMILY ARRANGEMENT.**

alleged that she had been authorised by her husband to adopt a son, and that she intended to adopt one whereupon a dispute arose between her and D. which was referred to arbitration and that resulted in the former petition. She prayed for separate possession of her share allotted in the partition D in her suit asserted that on N's death her husband P. succeeded to the whole estate by the right of survivorship and on his death she acquired a Hindu widow's estate in the property and that the deed of partition was not binding on her, her signature thereto having been obtained by fraud and in ignorance of the nature of the deed and of the legal rights. It was found by the Court below that N. and P. were members of joint Hindu family and on the former dying, without issue P. became owner of the whole by right of survivorship, and that the deed of partition was not binding on D. *Held*, that the deed of partition evidently had been executed by D. under the mistaken belief that she and L. were equal owners of the property left by her husband and that she would be divested of her rights by an adoption made by L. and consequently it was not binding on D. (*Piggott and Walsh, JJ.*) **LACHMI KUNWAR v. DURGA KUNWAR.**  
40 All. 619=16 A. L. J. 646.  
=46 I. C. 566.

—Binding nature of—Consideration—*Bona-fide* dispute, existence of essential—Claim patently false—Arrangement void of consideration and not binding. See **COMPRO-MISE.** 22 C. W. N. 463.

—Hindu widow—Agreement with re-versioner for maintenance—Adopted son not bound by arrangement from asserting his rights. See **HINDU LAW, WIDOW.** 44 I. C. 5.

—To settle disputed claim—Binding nature of—Minor affected by it if may repudiate it—Grounds on which it may be challenged.

In the absence of proof of mistake, in equality of position undue influence, coercion, fraud of any similar ground a partition of family arrangement made in settlement of a disputed or doubtful claim is a valid and binding arrangement which the parties thereto cannot deny, ignore or resile from. If the parties have settled a dispute, such settlement will not be set aside on the ground that it gave to one of them more than what he ought possibly to have recovered if he had taken the judgment of the Court upon the matters in difference between them. The Courts will not be disposed to scan with much nicety the quantum of consideration.

There is nothing in this doctrine of family arrangements opposed to the general principle that when it is sought to bind a minor by and

## FISHERY.

agreement entered into on his behalf, it must be shown that the agreement was for the benefit of the minor. If improper advantage has been taken of the minor's position a family arrangement can be set aside on the ground of undue influence or inequality of position or one of the other grounds which could vitiate such an arrangement in the case of adults. But when there is no defect of this nature the settlement of a doubtful claim is of as much advantage to a minor as to an adult, and where a genuine dispute has been fairly settled the dispute cannot be re-opened on the ground that one of the parties to the family arrangement was a minor. (*N. R. Chatterjea and Newbold, JJ.*) *KERAMATULLA MEAH v. KEAMATULLA MEAH.* 23 C. W. N. 118.

**FISHERY**—Co-owners—Right of—Catching of fish by other co-owners—Infringement of right—Cause of action—Damages. See CO-OWNERS, FISHERY. 46 I. C. 280.

—Non-navigable river—Test of—Exclusive right to a fishery, if passes right to the soil in the bed of the river. See RIPARIAN RIGHTS. 46 I. C. 305.

—Right to—Immoveable property. See GENERAL CLAUSES ACT, S. 3 (25). 14 N. L. R. 38=43 I. C. 962.

**FOREST ACT (VII of 1878) S. 25**—Hunting without a permit in a reserved forest—Common object to hunt. See (1917) DIG. COL. 600; *BARKAT ALI v. EMPEROR.* 40 All. 38=43 A. L. J. 424=42 I. C. 922=19 Cr. L. J. 10.

—S. 25 (F)—Cutting trees—Felling of each tree a distinct offence.

A person felling a number of trees in a forest is guilty of as many offences under S. 25 (f) of the Forest Act as the number of the trees felled by him. (*Piggot and Walsh, JJ.*) *EMPEROR v. RAGHUNATH.* 43 I. C. 577=19 Cr. L. J. 161.

—S. 25 (i). R. 3 (a)—Reserved forest—Shooting tiger without license—Offence.

The accused, who had his cattle killed by a tiger, successfully tracked and shot a tiger without a license in a reserved forest.

Held, that he was technically guilty of the offence of shooting in a reserved forest without a license, under Rule 3 (a) framed under S. 25 (i) of the Forest Act. (*Shah and Marten, J. J.*) *EMPEROR v. MBIRSAHEB BALAMIYA PATIL.* 42 Bom. 406=20 Bom. L. R. 384=45 I. C. 314=19 Cr. L. J. 610.

**FORFEITURE**—On breach of condition by Mulgani tenant—Transfer by landlord of his right subsequent to breach—Right of to enforce forfeiture. See T. P. ACT, SS. 6, 109, and 111. 20 Bom. L. R. 767.

## FRAUDULENT TRANSFER.

—By denial of landlord's title, applicability of rule to permanent leases See LANDLORD AND TENANT. 35 M. L. J. 129.

**FORGERY**—Element necessary to constitute offence of. See PENAL CODE, SS. 463 AND 464. (1918) Pat. 36.

**FRAUD**—Allegation of, in pleadings, to be specific.

In a suit based on fraud, the allegations of fraud must be specific. (*Saunders, J. C.*) *MANIK CHAND v. GIRDHARI LAL.*

3 U. B. R. (1918) 69=46 I. C. 342.

—Cessation of—Knowledge of fraud on the part of the person defrauded—Onus of proof on person setting up. See C. P. CODE, S. 47 and O. 21 R. 22. 27 C. L. J. 528.

—Charges of—Groundless allegations—Party guilty of, to be mulcted in costs but not deprived of remedy.

By making groundless charges of fraud, a party does not forfeit his right to the protection of the Court if he otherwise has a good cause of action, though such conduct may attract the consequence of an adverse order as to costs. (*Sir Lawrence Jenkins.*) *REHMAT-UN-NESSA v. PRICE.*

42 Bom. 380=20 Bom. L. R. 714=

35 M. L. J. 262=23 M. L. T. 400=

8 L. W. 53=22 C. W. N. 601=

16 A. L. J. 513=27 C. L. J. 623=

5 Pat. L. W. 25=45 I. C. 568=

45 I. A. 16 (P. C.)

—Judgment obtained by purjured evidence—Suit to set aside not maintainable. See, DECREE, SETTING ASIDE. 41 M. 743=

34 M. L. J. 590. (F. B.)

—Plea of—Allegations to be specific,

Where a plea of fraud is distinctly raised the Court is bound to consider it, although the allegations on which the plea is based are not set forth in detail. (*Stanyon, A. J. C.*) *AMRITABAI v. JABBANBI.* 46 I. C. 676.

—Principal and agent—fraud of agent—Scope of authority—Liability of principal. See. PRINCIPAL AND AGENT. 45 I. C. 856

**FRAUDULENT TRANSFER**—Fraud not effected—Right of real owner to recover—Maxim "allegans turpudinem suam non est audiendus"—Scope and applicability of—Mortgage—Suit for sale by real mortgagee—Deed of mortgage taken in name of plf's mother benami for plf. for fraudulent purposes—Admission of plf. of fraudulent purpose—Right of plf. to recover—Fraud not effected—Effect. See (1917) DIG. COL. 601; *RAJAGOPALACHARIAR v. SUNDARAM CHETTIAR.* 33 M. L. J. 696=45 I. C. 333.

## FRAUDULENT TRANSFER.

———Mahomedan—Transfer in lieu of dow-  
er in favour of his wife—Indebtedness of  
husband—Insolvency. See (1917) DIG. COL.  
602, NASIMUNNISSA v. ABDUL KADIR.

20 O. C. 295=43 I. C. 280.

———Test of—Mere preference of one Cre-  
ditor—Validity. See T. P. ACT, S. 53

21 O. C. 97.

FUND—Secretary — Position and status —  
Retention of Fund's money—Liability for  
interest on such money—Extent. See COV-  
PANY. (1918) M. W. N. 1.

GAMBLING ACT (III OF 1867), Ss. 3 and 4—  
Keeping a common gambling house — Facts  
necessary to be proved.

In order to sustain a conviction for keeping  
a common gambling house it is necessary for  
the prosecution to prove not only that he  
owned the house, or was the occupier of it and  
that the instruments of gambling were kept  
or used in it, but that they were kept or used  
for the profit or gain of that person. Where a  
house is not proved to be a common gaming  
house, the presence of other persons therein  
will not raise a presumption, against them and  
even if it were one, no presumption, will arise  
against such persons unless it can be shown  
that gambling was going on at the time when  
they were present. (Bannerjee, J.) RAGHU  
NATH v. EMPEROR. 16 A. L. J. 760=

47 I. C. 810=19 Cr. L. J. 958.

———S. 13—Confiscation of money gained  
—Order for illegal.

Under S. 13 of the Gambling Act a Magis-  
trate is not authorised to order for the confis-  
cation of money gained by an accused person in  
the gambling, only the instruments of gaming  
may be so seized. 36 All. 270 foll. (Banerji, J.)  
MATURWA v. EMPEROR.

40 All. 517=16 A. L. J. 428=  
46 I. C. 156=19 Cr. L. J. 700

———S. 13—Public place—Meaning—Offence  
under section — Essentials — Instrument of  
"gaming" What is — Betting and gaming—  
Distinction between.

For the purposes of S. 13 of Act III of 1867,  
the word "public place" signifies a place to  
which the public resort as a matter of fact  
whether or not or with the permission of a  
private owner.

There is a well established difference between  
betting and gaming for the purposes of the  
Criminal Law and except where it had been  
bridged over by special enactments going,  
to include betting within the term gaming, the  
Courts have always refused to punish betting  
as an instance of gaming. The distinction  
between betting and gaming disapproved.

To obtain a conviction under S. 13, the  
accused must have found playing for money or

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other valuable thing with some instrument of  
gaming used in playing any game, not being a  
game of mere skill. Every element necessary  
to constitute the offence must be present before  
the section can be enforced against the alleged  
offender. The enactment is directed against  
something which those wagering themselves  
bring about for the purpose of settling the bet.  
That something must be a game it must be  
played with some instrument, the play being  
carried out for the purpose of ascertaining  
the result upon which the eventual right to  
the stake depends.

A lottery or sweep ticket is not an instru-  
ment of 'gaming' within the meaning of S. 13.

Mere betting without gaming is no offence  
in the Central Provinces and Berar. (Sanyal,  
A. J. C.) GANJU v. EMPEROR

14 N. L. R. 137=47 I. C. 433=  
19 Cr. L. J. 917.

GANJAM AND VIZAGAPATAM AGENCY  
RULES. Rr. 10 (2) AND 20—Transfer of suit  
by—Agent after framing issues, to Asst. agent  
for decision—Procedure if regular—Decision of  
agent—Powers of High Court under Rule 20—  
License—Revocation of—Right of licensee to  
damages—Breach of contract.

It is competent to an Agent in whose court  
a suit exceeding Rs. 5,000 in value is institu-  
ted to refer the suit at any stage, even after  
the framing of issues, for the decision of the  
Asst. Agent.

A licensee is entitled to damage for breach of  
any contract or revocation of his license. In  
a proper case the Court will allow a revocation  
of the license only on payment of the expenses  
the licensee was led to incur in connection  
with it.

Per Krishnan, J.—Rule 20 of the Ganjam  
and Vizagapatam Agency Rules gives power to  
the High Court to direct the Agent to review  
his judgment on special grounds and does not  
give any right to the parties by way of appeal  
or otherwise. The High Court will not inter-  
fere with the decision of an Agent on purely  
technical grounds or on account of errors  
which have not led to any prejudice on the  
merits. When the application is in the  
nature of a second appeal the High Court will  
not ordinarily interfere with the findings of  
facts. (Spencer and Krishnan, JJ.) ZEMIN-  
DAR OF BODOKIMIDI v. KUMAR LAHARI.

(1918) M. W. N. 772.

GENERAL CLAUSES ACT (X of 1897) S. 3.  
(25) Fishery Right to if immovable property.

A right to fishery is an interest in immove-  
able property. Fitzgerald v. Firkbank (1897)  
2 Ch. 96; 24 C. 449, 19 C. 544 Ref. (Mitra,  
A. J. C.) SITARAM v. PETIA.

14 N. L. R. 35=43 I. C. 962.

———S. 3. (25)—Immovable property—  
money paid for acquisition of land under the

## GENERAL CLAUSES ACT, S. 3.

Land Acquisition Act—Not within the definition. *See* LIM. ACT. ARTS 120 AND 144  
3 Pat. L. J. 522.

—S. 3 (25)—Pugmill if immoveable property.

Where a pugmill is erected and affixed to the earth it is immoveable property within S. 3 (25) of the General Clauses Act (*Rig. J.*)  
U THET v. TOLA RAM. 43 I. C. 625.

—S. 3 (39)—Person—Singular included plural—Cr. P. Code, S. 234—Joint trial of several accused, legality of. *See* Cr. P. CODE. S. 234.  
3 Pat. L. J. 174

—S. 3 cl (45)—Registered meaning of. *See* LIM. ACT ART. 116. 35 M. L. J. 256.

—Ss. 9 and 10—Applicability to appeal from proceeding under Prov. Insolvency Act *See* PROV. INSOL. ACT, S. 46. 35 M. L. J. 531.

—S. 26—Separate sentences—Opium Act (I of 1878) S. 9 (c) (f)—Bihar and Orissa Excise Act (II of 1915) S. 47 (a)—Illegal possession and sale of opium.

Where a person illegally sold a certain quantity of opium and retained possession of the residue after the sale, separate sentences for the possession and the sale under the opium Act and the Bihar and Orissa Excise Act do not contravene the provisions of S. 26 of the General Clauses Act. (*Roe and Imam, JJ*) BALI SAHU v. EMPEROR 3 Pat. L. J. 433  
=44 I. C. 974=19 Cr. L. J. 446.

GHATWALI—Widow in possession as heir—Not Competent to relinquish. *See* LAND TENURE, GHATWALI. 5 Pat. L. W. 167.

—Land—Alienation of—Enfranchisement after date of alienation—Alienee acquires no right. *See* LAND TENURE, GHATWALI.  
28 C. L. J. 283

GIFT—Construction—Validity—Gift of absolute estate with invalid condition restricting powers of donee—Effect. *See* MAHOMETAN LAW.  
27 C. L. J. 502.

GOVERNMENT OF INDIA ACT, 1915 and 1916 (5 and 6 GEO. V, C. 61 and 6 and 7 GEO. V, C. 37) S. 65—Indian Legislature—Power of, to constitute Courts and tribunal—Defence of India Act, Ss. 8 and 4, not *ultra vires*. *See* DEFENCE OF INDIA ACT, Ss. 3, 4, 8 and 9  
4 Pat. L. W. 167=(1918) Pat. 87.

—S. 101 (2) Proviso to—Object and effect of Governor-General in Council—Power to appoint additional Judges—Appointments from time to time for periods not exceeding two years—Validity. *See* (1917) DIG. COL. 604; KANDASAMI PILLAI v. MUTHU- YENKATACHALA MANIGAB. 33 M. L. J. 787=  
43 I. C. 806.

## GOVERNMENT OF INDIA ACT, S. 107.

—S. 106 (2)—High Court—Original Jurisdiction—Suit for declaration that agreement for composition of income-tax is binding on Collector, maintainability on, Original Side—Objection to Jurisdiction—No allegation of mala fides of statutory power—Trial on the merits permissible.

S. 106 (2) of the Government of India Act in express terms deprives the High Court of its original jurisdiction in any matter concerning the revenue or concerning any act ordered or done in the collection thereof according to the law for the time being in force. Consequently, a suit for a declaration that an agreement for composition of income-tax entered into between the plaintiffs and the Collector of Madras was in force and that the latter was not entitled to reassess the pliffs in repudiation of the agreement, as he claimed to do in consequence of the enactment of S. 4 of the Indian Income Tax (Amendment) Act (V of 1916), is not cognizable by the High Court in its original jurisdiction.

In the absence of any allegation that the Collector acted *mala fide* or purporting to seek the protection of the statute with the full knowledge that he was committing a mere act of aggression, it was not competent to the Court to try the suit on the merits with a view to determine whether the Collector was right in his view of the law. To uphold the objection to jurisdiction only in cases where it is proved on enquiry that the Collector acted in entire conformity to the existing laws, would be to render the statute barring jurisdiction wholly nugatory. (*Coutts-Trotter, J.*) MESSRS BEST & CO. LTD. v. THE COLLECTOR OF MADRAS.  
35 M. L. J. 23=48 I. C. 796.

—S. 107—Cr. P. Code S. 145—Proceedings under—Interference, when.

S. 107 of the Government of India Act cannot be invoked so as to question proceedings which purport to be proceedings lawfully taken by a Magistrate under Chap. XII of the Cr. P. Code. If proceedings totally without legal foundations as legislative authority are taken by a Magistrate under colour of Ch. XII but not seriously purporting to be taken under or to comply with the provisions of that chapter, there is a clear case for interference. (*Walsh, J.*) SUNDAR NATH v. EMPEROR. 40 All 364=16 A. L. J. 189=  
44 I. C. 673=19 Cr. L. J. 369.

—S. 107—Criminal Revision—Power of High Court to direct re-hearing of appeal by Sessions Judge after receiving additional evidence *See* CR. P. CODE, S. 439.  
47 I. C. 274.

—S. 107—Dt. Magistrate—Administrative order of—No power to High Court to interfere under S. 107. *See* CR. P. CODE S. 195 (1) (a) (b).  
35 M. L. J. 454.

## GOVERNMENT OF INDIA ACT, S. 107.

—S. 107—Error of law—No ground for revision. See C. P. CODE, S. 115.

35 M. L. J. 604

—S. 107—Expunging from record irrelevant and scandalous matter in judgment of subordinate court—Application by third party—Power of High Court—Superintendence, meaning of.

Held, by *Abdur Rahim, J.* (*Oldfield, J.* dissenting). The High Court has jurisdiction to direct the expunging of irrelevant and scandalous matter in the judgment of a Subordinate Court on the application of a third person under S. 107 of the Government of India Act. The powers of superintendence of the High Court are of an extremely wide character and include the power to expunge such matters from judgment so that they may not be circulated and published to the prejudice of persons who are or are not concerned in the suit either as a party or as a witness.

The High Court will not only interfere in exceptional cases and with great caution in the exercise of such jurisdiction.

Per *Oldfield, J.*—The High Court has no power under S. 107 of the Government of India Act to order the expunging of portions of the judgment of a Subordinate Court at the instance of a person who is not a party, to a suit. The expression 'superintendence' in S. 107 does not include the relief above mentioned. (*Abdur Rahim and Oldfield, JJ.*)

N. KRISHNASWAMI AIYANGAR, *In re.*

35 M. L. J. 368.—47 I. C. 981.

—S. 107—Interferences—Order of lower Court refusing leave to sue—Inherent power—Refusal to exercise—Revision C. P. Code S. 115 See. (1918) Pat. 337.—47 I. C. 719.

—S. 107—Interference under—Order of magistrate demanding security under S. 3 of the Press Act—Reversal of by High Court. See PRESS ACT, SS. 3 (1) (2) and 29.

4 Pat. L. W. 155.

—S. 107—Interlocutory order—Refusal to add party—interference by the High Court See C. P. Code, S. 115, O. I. R. 10 (2) AND O. 31, R. 1. 44 I. C. 564.

—S. 107—Powers of superintendence of High Court—Jurisdiction confined to Courts—subject to appellate jurisdiction of High Court Tribunal constituted under Defence of India Act (IV of 1915)—Proceedings of—No power to High Court to revise. See DEFENCE OF INDIA ACT SS. 8 AND 11. 46 I. C. 977.

—S. 107—Small Cause Court—Grant of leave to withdraw without recording reasons—Interference.

The Judge of a Small Cause Court has no power to allow a suit to be withdrawn without recording reasons therefor. Where a suit has

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been allowed to be withdrawn by a Small Cause Court and no reasons have been recorded for permitting such withdrawal, the High Court will set aside the order in the exercise of its powers under S. 107 of the Govt. of India Act, 1915. (*Thamier, C. J. and Sharfuddin, J.*) LUCHI RAI v. RAGHUBIR DUBE 2 Pat. L. J. 682.—43 I. C. 455.

—S. 107 (2)—Superintendence—Limits of the power

The word 'Superintendence' in S. 107 (2) of the Govt. of India Act should be construed very narrowly and does not justify the interference of the High Court so as to evade the provisions of S. 115 of the C. P. Code and to result in entertaining an appeal or revision where no such right is given by the statute. (*Sanderson, C. J. Teunon and Walsley, JJ.*) KUMAR CHANDRA KISHORE v. BASARAT ALI. 27 C. L. J. 418.—22 C. W. N. 627.—41 I. C. 763.

GRANT—Construction—Confiscation and re-grant by Government—Self-acquired property of grantor. See OUDH ESTATES ACT, S. 22. 210 C. 1.

—Construction—Female donee—Construction against grantor and in favour of grantee—Grantee described as *malik*—Grant of absolute estate. See HINDU LAW, GIFT. 16 A. L. J. 564.

—Construction—Grant to person individually or as holder of office—Head of mutt—Grant to for food chatram and construction of aghraharam round tomb of original founder—Right of management—Divisibility of property granted among heirs of grantee. See RELIGIOUS ENDOWMENTS. 41 Mad. 296 (P. C.)

—Construction—Grant of property to a priest and his heirs—Absolute property of grantee. See REL. ENDOWMENT. 16 A. L. J. 394.

—Construction—Grantee of land bounded by non-navigable river—Right to bed of the river *ad medium filum aquae*—Presumption—Onus.

As regards a grant of land in India described as bounded by a non-navigable river the onus of showing that the grant did not cover the bed *ad medium filum aquae* is on the grantor. The presumption may be strong or weak according to the circumstances of the particular case, and the amount of evidence required to rebut it will vary accordingly. (*Wallis C. J. Sadasiva Iyer, Oldfield, Spencer and Beckwith, JJ.*) SRI RAJAH VENKATA LAKSHMI NARASAMMA v. THE SECRETARY OF STATE FOR INDIA. 41 Mad 840.—35 M. L. J. 159.—(1918) M. W. N. 662.—47 I. C. 606. (F. B.)

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—Construction—Hereditary—"Al aulad."

The words 'al aulad' in a Chota Nagpur grant are restricted to mean male descendants only, but when they are accompanied by the words "naslan bad naslan" they import generation after generation. 31 Cal. 561 ref (*Chamier, C. J. and Sharfuddin, J.*) *RAMESWAR LAL BHAGAT v. RAJKUMAR GIRWAR PRASAD SINGH.*

8 Pat L. W. 316=(1918) Pat. 156=  
45 I. C. 888

—Construction—Hindu Law creation of successive life-estates by grantor—Succession law of if can be altered by agreement.

A grant of lands made by a Hindu in favour of another Hindu, in so far as it lays down a rule of succession unknown to the Hindu Law is absolutely void.

An agreement between a grantor and a grantee cannot alter the line of succession according to law.

The Hindu Law does not permit the creation of successive life-estates in favour of unborn persons, the estate itself remaining undisposed of.

A rule of succession laid down in a grant creating successive life-estates in the property granted to certain female members of a Hindu family cannot be binding upon the family even though it has been actually followed in the family for a long time, unless it has ripened into a family custom. (*Chatterjee and Walmsley, J.J.*) *AMBALIKA DASSI v. ARPANA DASSI.*

45 Cal 835=23 C. W. N. 160=  
47 I. C. 402.

—Construction—Jagir—Grant for maintenance—grant to K and heirs—Grant of land and not of revenue—Property absolute in the hands of the heirs of the grantee. See C. P. CODE, S. 60 (G) 22 C. W. N. 577 (P.C.)

—Construction—Maintenance grant—Words of inheritance—Presumption—Conduct of parties.

A grant for the maintenance of the grantee is *prima facie* intended to be for the life-time of the grantor or the grantee only. In such a case the use of the words "always" or "for ever" does not *per se* create an inheritable estate. The circumstances under which the instrument was made or the subsequent conduct of the parties may show the intention with sufficient certainty to enable the Court to presume that the grant was perpetual or otherwise. (*Drake Brokman, J. C.*) *MAHOMED ALI KHAN v. SHUJAT ALI KHAN.*

46 I. C. 913.

—Construction—Maintenance—Permanent grant—Presumption of, from payment for along series of years—No presumption where grant itself is forthcoming.

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In cases where a maintenance grant is not forthcoming, the fact that payment has been made for successive generations may be taken as evidence from which a permanent heritable grant might be presumed, but where the deed of grant is in existence, the heritability or otherwise of the grant must be determined with reference to the terms of the grant itself. (*Wallis, C. J. and Seshagiri Iyer, J.*) *SUGUTUR IMMEDY PEDDA CHIKKA v. SUGUTUR IMMEDY SAMBASADASIVA CHIKKA.*

43 I. C. 654.

—Construction—Patni lease—Clause receiving power to Zemindar to appoint dismissed Chowkidars, does not amount to reservation of Chowkidari Chakran Land. See CHOWKIDARI CHAKRAN LAND.

22 C. W. N. 487,

—Construction—Permanent tenancy—Covenant to relinquish in case of personal necessity of grantor. See (1917) DIG. COL. 606; *SARADA KRIPA LAHA v. AKHIL BANDHU BISWAS.*

21 C. W. N. 903=  
40 I. C. 530=23 C. L. J. 48.

—Construction—Property bounded by river—Right of grantee *ad medium flum aquæ*. See BENGAL REGN. XI OF 1825.

22 C. W. N. 872.

—Construction—Property bounded by road or river—Grant of—Grantee entitled to middle of the road or river bed. See RIPARIAN RIGHTS.

46 I. C. 305.

—Construction—Rent free—Musfi resumption—grant to temple—Mahant—Two-successors to original grantee—Agra. Ten. Act, S. See (1917) DIG. COL. 607. *BHARAT DAS v. NANDRANI KUNWAR.*

39 All 689=  
15 A. L. J. 769=42 I. C. 818.

—Construction, Zemindar—Mokurari-dar—Permanent tenure—Minerals—Rights to minerals—Mokurari pattah—Effect of pattah with all rights (*Mai huk hakuk*). See (1917) DIG. SUPPLEMENT. *GIRIDHARI SINGH v. MEGH LAL PANDEY.*

45 Cal. 87=  
20 Bom. L. R. 64=33 M. L. J. 687=22 M. L. T. 353=7 L. W. 90=22 C. W. N. 201=26 C. L. J. 584=15 A. L. J. 857=3 Pat. L. W. 169=42 I. C. 651=44 I. A. 1st

—Construction—Zemindari sanad—Grant of to holder of *palyam*—Removal of restriction on alienation—Abolition of the military tenure. See HINDU LAW, IMPARTIBLE ESTATE.

7 L. W. 36=43 I. C. 871.

—Devolution of estate granted—Right to regulate—Power of Crown and of subject—Distinction—*Talukdari* estate—Lands appertaining—Exchange for other lands—Ownership of

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*lands obtained in exchange—Talukdar—Grant to of land for use—Right to—Right of heirs of Talukdar.*

The Crown has in British India power to grant or to transfer lands, and by its grant or transfer to limit in any way it pleases the descent of such lands. But a subject has no right to impose upon lands or other property any limitation of descent which is at variance with the ordinary law of descent applicable to his case.

*Held*, that villages transferred by the Government in exchange for villages included in the talukdari Sanad must be treated as talukdari villages.

*Held also*, that where a house in Kaiserbug Lucknow had been allotted to a Talukdar for his use as such, the right to possession of it possessed by the Talukdar would on his death pass to his successor in the Talukdari Estate and not to his heirs under the personal law. (*Sir John Edge*) **RAJINDRA BAHADUR SINGH v. RANI RAGHUBANSA KUNWAR.**

40 All. 470=20 Bom. L. R. 1075=  
22 C. W. N. 101=28 C. L. J. 456=  
24 M. L. T. 282=(1918) M. W. N. 331=  
8 L. W. 570=21 O. C. 106=  
43 I. C. 213=45 I. A. 134 (P.C.)

———Gift—Widow—Power to give of estate for religious or charitable purposes—Extent of. See **HINDU LAW, WIDOW.**

20 Bom. L. R. 1

———Implied from 40 year's user—Fishery. See **EASEMENTS ACT, S. 15.**

14 N. L. R. 35=43 I. C. 962.

———Jagir—Grant of land, not merely of revenue—Grant for maintenance—Property absolute in the heirs of grantees. See **C. P. CODE, S. 69 (a).** 22 C. W. N. 577 (P.C.)

———Presumption of—Lost grant from ancient and uninterrupted user—Conditions necessary for raising such presumption—Right should have been capable of being validly granted. See **EASEMENTS ACT, SS. 2 (c) AND 17 (c).** 20 Bom. L. R. 398.

———Rent for—Muafi—Resumption—Grant to temple—Mahant—Two successors to original grantee—Agra—Ten. Act. S. 158. See (1917) **DIG COL. 607; BHARAT DAS v. NANDBANI KUNWAR.** 39 All. 689=15 A. L. J. 769.

42 I. C. 818.

———Resumability—Grant of land burdened with services—Grants of office to which lands are annexed by way of remuneration—Resumption—Burden of proof.

For the purposes of resumption, grants fall into two main categories; grants of land burdened with service, and grants of office to which lands are annexed by way of remunera-

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tion instead of or along with cash. The former grants are always irresumable, unless the grantor can show that they have been specially conditioned so as to enable him to resume for failure to perform for these services, or at his own will to discontinue the service, and resume the lands. Grants under the second category are always resumable unless the grantees can show that they have been specially conditioned otherwise so as to prevent their resumability. In every case, the burden of proof is upon the grantor suing to resume to show that either grant was of a kind falling under the second category, or, if a grant of the kind, falling under the first category, that it was specially conditioned. (*Beaman and Henton, JJ.*) **CHANDRAPPA v. BHIMA** 20 Bom. L. R. 779=47 I. C. 330.

———Talukdar of village, conditioned on payment of Jama—Rent for grants of lands to several holders—Failure of Talukdar to pay jama—Right of Govt. to levy assessment proportionally from the holder of rent free lands. See **BOM. LAND REV. CODE, SS. 144, AND 160.** 20 Bom. L. R. 748.

———Vatan—Personal inam without condition of service—Daughter of last holder of Vatan—Right to share in the Vatan—Bom. Vatan Act. (V of 1886) S. 2 no bar. See **BOM. VATAN ACT, S. 2.** 20 Bom. L. R. 983.

**GUARDIAN AND WARD**—Sale by guardian of minor's property—Whether binding on minor—Sale amount utilised for purchase of other property for minor—Vendee's remedy—Minor setting up invalidity of sale on attaining majority—Limitation. See **CONTRACT ACT, S. 64** 35 M. L. J. 652.

**GUARDIANS AND WARDS ACT (VIII OF 1890), SS. 12 AND 25—Suit for custody of child if maintainable.**

Except in cases in which the Guardians and Wards Act provides a remedy by an application, a suit *inter partes* for the custody of a minor son is the only remedy of the father. 28 Mad. 807 dist. S. Bur. L. T. 123 dist. (*Robinson, J.*) **MATEURABAN v. D. TEWARY.**

10 Bur. L. T. 186=44 I. C. 753.

———S. 16 (2) (b)—Powers of guardian—Contract for sale of minor's property—Specific performance.

The words "for the preservation and benefit of such property" in S. 16 (2) (b) of the Court of Wards Act should be interpreted in the light of the usual powers of guardians to bind the estates of the minors. Consequently a decree for specific performance of a contract of sale made by a guardian of minor's property should not be decreed except on proof of certain benefit to minor. (*Batten, A. J., C.*) **PURAN LAL v. VENKATARAO GUJAR.** 45 I. C. 192.

## GUARDIANS AND WARDS ACT, S. 17.

—Ss. 17 and 19 (G)—*Natural rights of father—Welfare of minor—Effect of conversion from Hinduism to Mahomedanism.*

S. 19 recognizes the natural right of the father and is controlled by S. 17 according to which the paramount consideration is the welfare of the minor.

A Hindu father's conversion does not operate to deprive him of the guardianship of his children by reason of Act XXI of 1850; nor is his conversion *per se* a reason for the court to declare the father unfit, for the court cannot say that one religion is better than the other (*Pratt, J. C. and Crouch, A. J. C.*) **SHEIKH MAHOMED v. MR. RADHABAI.**

12 S. L. R. 14=47 I. C. 817

—Ss. 17 (1) and 19 (a)—*Mahomedan Law—Guardianship—Minor boy and girl—Mother and paternal uncle—Preference.*

Under S. 17 (1) of the Guardians and Wards Act the Court is bound to take the Mahomedan Law into consideration in deciding as to who is to be selected as guardian for a minor Mahomedan.

The husband is a most unsuitable guardian for a girl who had not attained the age of puberty.

It is desirable that the guardian of the person should also be the guardian of the property.

Under the Muhammadan Law the mother is a preferential guardian over a paternal uncle of a boy who is under seven years of age and even if he is above seven the Court, which takes the place of the father, can appoint the mother in preference to the paternal uncle as the guardian. (*Batten, A. J. C.*) **MAHMAD-KHAN v. SULTAN BEGAM.**

43 I. C. 849

—Ss. 19 and 25—*Jurisdiction to appoint the father guardian of person—Guardian, meaning of—Custody what is—Court if can delegate duty of enquiry.*

The Court has, subject to the explanations made in S. 19 of the Guardians and Wards Act, no power to appoint a father the guardian of the person of his children and where the Court does so the order of appointment is without jurisdiction and can be called in question.

The expression 'guardian' as used in S. 25 of the Guardians and Wards Act is not confined to statutory guardians appointed under the Act but includes any person having the care of the person of a minor or of his property or both of his person and property. Such a person need not necessarily be the *de facto* guardian of the minor.

The 'custody' referred to in S. 25 of the Act includes both actual and constructive custody.

The duty of inquiry under that section of the Act is cast upon the Court and cannot be delegated. (*Lindsay, J. C.*) **MUSHAFF v. MOHAMMAD JAWAD.**

21 O. C. 194=5 O. L. J. 616=43 I. C. 60.

## GUARDIANS AND WARDS ACT, S. 31.

—S. 19 (a)—*Minor girl—Husband not a proper guardian before puberty. See GUARDIANS AND WARDS ACT, Ss. 17 (1) and 19 (a)*

43 I. C. 849.

—S. 29—*Applicability of—Transfer by Guardian ad litem—Sanction of court unnecessary.*

S. 29 of the Guardians and Wards Act does not apply to transfers of property made on behalf of minors by their guardians *ad litem*. No sanction of the Court is, therefore, necessary in the case of such transfers. (*Shah Din and Wilberforce, J. J.*) **BARKAT v. JAMILA.**

61 P. W. R. 1918=44 I. C. 554.

—Ss. 29 and 30—*Certificated guardian who is also natural guardian—Powers of—Alienation without sanction of Court—Validity—Alienation beneficial to minor—Effect.*

A certified guardian under the Guardians and Wards Act is not free from the limitations imposed by S. 29 of the Act because he or she is also a natural guardian.

*Held*, also that S. 30 of the Act gives a minor a right to avoid a sale made in contravention of S. 29 even if the whole of the sale price was spent in benefiting him. (*Chevis, J.*) **SHIB LAL v. SHAM DAS.**

61 P. R. 1918.  
=162 P. W. R. 1918=47 I. C. 353.

—Ss. 29 and 31—*Contract for sale of minor's property by guardian with sanction of Court—Specific performance.*

Where a guardian of minors appointed by Court, with the Court's sanction, agreed to sell the minor's property to A at a price which was above that fixed by the Court.

*Held*, that a suit by A for specific performance of the contract was maintainable. 39 Cal. 232, Ref. (*Chatterjee and Newbould, J.J.*) **INNATUNESA BIBI v. JANKI NATH SARKAR.**

22 C. W. N. 477=40 I. C. 490

—S. 29—*Mortgage by guardian without sanction of Court—Right of mortgagee to money advanced.*

Pf. obtained a mortgage of a minor's property from his certificated guardian without the sanction of the Court. The money lent by the mortgagee was spent for the minor's benefit.

*Held*, that the property was not affected by the mortgage and that the proper decree to be given to the pf. was that the mortgage money was liable to be repaid personally by the guardian. (*Fletcher and Huda, J.J.*) **RAJANI KANTA ROY v. MANMATHA NATH NADI.**

46 I. C. 665.

—Ss. 31 and 47—*Sale of minor's property by guardian with sanction of Court—Resale by auction—Order for, if valid—Appealability of order.*

## GUARDIANS AND WARDS ACT, S. 34.

Where an unconditional sanction has been given by the Dt. Judge to the sale of a property of the minor by the guardian appointed by the Court, he has no jurisdiction to order a re-sale of the property by auction after the sale has been executed and registered.

*Quære*.—Whether an appeal lies from an order of a Dt. Judge ordering the re-sale of a property of a minor which has already been sold under his order. (*Richards, C. J. and Banerji, J.*) **PREM SUKH DAS v. LACHMI TEWARI**, 46 I. C. 542

—S. 34 cl. (c)—Order directing a guardian to pay a sum of money to petitioner, if executable as a decree—C. P. Code. S. 36. See (1917) DIG. COL. 614; **PARVATHAMMAL v. CHOKHALINGA CHETTY**, 41 Mad 241= (1917) M. W. N. 602=6 L. W. 526= 41 I. C. 341.

—S. 41 (3)—Minor ward—Death of—Direction to guardian to hand over property to heir of minor.

Where a Court on the death of a minor directed the guardian to hand over the minor's property to a person who claimed as heir of the minor

*Held*, the action of the Court was within its power under S. 41, Cl. 3.

The word 'for any cause' in S. 41 cl. 3 of the Act is not confined to the causes mentioned in cls. 1 and 3 and when the death of a minor ward occurs that is also within the meaning of the 'expression' any cause.' 33 Bom. 419 ref. (*Oldfield and Sadasiva Iyer, JJ.*) **NATARAJA PILLAI v. SUBBARAYA PILLAI**, (1918) M. W. N. 440

—S. 41 (4)—Order of discharge not express—Civil suit by ward for accounts—Maintainability See (1917) Dig. Col. 615; **AMAR NATH v. RAGHPAT RAI**, 25 P. R. 1918= 108 P. L. R. 1917=73 P. W. R. 1917= 41 I. C. 344.

—Ss. 55, 36, 37, and 41 (3) —Ward—Suit for account against guardian's legal representative — Maintainability. (*Shah-Din and Leslie Jones, JJ.*) **MUHAMMAD JAMIL v. MUST MEHRAN BIBI**, 55 P. R. 1918= 46 I. C. 457.

**GUZERAT TALUKDARS ACT (BOM. ACT, VI OF 1938) S. 29 E, Sub-S. 3**—Decree against Talukdar—Certificate of managing officer—Right of decree-holder to exclude time from the date of the decree to date of application for certificate. See LIM. ACT, ART. 182. 20 Bom. L. R. 872.

**HABEAS CORPUS**—Jurisdiction of High Court to issue. See DEFENCE OF INDIA ACT SS. 3, 4, ETC. (1918) Pat. 97.

## HIGH WAY.

**HIGH COURT**—Contempt—Jurisdiction to commit for contempt out of Court—Nature and extent—Conditions of exercise of—Circumstances to be taken into account. See (1917) DIG. COL. 615; IN THE MATTER OF AMBITA BAZAR PATRIKA. 45 Cal. 169=

21 C. W. N. 1161=26 C. L. J. 459 =48 I. C. 338.

—Patna—Calcutta decisions — Special value of, as precedents. See PRACTICE. 44 I. C. 146.

—(Patna) — Power of, to declare Defence of India Act, *ultra vires*—Jurisdiction to issue writ of Habeas Corpus. See DEFENCE OF INDIA ACT, SS. 3, 4 ETC. (1918) Pat. 97.

**HIGH COURTS ACT S. 15** — Power of superintendence — Commissioners appointed under—Defence of India Act—No power of superintendence to High Court. See DEFENCE OF INDIA ACT, SS. 8 AND 11. 46 I. C. 977.

**HIGH COURT RULES (ALLAHABAD) Ch. III R. 2**—Rule making power—Power to alter the period of limitation fixed by the limitation Act, S. 12—Time for obtaining copy of the judgment and decree of the court of first instance—Whether excluded in computation of, for second appeal. See (1917) DIG. COL. 616; **NARSINGH SAHAI v. SHEO PRASAD**, 40 All. 1=15 A. L. J. 835=42 I. C. 855. (F. B.)

**HIGHWAY**—Obstruction—Mistake—Right of the public to use the full breadth of a public road. See MADRAS DT MUNICIPALITIES ACT, SS. 172 AND 173. 44 I. C. 308.

—Obstruction to—Special damage—Proof of essential.

Special damage for the obstruction of a highway has to be established in a case for the removal of an encroachment on the highway. (*Prideaux, A. J. C.*) **CHAINU v. MANBODH**, 45 I. C. 894.

—Origin of—Dedication—Public way, through private land.

There may be a public right of way through private field: such public right of way originates from a dedication to the public by the owner of the land, and dedication may be inferred if the public use a way for a long period to the knowledge of the land owner. The nature of such way in the Central Provinces discussed. (*Batten, A. J. C.*) **LAXMAN v. TUKIA**, 14 N. L. R. 78=44 I. C. 868.

—Right of public to go in procession—Obstruction—Action for—Special damage—Proof of—Necessity.

## HIGH WAY.

Where some members of the Moopan caste were prevented by the hostile and threatening attitude of some other castes from taking a marriage procession on horseback along a public street near Thirumangalam in Madura and in a suit by the Moopans for declaration of their right and an injunction it was contended that the plaintiffs had no cause of action as they were not actually stopped while going along the street and also as they had suffered no special damage.

*Held*, proof of actual obstruction or the use of violence is unnecessary.

The plffs. should have some special damage where it is found that by being prevented from riding on horseback through the street, the plffs. did suffer special damage (mental suffering) compensation may be awarded on estimate of the moral damage suffered and the possibility of such award is sufficient to entitle the plffs to sue for a declaration and injunction. 22 Cal. 551, 14 Mad. 177, 13 M. L. T. 491, 32 Mad. 478 and 17 M. L. T. 453 ref. (*Oldfield and Phillips, J.J.*) GANAPATHY MOOPAN v. SUBBA NAYAKAN.

23 M. L. T. 258=(1918) M. W. N. 547=  
44 I. C. 834.

———Rights of public—Right to go in procession accompanied by music not a natural user.—Declaration of such right not to be made. See SP REL ACT S. 42.

20 Bom. L. R. 667.

**HINDU LAW**—Adoption—Affiliation—Distinction between—Payment of price, if vitiates adoption—Change of gotra on adoption.

An adoption under the provisions of S. 22 of the Oudh Estates Act is merely a selection which need not be according to the condition and the restrictions found in the personal law applicable to the person making the adoption.

Under the Hindu Law an adoption is not vitiated by the payment of a price for an adopted son.

A male Hindu under the Mitakshara Law can only change his gotra on adoption. (*Stuart and Kenhaiya Lal, A. J. C.*) LAL TRIBHAWAN NATH SINGH v. THE DEPUTY COMMISSIONER FYZABAD.

47 I. C. 225.

———Adoption—Agreement between natural parent of adopted son and adoptive mother—Validity—Conditions.

U a ghatwal died leaving a will authorising his widow K. to adopt a son and giving to his widow an estate about the true nature of which opinion differed as to whether it was only a right of management of a life estate. The widow K. entered into an agreement with the parents and other members of the family of a minor S. whereby it was agreed that the widow would have a Hindu widow's estate during her life-time and that S. would be suitably maintained and brought up and would take the estate after her death. It appeared

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that the minor S. under this arrangement got a great deal more than what he would have got, if he had remained a member of his natural family. But a suit was instituted by S. through his guardian for a declaration that the agreement was not binding on him.

*Held, per Courts, J.*—that a minor can act only through a guardian and contracts entered into by a guardian are binding on a minor provided they have been properly entered into and are for his benefit. The agreement, being one which at the time it was entered into was fair and reasonable and would have appeared such to any reasonable man, was binding on S. unless it was contrary to Hindu Law. Such agreements have been held to be binding. 11 Bom. 381, 38 Bom. 722, 27 Mad. 577 foli. 16 Cal. 556 P. C. dist.

The construction of the will being doubtful, it was construed by competent legal authority as giving a life interest to the Rani and this interpretation having been accepted as a condition of the adoption and incorporated into the agreement, it was not open to the plff. to contend that the construction was wrong. He cannot be allowed to approbate that part of the agreement which construes the will in his favour as giving the Rani power to adopt him in the form he was adopted, and reprobate that portion which construes the will as giving the Rani a life interest.

*Per Roe, J.*—In view of the doubt as to the true interpretation of the will the agreement would be binding on the parties as a family arrangement. (*Roe and Courts, J.J.*) RANI KESHOBATI KUNWARI v. KUNWAR STAYANARAIN SINGH.

5 Pat. L. W. 167=(1918)  
Pat. 294=47 I. C. 55.

———Adoption—Anti-adoption agreements between natural father of the boy and the adoptive mother if and when binding on adopted son.

Anti-adoption agreements by the adoptive mother with the natural father of the boy operating in restriction of the rights of the adopted son are valid only if they amount to fair and reasonable arrangements for the enjoyment of her husband's property by the widow during her life-time, especially when there is authority from the husband in that connection. The contract is not, however, absolutely void and can be ratified by the minor. 16 Cal. 556; 37 Bom. 251; 17 Mad. 577; and 8 Cal. 357 ref. (*D. Chatterjee and Walmesley, J.J.*) PANCHANAN MAJUMDAR v. BINOY KRISHNA LANNERJEA.

27 C. L. J. 274=44 I. C. 538.

———Adoption—Authority in junior wife in supersession of senior wife, respect to life-estate in her favour—Validity of adoption.

The junior widow of a talukdar validly adopted a son in pursuance of a will made by

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the Talukdar, under which the latter bestowed a life-estate upon her and gave her the power to adopt a son and further directed that the adopted son would take possession of the taluk only after her death, under the provisions of S. 22, clause 8 of the Oudh Estates Act.

*Held*, that the adoption was good, as it effectuated the intention of the talukdar as expressed in his will and as the talukdar could not lose the character of impartibility in the hands of the adopted son. (*Stuart and Kankaiya Lal, A. J. C.*) LAL TRIBHAWAN NATH SINGH v. THE DEPUTY COMMISSIONER, FYZABAD.

47 I. C. 225.

—Adoption—Ceremonies—Twice-born Kshatriyas—Brother's son—Adoption six days after birth—Doctrine of pollution and impurity of body applicability of, to twice-born classes.

There is no prohibition among Kshatriyas against the adoption of a brother's child before the 11th day after birth by reason of the doctrine of pollution, or before the 21st day by reason of the impurity of the body of the child.

Where religious rites are not a necessary requisite as, for instance, where a Hindu of one of the twice-born castes adopts a boy of the same gotra as himself the omission of such rites cannot affect the validity of the adoption and, therefore, the fact of pollution, which only affects the degree of merit attached to the religious rites, is also immaterial to the validity of the adoption. (*Mullick and Atkinson, J.J.*) SREEMATTY LAKSHMINALAI JEMAMANI BAHURIA v. UDIT PARTAP SINGH.

3 Pat. L. J. 499.

—Adoption—Consent of Sapindas no bona fide effort to obtain same validity.

Where there is no bona fide attempt on the part of a Hindu widow to get the consent of her nearest sapindas before making an adoption to her deceased husband, such an adoption would be invalid. 1 Mad. 179; 1914 M. W. N. 502 referred.

The widow has no right to assume that it would be useless to consult the nearest reverend persons who are the actual advisers and protectors of the widow. 30 M. L. J. 265, referred (*Wallis, C. J. and Spencer, J.*) CHIRAVURI PATTABHIRAMABAJU v. KALLAPALLI TIRAPATIRAJU.

(1918) M. W. N. 678—  
8 L. W. 413.—48 I. C. 222.

—Adoption—Consent of Sapindas subsequently given cannot validate—Deed—Construction—Release, when operative as a conveyance—Pleadings, amendment of events subsequent to the institution of a suit—Power of Court to take cognizance of and grant relief accordingly—Suit for redemption claiming as heir—Relief on the strength of a conveyance from the true heir obtained by plff. subsequent to the institution of the suit

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if can be granted. See (1917) DIG. COL. 617. DURAISWAMI PILLAI v. CHINNA GOUNDAN. 33 M. L. J. 261—22 M. L. T. 533—(1918). M. W. N. 55—7 L. W. 335—43 I. C. 560.

—Adoption—Datta Homam, necessity of—Agarwala Banias, adoption by without performance of, validity. See (1917) DIG. COL. 618. GANGA DEVI v. GOPAL DAS. 20 O. C. 356—43 I. C. 318.

—Adoption—Dattahomam, if necessary to validate—Adoption by widow—Consent of husband if essential in Berar—Execution of deed of adoption, if enough to confer status—Agreement restricting rights of adopted son if valid.

Among the twice-born castes, the absence of the Dattahomam ceremony will not invalidate.

In Berar it is not necessary for the validity of an adoption made by a widow that the husband should have authorised it. The authority is presumed in the absence of a prohibition.

A mere execution and registration of a deed of adoption cannot confer the rights of an adopted son. To constitute an adoption there must be at least a giving and taking.

An agreement conferring a benefit on the widow at the expense of a minor adopted son must be a fair and reasonable one if it is to be upheld. 27 M. 677 foll. (*Mitra, A. J. C.*) CHANDRABHAGABAI v. RAMCHAND.

46 I. C. 850.

—Adoption—Daughter's daughter's son—Migration from Rajputana—Validity.

Under the Mitakshara the adoption of a daughter's daughter's son in a family coming from Rajputana in Western India is valid. (*Chitty and Richardson, J.J.*) BISWANATH SINHA v. KALICHARAN SINHA.

27 C. L. J. 113.—45 I. C. 246.

—Adoption—Daughter's son—Validity of—Kashmir Brahmins.

According to a custom prevailing among Kashmir Brahmins it is permissible to adopt a daughter's son. (*Kankaiya Lal, A. J. C.*) IKBAL NARAIN v. RAJENDRA NARAIN.

21 O. C. 276.—5 O. L. J. 701—48 I. C. 767.

—Adoption—Divesting of estate—Limitations on widow's power to adopt.

Hindu law recognises the validity of an authority given to a widow by her deceased husband to make a second, or even a third or fourth adoption, on failure of the previous adoption to attain the object for which the power is given, the perpetuation of the deceased's line to discharge the obligations that rest on a pious Hindu. Such a power comes to an

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and as soon as any such adopted son attains full legal capacity to continue the line: nor does it subsequently revive on his death, whether or not he leaves a son of his own or a widow capable of adopting to him. 26 Bom. 526 appr. (*Viscount Haldane*.) SRI MADANA MOHANA DEO v. SRI PURUSOTTAMA ANANGA BHEEMA DEO.

41 Mad. 855=35 M. L. J. 138=24 M. L. T. 231=(1918) M. W. N. 621=20 Bom. L. R. 1041  
=23 C. W. N. 177=28 C. L. J. 403=8 L. W.  
167=5 Pat. L. W. 179=16 A. L. J. 725=  
46 I. C. 481=45 I. A. 155 (P. C.)

[On appeal from 38 Mad. 1105=  
27 M. L. J. 305=24 I. C. 999.]

—Adoption—*Dwamushyayana*—Express agreement essential—Presumption of—*Dattaka* form.

Under the Hindu Law, adoption must be presumed to be in the ordinary form, except where there is an express agreement to the effect that the adoption is to be in the *Dwamushyayana* form. (*Heaton and Shah, JJ.*) HUCHRAO v. BHIM RAO.

42 Bom. 277=20 Bom. L. R. 161=  
44 I. C. 851.

—Adoption—Joint family, death of one member—Adoption objection by his widow in pursuance of authority given by him—Death of adopted son at age of four—Second adoption by widow—Validity—Right of second adopted son to joint and separated property of of his adoptive father.

R a member of a Hindu joint family died leaving behind him his widow, his undivided brother and joint and separate property. In pursuance of authority given by R his widow adopted two boys in succession, the second G after the death of the first at the age of four. On a question arising as to the validity of the adoption of G and as to his right as against his undivided brother of R, to a share in the joint property by partition and to R's separate property by inheritance held that the adoption was valid and that G was entitled to a share in the joint property by partition and to R's separate property by inheritance.

*Per Oldfield, J.*—The existence of a co-parcener otherwise competent to take by survivorship is no obstacle to the widow's exercise of the power of adoption recognised in 10 M. I. A. 279 and 85 M. L. J. 188 P. C. Ref.

*Per Phillips, J.*—The theory that an adoption should be to the last male holder is not applicable to joint Hindu families living in co-parcenary. (*Oldfield and Phillips, JJ.*) VENKATRAMIAH v. GOPALAN.

38 M. L. J. 698=  
24 M. L. T. 440=(1918)  
M. W. N. 779=9 L. W. 43

—Adoption—Limits of the exercise of power by the widow.

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A widow's power to adopt a son is at an end when the estate has vested in the widow of a co-parcener who had got the estate by survivorship after the death of the adopting widow's husband. (*Pigot and Walsh, JJ.*) LACHMI KUNWAR v. DURGA KUNWAR.

40 All. 619=16 A. L. J. 646=46 I. C. 566.

—Adoption—Married Sudra, if can be adopted—Benares school.

The adoption of a married Sudra is invalid according to the Mitakshara as understood by the Benares School of Hindu Law. 35 All. 263, 11 A. L. J. 293 foll. (*Prideaux, A. J. C.*) KRISHNA MALI v. DEOLIA.

44 I. C. 923.

—Adoption—Mitakshara family. Adoption by widow in the Dravida country—Assent of Sapindas—Whose assent necessary—Position of widow in an undivided family and in a divided family—Assent of nearest kinsmen equally necessary—Rights of property not to be disregarded.

Under the Dravidian branch of the Mitakshara Law, in the absence of authority from her deceased husband a widow may adopt a son with the assent of all his male agnates 12 M. I. A. 297 foll; 1 Mad. 174; 1 M. 69 dist. and foll

In the case of an undivided family the consent must be obtained by a widow within that family. If the father-in-law is alive from him: if not from the deceased husband's brother. The assent of separate and remote kinsmen is insufficient. The principle is the same if the husband dies separate from his kindred. In considering what assent is sufficient, right of property cannot be disregarded; and the widow cannot be allowed to adopt on the assent of remoter relations when there are nearer one in existence. It is immaterial that the widow knew that the nearest sapindas if asked for their consent would have refused. (*Mr. Amir Ali*) VEERABASAVARAJU v. BALASURYA PRASADA RAO.

41 Mad 998=36 M. L. J. 40=25 M. L. T. 1  
=23 C. W. N. 251=17 A. L. J. 34=  
48 I. C. 706=45 I. A. 265. P. C.

—Adoption of orphan boy invalid. See 6 P. R. 1918.

—Adoption—Putrika Putra—Form of, if obsolete.

Although the practice of begetting a putrika putra son has fallen upon into disuse, it is nevertheless recognised by the Mitakshara Law.

*Per Kanhaiya Lal, A. J. C.*—According to the Hindu Law, a son affiliated in the putrika putra form is a valid substitute for a son. The ease with which he obtained by adoption has had the effect in the course of time of rendering affiliation in the form of putrika putra more or less uncommon, but it has by

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no means become obsolete and effect cannot legitimately be refused to an affiliation in the *putrika putra* form if it is made. (*Stuart and Konhaiya Lal, A.J.C.*) LAL TRIBHAVAN NATH SINGH v. DEPUTY COMMISSIONER, FYZABAD 47 I. C. 225.

—Adoption—Sagotras—Ceremonies unnecessary—Validity of adoption—Supply of ornaments to the parents of boy.

The supply of clothes or ornaments to the parents of the boy to be adopted or the payment of money therefor in anticipation of the adoption cannot invalidate the adoption or be taken to indicate that it was made from sinful or improper motives.

The performance of requisite ceremonies for adoption can be dispensed with, if the adoptive father and the adopted boy belong to the same gotra (*Stuart and Konhaiya Lal, A. J. C.*) LAL TRIBHAVAN NATH SINGH v. THE DEPUTY COMMISSIONER, FYZABAD. 47 I. C. 225.

—Adoption—Status of the unborn son of the adopted son.

Under the Hindu Law, on the adoption of a person, his son who is not born but is in the womb at the time, passes with him into the adoptive family, inasmuch as the legal entity of the after born son must be taken to date from the date of his birth for all the purposes of succession and inheritance. (*Beaman and Heaton, J.J.*) ADVI v. FAKIRAPPA. 42 Bom 547=20 Bom. L. R. 703=46 I. C. 644.

—Adoption by widow—Agreement postponing adopted son's estate during widow's life-time—Alienation of portion of estate during widow's life time by adopted son—Validity—Not a mere *spec-successiones*, but a vested right See T. P. ACT, S. 6. 16 A. L. J. 765.

—Adoption—Widow—consent of nearest Sapinda—Consent arbitrarily withdrawn—Subsequent adoption by widow—Validity. See (1917) DIG. COL. 620, SURYANARAYANA v. RAM DOSS. 41 Mad 604=34 M. L. J. 87=22 M. L. T. 501=(1918) M. W. N. 208=7 L. W. 72=43 I. C. 526.

—Adoption—Widows—Consent of sapindas—Bona fide attempt to obtain same.

A Hindu widow fifteen years after her husband's death and three days before her death, having first obtained the permission of a remote reversioner of her husband, wrote to a nearer reversioner threatening to make an adoption on the strength of the consent of the remote reversioner, if he would not within twenty-four hours signify his assent to an adoption and on his refusal made an adoption

Held, that there was no bona fide attempt to obtain the consent of the sapindas and that the adoption was invalid. (*Wallis, C. J.*)

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and Spencer, J.) CHIRAVURI PATTABHIRAMA RAJU v. KALLEPALLI TIRAPATHIRAJU. 8 L. W. 413=(1913) M. W. N. 678=48 I. C. 222.

—Adoption—Widow—Consent of sapindas—Maheshwari Hindus domiciled in Bengal—Adoption by widow without authority from husband or consent of sapindas.

Held, on the evidence, that among the maheshwari Hindus who had emigrated from Bikaner and settled in Bengal and who were governed by the Mitakshara Law, it was open to the widow of a divided member to adopt without the authority of the husband or the consent of the sapindas. (*Fletcher and Shamsul Huda, J.J.*) MATHURA DAS KARNANI v. SRIKISSEN KARNANI. 27 C. L. J. 817=44 I. C. 5.

—Adoption—Widow's power—Limits of—There is no limit of time during which a Hindu widow may act upon the authority given to her to adopt a son to her deceased husband.

Where a Hindu son, whether natural or adopted, having inherited the property of his deceased father, dies leaving a son, or widow, or any other person as his heir other than the widow of his father, any power to adopt, held by his father's widow comes to an end. But this rule does not apply where the son dies leaving no heir other than his father's widow. (*Stanyon, A. J. C.*) NARAYAN RAMBAO v. DEBIDAS NARSINGH. 47 I. C. 41.

—Alienation by widow—Spiritual benefit of husband to what extent permissible—Spiritual benefit whether equal to *sraddh*.

A Hindu widow succeeded to certain property as heir to her sons. She went on pilgrimage to Jagannadh and there made an oral gift of a portion of the property in her possession in favour of the pandas of the temple. On her return home she made a formal deed of gift in which after alluding to the oral gift she stated that she had made the gift and shankalap "for the salvation of her husband and his family members and for her own salvation." The portion endowed constituted no more than 1/80 part of the entire estate. After her death the next reversioner to her husband brought a suit for recovery of possession of the property from the donee and his lessee by cancellation of the deed of gift:—Held that the gift was valid having been made with a view to the spiritual benefit of the widow's husband and her sons who were included in the expression "husband's family members." An alienation made by a Hindu widow for the spiritual benefit of the deceased will not be set aside merely because it was not made in connection with a *sraddh* ceremony of the deceased.

Per Piggot, J.—There are ceremonies and duties incumbent upon a widow in the sense that

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their performance is regarded as indispensable to the spiritual welfare of her late husband. These duties she is under an obligation to perform and these ceremonies she must carry out and for this purpose she has a power of alienation in respect of the *corpus* of the property in her hands, independent altogether of the proportion which the property alienated may bear to the whole. In the case of an alienation for a purpose regarded as indispensable to the welfare of the late husband, the question will not be what proportion does the property alienated bear to the entire estate but only, whether the alienation was a reasonable one under the circumstances in the sense that the expenditure incurred was such as might be regarded as suitable to the position of the family. There may be alienations made by a Hindu widow for the purpose of doing pious acts for the benefit of her late husband which are not in the nature of spiritual necessities: and with regard to such alienations the question of the proportion born by the property alienated to the value of the entire estate becomes pertinent. (*Piggot and Walesh, JJ.*) KUNJ BEHARI LAL v. LALTU SINGH 16 A. L. J. 996.

———Ancestral property—Inheritance from maternal grand father—Sons not entitled to—Right by birth. See HINDU LAW, JOINT FAMILY, ANCESTRAL PROPERTY. 3 Pat. L. J. 168.

———Applicability of—Adoption of Hinduism—Hindu Law how far governs—Onus of proof.

A man does not become a Hindu by calling himself one, nor is the adoption by a non-Hindu of usages resembling some parts of the Hindu law a sufficient ground for applying the whole of that law to him *en bloc*, in the same way and to the same extent as if he were a Hindu.

In the case of a family which is not originally Hindu but which has adopted Hinduism the burden of proving that the family is governed in a particular matter by the Hindu Law is upon the person who asserts that it is so governed.

An unconscious application of wrong law cannot set up a principle of *stare decisis* merely because it has been left unchallenged for a few years owing to the ignorance of the people affected by it. (*Stanyan, A. J. C.*) UJIYARA v. TILOCHAN GOND. 44 I. C. 435.

———Applicability of—Baisichowasi Gaddis custom—Proof of—Non-Hindu Community adopting Hinduism—Assimilation of Hindu law of adoption.

In dealing with the custom of an entire community it is of more importance to have regard to the history of the main body than to the history of less important branches.

## HINDU LAW CASTE.

The holders of the Baisi Chowrasi gaddis are now a recognised community. The members of that community were non-Hindu in origin, but they have now accepted Hinduism to such a degree that the burden of proving that they have not assimilated the Hindu law of adoption lies on the person who asserts it.

The Lactomipur family has assimilated the Hindu law of adoption and there is no custom in it to the contrary.

The question of the burden of proof is not of any very great importance in a Court of Appeal where evidence has been given upon both sides in the original court (*Chapman and Atkinson, JJ.*) SAHDEO NARAIN DEO v. KUSUM KUMARI. 46 I. C. 929.

———Applicability of—Central Provinces—Lex loci—Law of the Benares School—Bombay law, how far applicable.

The Benares school of Hindu law is *lex loci* of the Central Provinces, that of the Bombay School being applied only to Maharatta Brahmans in Nagpur and other cases where it is specially found to be applicable. (*Stanyan, A. J. C.*) GANNO v. BENI. 14 N. L. R. 82—43 I. C. 943.

———Applicability of—Gonds of Central India Not Hindus—Hindu Law not applicable See C. P. LAWS ACT, S. 5 44 I. C. 435

———Applicability of—Halai memons—Succession and inheritance—Mahomedan Law applicable. See CUTCHI MEMONS. 20 Bom. L. R. 289.

———Applicability of—"Hindu" meaning of—Kalars, law applicable to—Caste reputation, force of, Court, duty of—Burma Laws Act S. 13, See (1917) DIG. COL. 621 MAUNG CHIT MAUNG v. MA YAIT. 10. Bur. L. T. 194—37 I. C. 780.

———Applicability of—Migrating family—Law of original abode applicable. See HINDU LAW, ADOPTION. 27 C. L. J. 517. also 27 C. L. J. 119.

———Applicability of—personal law or territorial law.

Although the Hindu Law is primarily a personal law, it has also become attached to localities and therefore a Hindu must be presumed to be governed by the law of the locality where he resides. (*Stanyan, A. J. C.*) UJIYARA v. TILOCHAN GOND. 44 I. C. 435

———Caste—Sudra, who is—Non-Hindu can be a Sudra.

Every Hindu, properly so called, who does not belong to one or other of three regenerative classes is a Sudra, and to him the Hindu law

## HINDU LAW CONVERSION.

relating to Surdas applies of its own force, but no non-Hindu can be a Sudra, any more than he can be a member of any of the regenerate class. Since a Gond is not a Hindu at all he cannot be brought within the category of Sudras. (*Stanjon, A. J. C.*) **UJIYAR v. TILOCHAN GOND.** 44 I. C. 435.

———Conversion—Effect of—Retention of Hindu law and usage—Onus on person setting up. See C. P. LAWS ACT, S. 5.

44 I. C. 435.

———Conversion of Hindu widow to Mahomedanism and re-marriage—Effect forfeiture of first husband's estate See HINDU LAW WIDOW, RE-MARRIAGE

35 M. L. J. 317 (F.B.)

———Custom—Adoption—Proof of—Non-Hindu community—Adoption of Hinduism—Effect of. See HINDU LAW APPLICABILITY OF.

46 I. C. 929

———Dancing girl—Succession—Daughter's daughter preferred to daughter's son. See HINDU LAW, SUCCESSION.

45 I. C. 672.

———Debts, See also HINDU LAW, JOINT FAMILY.

———Debts—Antecedent debt incurred by one brother when binding on others.

In a joint Hindu family consisting of brothers and their families, an antecedent debt incurred by a brother in the position of manager is not binding upon his other coparceners, unless it can be shown to have been incurred for family necessity. It is not the pious duty of brothers or nephews to pay debts incurred by their brothers or uncles. (*Tudball, J.*) **NIRBHAY LAL v. KALLAN.**

45 I. C. 546.

———Debts—Antecedent debts—Personal covenant in simple mortgage if can amount to antecedent debt—Son's liability to pay father's debts.

The personal obligation to repay comprised in a simple mortgage may amount to an antecedent debt which the sons may be bound to discharge if the debt was not incurred for an illegal or immoral purposes. 39 All. 437 foll. (*Kannaiya Lal and Daniels, A. J. C.*) **RAMNAN LAL v. RAM GOPAL.**

21 O. C. 200=47 I. C. 987.

———Debts—Antecedent Debts—Prior Mortgage debt, not antecedent debt. See HINDU LAW, JOINT FAMILY, ALIENATION.

35 M. L. J. 382

———Debts of father—Liability of sons—Contract of suretyship to pay on default by another son liable to pay—Distinction between different kinds of suretyship.

## HINDU LAW DEBTS.

Where a Hindu father makes a promise in the following words: "I shall make the said V. pay the amount due under the said promissory note within two months, from this date. In default of payment as aforesaid by the said person within the said time, I shall pay the amount of principal and interest on the said promissory note and get back the said promissory note and the surety bond and the title deeds." the promise amounts to a suretyship for payment and his sons are bound under the Hindu law to pay the debt created thereby.

Distinction between the various kinds of suretyship and their binding nature on the sons under the Hindu Law discussed. (*Wallis, C. J. and Spencer, J.*) **THANGATHANMA v. ARUNACHELLA CHETTIAR.** 41 Mad. 1871=35 M. L. J. 225=(1918) M. W. N. 673=43 I. C. 75.

———Debts of father liability of sons—Father an agent—Decree against him for amounts left uncollected by him as agent—Liability of sons for such debt.

Mitakshara sons are bound by a sale of their property held in execution of a decree against their father even where it is not shown that the debt was not incurred for legal necessity, unless they succeed in proving that the debt was an immoral debt. But every civil debt does not necessarily involve a moral stigma.

Where a Hindu father, who had acted as an agent, failed to deliver accounts to his principal, and by reason of his failure a decree was obtained against him and the ancestral property was sold in execution of the decree. Held, that there being nothing in the circumstances of the case to show a criminal appropriation on his part, or to show that there was any dishonesty which could constitute any immoral act within the meaning of the Hindu Law, the sons were bound by the sale. 6 I. A. 83, 26 C. L. J. 1, 31 All. 76 and 39 Cal. 862 foll. and ref. (*Mulick and Atkinson, J.J.*) **MCHANTHA GADADHAR RAMANUJ DAS v. GHANA SHYAM DAS.**

3 Pat. L. J. 333=47 I. C. 212.

———Debts of father—Liability of sons on promissory note executed by father after partition in renewal of a note executed before—Debts of father—Pious obligation of son, extent of. See (1917) DIG. COD. 623; **PEDA VENKANNA v. SREENIVASA DEEKSHITULU.**

41 Mad. 135=33 M. L. J. 519=22 M. L. T. 364=(1915) M. W. N. 55=5 L. W. 549=43 I. C. 225

———Debts—Father—Pious obligation of sons during life-time of father—Liability of debtor's share of joint family property.

So long as the father in a Hindu family is alive the pious obligation to discharge his debts which is imposed by the Hindu Law upon his sons cannot be enforced.

## HINDU LAW DEBTS.

Under a decree against any individual coparcener for his separate debt, a creditor may during the life of the debtor seize and sell his undivided interest in the family property. (*Lindsay, J. C.*) MANNA LAL v. BHAGWAN-DIN. 5 O. L. J. 447=47 I. C. 679.

Debts—Father—Sale of family properties by father—Purposes not binding—Suit to set aside sale by sons and for recovery of their share—Purchaser if entitled to a charge for any portion of the consideration—Non-binding portion of the consideration, if a debt. See HINDU LAW, JOINT FAMILY. 35 M. L. J. 451.

Debts—Liability of sons and grandsons for debts of father and grandfather contract of surety and indemnity

A Hindu son or grandson governed by the Mitakshara law is liable for the debt of his father or grandfather due on account of a contract of suretyship for the payment of money, but not money due on a contract of indemnity unless the transaction comes within the meaning of the term "Vyavaharika" (i.e.) lawful, useful or customary. (*Mullick and Thornhill JJ*) MAHABIR PRASAD v. SRI NARAYAN. 3 Pat. L. J. 396=4 Pat. L. W. 437=(1918) Pat. 323=46 I. C. 27.

Debts—Liability of son—Illegal or immoral debts—Creditor party to father's waste. See (1917) DIG. COL. 628; MUSSAMMAT JASWANTI v. TEJ NARAIN. 10 P. R. 1918=120 P. W. R. 1917=41 I. C. 192.

Debts—Son's liability for amounts collected by father as trustee and misappropriated by him—Avyavaharika debts—Meaning See C. P. C. S. 92. 35 M. L. J. 661.

Debts—Trade debts—Minor's share in Joint family property liable and not merely his interest in the partnership concern. See HINDU LAW, JOINT FAMILY, TRADE. (1918) M. W. N. 44=7 L. W. 218=43 I. C. 76.

Debts—Widow in possession of husband's estate—Debts of husband undertaken to be paid off by a stranger with consent of creditor—Debt ceases to be binding on estate—Widow not entitled to sell of portion of estate, to discharge such debts there after. See HINDU LAW, WIDOW. 16 A. L. J. 463.

Gift—Deed of when complete—Deed not delivered to donee or his agent and repudiated by donor—Effect.

Where though a deed of gift was executed by a person in favour of a minor, it was not delivered to the donee or her guardian or to anybody acting on her behalf but was kept by the donor with himself and was, though presented by him for registration, yet repud-

## HINDU LAW GUARDIANSHIP.

ated by him afterwards and he executed a document inconsistent with and having the effect of cancelling the contemplated gift, held, that the deed of gift was incomplete. 40 M. 759 F. B. dist. (*Abdur Rahim and Oldfield, JJ.*) PADMAVATI v. SHRINIVASA KAMPTI. 7 L. W. 339=44 I. C. 483.

Gift—Female—Gift to wife as absolute owner, during her life-time—Limited estate. See WILL, CONSTRUCTION. 6 Pat. L. W. 167.

Gift—Female donee—Malik mustagil, meaning of—Absolute estate.

The word *malik* alone used in a deed of gift executed by a Hindu in favour of a female unless there were something definite to the contrary in the surrounding circumstances to qualify the meaning of the expression indicates an absolute estate.

Where a Hindu, executed a deed of gift in favour of his daughter-in-law and constituted her thereunder *malik mustagil* in respect of the property gifted to her, held, that in the absence of the surrounding circumstances to indicate that the donor intended the lady to take a mere life-estate, the lady must be deemed to have taken an absolute estate.

A grant should be construed in favour of the grantee rather than in favour of the grantor. (*Richards C. J. and Banerji, J.*) NAULAKHI KUAR v. JAI KISHEN SINGH. 40 All. 575=16 A. L. J. 564=46 I. C. 905.

Gift—Joint family property—Gift of, does not bind even the undivided share of alienor. See HINDU LAW, JOINT FAMILY, SELF-ACQUISITION. 22 C. W. N. 649.

Gift—Life-estate—Succession of life estates—Creation of, repugnant to law. See GRANT. 47 I. C. 402.

Guardianship—Minor member of joint Hindu family—No power to appoint guardian for properties of minor. See HINDU LAW, JOINT FAMILY. 46 I. C. 15.

Guardianship—Testamentary guardian—Appointment of by father or manager in respect of co-parcenary property of minor members, invalid. See HINDU LAW, WILL, TESTAMENTARY GUARDIAN. 34 M. L. J. 381.

Guardianship—Mother's right to act as guardian of minor sons in respect of joint family property except in case of partition. See HINDU LAW, PARTITION. 8 L. W. 400.

Guardianship—Step-mother, right of. See T. P. ACT S. 72. 34 M. L. J. 177.

## HINDU LAW ILLEGITIMATE SON.

—Illegitimate son of permanently kept concubine—Succession to property of—Right of the putative father surviving such son there being neither issue, widow nor mother of son—Inheritance—Mutuality—Text—Interpretation, rules of. See (1917) DIG. COL. 627: SUBRAHMANYA AIYAR v. RATHNAVELU CHETTY.

41 Mad. 44=33 M. L. J. 224=

22 M. L. T. 94=6 L. W. 148=

32 I. C. 556 (F. B.)

—Impartible estate—Custom—Alienation—Restraint on powers of—Military Tenure—Custom of inalienability—Proof of—Permanent Settlement Regulation (XXV of 1802), S. 8—Effect of.

The Zamindar of Karvetinagar was originally a semi independent poligar holding an impartible Raj on the terms of paying an annual tribute to the Nawab of Arcot and supplying a military force. In 1792, the East India Company took the control of Karvetinagar from the Nawab under a treaty and by a later treaty of 1801, the same independent kingdom became merged in the British territory. The poliem was settled in 1802 as a Zamindari and a sanad was granted to the Zamindar which contained *inter alia*, provisions enabling the holder for the time to transfer by sale, gift, etc., the whole or a portion of the estate. In pursuance of the policy which led to the passing of the Permanent Settlement Regn. of 1802 the poligar was disarmed, the military services were dispensed with and a fixed money tribute was substituted in lieu thereof. In a suit for the sale of the various portions of the Zamindari mortgaged to creditors by the holder thereof prior to the Madras Impartible Estates Act it was contended by the deft. a succeeding Zamindar that the Karvetinagar Zamindari was inalienable (1) because of its original military tenure and (2) because of the existence of a custom in the Zamindari by the force whereof any holder for the time being was not entitled to alienate the same except for purposes for which the manager of a joint Hindu family, could as such manager alienate the joint family property. On appeal;

*Held*, (1) that when during the period the poligar was semi-independent under the Nawab a restraint on alienation of the whole or a part of the Raj without the permission of the overlord was under the very circumstances of the tenure necessary, (2) that, however, as soon as the military tenure under which the properties were held, was put an end to and the British Government granted the lands under a quite different tenure with express powers of alienation and after imposing a liability on the lands to be attached and sold in execution, the restraint on alienation came to an end.

Per Napier, J. By the sanad the Govt. created a new estate with the incident of alienability for the benefit of the Zamindar

## HINDU LAW IMPARTIBLE ESTATE.

and the fact that similar language is found in the sanad of other Zamindaries on whose alienation there was no such restraint under the prior Govt. does not affect the question.

*Semble*. By the sanad the Govt. wanted to alter the tenure on which the estate was held previously. 42 I. A. 329 ref.

*Per curiam*. The essence of a custom is in its being some special usage modifying the law. A practice however long standing which merely followed but did not modify the then existing law cannot be relied on as a custom having the force of law 22 M. 383. (P. C.) foll. Where the evidence disclosed that from time to time the son or brother of the Zamindar for the time being protested against an alienation made by him not for necessity and set up a custom but that each Zamindar on inheritance from his father continued to alienate the properties without any necessity, *held* that the custom as to inalienability had not been proved. (*Sadasiva Iyer and Napier, JJ.*) ZAMINDAR OF KARVETINAGAR v. SUBBABAYA PILLAI. (1918) M. W. N. 146=7 L. W. 36 =43 I. C. 871.

—Impartible Estate—Junior members—Position of—No right by birth—Maintenance—Right to—Limits of Custom—Proof of, unnecessary, if judicially recognised.

An impartible zamindari is the creature of custom. It is of its essence that no co-parcenary in it exists. Apart, therefore, from custom and relationship to the holder the junior members of the family have no right to maintenance out of it.

A custom entitling the sons of the holder to maintenance has so often been judicially recognised that it is not necessary to prove it in each case.

There is no invariable custom by which any member of the family beyond the first guardian from the last holder can claim maintenance as of right. 5 Cal. 253 appr. (*Lord Dunsedin*) RAJA RAMA RAO v. RAJA OF PITTAPUR.

41 Mad 778=35 M. L. J. 392=24 M. L. T.

276=(1918) M. W. N. 922=23. C. W. N.

173=23 C. L. J. 428=20 Bom. L. R. 1056.

16 A. L. J. 833=5 Pat. L. W. 267=

47 I. C. 354=45 I. A. 143. (P. C.)

## ON APPEAL FROM.

39 Mad. 396=28 M. L. J. 624.

—Impartible estate—Maintenance of junior members—Right cannot be enforced against transferee—Custom.

A transfer of an impartible estate is not subject to rights of maintenance claimed by younger members of the family of the transferor, unless a family custom to that effect is published. (*Roe and Coutts, JJ.*) THAKUR DEBENDRO NATH SAH DEO v. DEO NANDAN SINGH.

3 Pat. L. J. 648=

48 I. C. 613.

## HINDU LAW IMPARTIBLE PROPERTY.

—Impartible property—Endowments of office—Acquisition out of savings from—Nature of.

Under the Hindu Law property allotted by the State to a person in consideration of the discharge of particular duties or as payment for an office is *prima facie* impartible, even though the duties or office may become hereditary in a particular family. Property purchased out of the savings of the income of a Patwari is *prima facie* self-acquired property, and in the absence of any intention on the part of the acquirer to treat it as joint family property his co-parcener cannot claim a partition of the same. (*Mitra, A. J. C.*)

SHIVEAM AMBADOSS v. SHRIDHARSHIVRAM  
48 I. C. 137.

—Joint family—Acquisition in the name of one member—No presumption that it is separate property. See HINDU LAW JOINT FAMILY, PRESUMPTION.

5 Pat. L. W. 122=48 I. C. 255.

—Joint Family—Alienation by one member when valid—Sale or gift of a member's share—Invalidity of.

Under the law of the Mitakshara joint family property owned by all the members of the family as co-parceners cannot be the subject of a gift, sale or mortgage by one co-parcener except with the consent, express or implied, of all other co-parceners. Any deed of gift, sale or mortgage granted by one co-parcener on his own account or over the joint property is invalid and the estate is wholly unaffected by it and it entirely stands free of it. 30 All 437 rel. (*Drake Brockman, J. C.*) VINAYAK RAO v. LAXMAN

14 N. L. R. 36=44 I. C. 51.

—Joint Family—Alienation of family property by one member—Consent by other members—Silence when amounts to.

That silence for a long interval by members of a joint Hindu family entitled to avoid a sale of the family property to certain other members does not by itself, amount to adequate evidence of implied consent to the sale. (*Lindsay, J. C.*) NADIR SINGH v. INDER SEN

21 O. C. 156=46 I. C. 360.

—Joint family—Alienation by father—Family necessity—Antecedent debt—Prior mortgage if an antecedent debt.

An alienation by the father of a Hindu joint family is binding on the sons under two circumstances (1) where the alienation is for purposes of family necessity (2) where it is for discharging an antecedent debt incurred by the father.

The expression 'antecedent debts' applies only to debts incurred antecedently on the father's sole responsibility and wholly apart from the ownership of the joint estate or the

## HINDU LAW JOINT FAMILY.

security afforded or supposed to be available by such joint estate

A prior mortgage which has not been proved to have been created to discharge a debt antecedent to it cannot be treated as an antecedent debt for the purpose of binding the sons' interest in co-parcenary property in a subsequent mortgage. 33 M. L. J. 14 foll. (*Spencer and Krishnan, J.J.*) BADAGALA JOGI NAIDU v. BENDALAM PAPIAH NAIDU.

35 M. L. J. 382=48 I. C. 289.

—Joint family—Alienation—Father—Sale of family property for purposes not binding on family—Rights of his sons and of purchaser—Suit by sons for recovery of their share—Purchaser if entitled to charge for any portion of consideration—Consideration for such case of "debt" for which sons are liable—Prior suit by father for setting aside sale—Effect on—Maintainability of suit by sons Res-judicata.

In a suit by Hindu sons for the recovery of their share in joint family property sold by their father for purposes found not to be binding on the family, the purchaser, was not entitled to any charge on the sons' share for any portion of the consideration paid by him and that the suit was not barred by *res judicata* by reason of the dismissal of a prior suit by the father for setting aside the sale on the ground of fraud, undue influence and want of consideration.

Per *Abdur Rahim, J.*—Until the sale is set aside, no question of any portion of the consideration for such a sale being a debt of the father which the sons would, under the Hindu Law, be under a pious obligation to pay can arise

Quare. Whether even then the portion of the consideration found to have been advanced for purposes not binding on the family can be said to be such a debt. (*Abdur Rahim and Napier, J.J.*) KILARU KOTTAYYA v. POLAVARAPU DURGAYYA.

35 M. L. J. 451=

47 I. C. 192.

—Joint family—Alienation by father—Sons suit to set aside—Alienee if bound to account for mesne profits.

The possession of a transferee from a Hindu father under a deed which was set aside on condition of the son's paying a certain sum of money to the vendee could not be said to be unlawful while the deed stood and no mesne profits could be awarded against him. (*Lord Phillimore.*) BANWARI-LAL v. MAHESH

21 O. C. 228=45 I. A. 234 (P. C.)

—Joint family—Alienation by father—Suit to impeach alienation by sons—Necessity—Antecedent debt—Proof of.

Pfiff sued for cancellation of two mortgage deeds and a lease alleged to have been illegally executed by his father in-favour of debt.

## HINDU LAW JOINT FAMILY.

*Held*, that it was necessary for the Court to decide whether the debts in question were raised by the executant for some family necessity or to meet antecedent debts and to see whether the antecedency of the debts was real or merely a cover for what was essentially a breach of trust. (*Scott-Smith J*) **LADJA RAM v. NARINJAN LAL**. 101 P. W. R. 1918=45 I. C. 939

— Joint family—Alienation—Mortgage by managing member, not being the father—No necessity—Mortgagor's share even not liable. See HINDU LAW, JOINT FAMILY MANAGER. 40 All. 171 (P. C.)

— Joint family—Alienation by one member—Mortgage of share without legal necessity.

Under the Mitakshara, as strictly interpreted, any mortgage granted by a co-parcener on his own account over the joint family property is invalid, but the view that has prevailed in the Central Provinces, following that of the Bombay and the Madras High Courts has been that a co-sharer can mortgage his own share without any such necessity as is binding on all the co-parceners. This view has been one of gradual growth founded upon the equity which a purchaser for value has, to be allowed to stand in his vendor's shoes and to work out his rights by means of a partition. Case law on the point discussed. (*Batten, O. J. C.*) **RAI BEHARI LAL v. HUKUMCHAND**. 46 I. C. 754.

— Joint family—Alienation of property Necessity—Purchase of fresh property—Trade—Adult co-parceners joining in sale—Effect of—on minor members—Suit by them to set aside alienation—Mesne profits—Right to—Discretion of Court.

The staying of a prospective trade is not a ground justifying alienation of family properties by the manager. An alienation of joint family properties for the purpose of purchasing other properties instead is not binding on the members of the family at any rate in the absence of clear benefit to the family.

Where the sale deed itself does not show any necessary purpose and there is no evidence of necessity, the fact that all the adult members of the family joined in it does not give any weight to the transaction.

Where the co-parceners of a joint family sue to set aside alienations by the Manager, they are not as of right, entitled to mesne profits from the date of alienation. Mesne profits are in the nature of damages which the Court will mould according to the justice of the case. 29 A. 61 ref (*Wallis, C. J.*) and *Kumaraswami Sastri, JJ.* **GANESHAIYAR v. AMERTHASANY UDAYAR**.

23 M. L. T. 245=(1918) M. W. N. 892=44 I. C. 605.

## HINDU LAW JOINT FAMILY.

— Joint Family—Alienation—Right of others to impeach as being improper and without necessity—Right of stranger and members, of family—Difference.

Where a member of a joint family makes an alienation of property belonging to the family purporting to act on behalf of the family, the other members can call it in question on the ground that it was made without authority or without valid necessity for their benefit. But a person who is a stranger to the family and does not claim through the joint family is not competent to do so. (*Piggot and Walsh, JJ.*) **BANARSEE DAS v. SHEODARSHAN DAS SHASTRI**. 16 A. L. J. 394=45 I. C. 451.

— Joint Family—Ancestral property—Property inherited from maternal grand-father. See (1917) DIG. COL. 633; **BISWANATH PRASAD SAHU v. GAJADHAR PRASAD**.

3 Pat. L. J. 168=(1917) Pat. 356=3 Pat. L. W. 286=43 I. C. 370.

— Joint family—Bond in name of member of—Suit upon—Parties—Other members if necessary parties—Bond for family debt Effect See (1917) DIG. COL. 632; **SHER MAHOMED v. RAM CHAND**. 87 P. R. 1917=170 P. W. R. 1917=8 P. L. R. 1918=42 I. C. 377.

— Joint Family—Debts—Father and son Liability of son's share—Immorality or illegality—Proof of—Onus—Connection between immorality and particular debt, proof of.

In order to except a Hindu son's share in the family property from liability for his father's debts the son must show that the debts were incurred for immoral purposes 30 All. 156 rel. 31 All. 176 dist. 28 All. 508 expl.

There must be some definite connection established between the debt and the expenditure. It is not sufficient to prove that the father was a man of extravagant and vicious habits. 14 Bom. 320 foll.

The onus of proof that the debt was incurred by the father for illegal or immoral purposes, is not shifted on to the creditor by proof of immoral habits. (*Mitra, A. J. C.*) **BHIKA v. FARLAL**. 45 I. C. 206.

— Joint Family—Debt incurred by father personally—Liability of son's share—Execution of personal decrees against father—Pious obligation. See (1917) DIG. COL. 634; **BHARATH SINGH v. PRAG SINGH**. 20 O. C. 311=43 I. C. 291.

— Joint Family—Debts—Manager incurring trade debts in partnership with stranger—Liability of minor member's interest in joint family property for the debt. See HINDU LAW, JOINT FAMILY TRADE. 43 I. C. 76.

## HINDU LAW JOINT FAMILY.

———*Joint Family—Debts—Mortgage debt contracted by father if enforceable against the son during father's life-time—Antecedent debt, meaning of—Debt incurred for immoral or illegal purposes—Burden of proof.*

The pious obligation of a mitakshara son to pay his father's debts is not during his father's life-time, a ground for giving effect as against the son, to a mortgage of ancestral joint family property executed by the father to secure a debt which is neither antecedent nor justified by legal necessity. A loan made to the father on the occasion of such a mortgage is not an "antecedent" debt and if the loan is not justified by the legal necessity the mortgage is to that extent inoperative as against the son's share. 39 All 437 P. C. and 9 N. L. R. 74 ref.

If in a suit to enforce such a mortgage the son is impleaded as a party, he can show that any "antecedent" debt forming part of the consideration is tainted with immorality; but it is not incumbent on him to go further and prove that when the debt was contracted the creditor was aware or might have been aware of the immoral purpose for which the money was taken. 28 All 508 foll. (*Drake Brockman, J. C.*) DILLI SINGH v. BINA.

14 N L R. 41=44 I. C. 506.

———*Joint Family—Debts—Suit against widow and brothers of deceased executant—Suit on bond executed by the deceased member—Form of decree. See (1917) DIG. COL. 684; PAHALWAN SINGH v. JANKI.*

40 All 17=15 A. L. J. 849=  
42 I. C. 858.

———*Joint Family—Father—Alienation of ancestral property—Sons not in existence if can question. See (1917) DIG. COL. 684 BISAWANATH PRASAD SAHU v. GAJADHAR PRASAD SAHU.*

3 Pat L J 168=(1917) Pat 356.  
=3 Pat L. W. 286=43 I. C. 370.

———*Joint Family—Father borrowed at heavy and exorbitant rate of interest on credit of Family property—Power of court to interfere. See INTEREST.*

21 O C. 365.

———*Joint Family—Father—Debts of—Son not liable during father's life-time except for antecedent debts or debts contracted for necessity. See HINDU LAW, JOINT FAMILY, DEBTS.*

14 N L R. 41.

———*Joint Family—Father—Decree against and sale of right and interest of father in execution—Right acquired by purchaser—Son's interest in property if and when will pass.*

The rule that a sale of family property in execution of a decree obtained against a Hindu father for debts which are neither illegal nor immoral involves the sale of the interest of his son or sons therein does not always apply.

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The creditor's conduct, for example, may evidence his intention not to proceed against the interest of the son or sons. This is peculiarly so where the form of his proceedings points to an election to seek execution against his own debtor's interest, and no further.

Where the certificate of sale recited that the decree-holder has bought "the right and interest of the judgment-debtor (the father) to be allotted by division," held, that there was strong indication of an intention to proceed against the father's interest only. (*Lord Sumner*) RADHA KRISHNA CHANDERJI v. RAM SAHADUR.

34 M. L. J. 97=  
23 M. L. T. 28=16 A. L. J. 33=  
7 L. W. 149=27 C. L. J. 191=  
22 C. W. N. 330=(1913) M. W. N. 163=  
20 Bom L. R. 502=43 I. C. 263 (P. C.)  
See also 3 Pat. L. J. 1=  
(1917) Pat 285=3 Pat L. W. 222=  
42 I. C. 835.

———*Joint Family—Father—Decree against—Execution sale of ancestral property—Son's share if bound*

Debts, Nos. 6 and 7 sued to recover a sum of money from Debt. No. 5 in 1904 and obtained a decree. At that time, debt. No. 5 had a son (plff.) who was four years of age. In execution of the decree, two houses forming part of the ancestral family property of debt. No. 5 were sold at a Court sale and purchased by debt. Nos 1 to 4. The plff. sued in 1915 to have it declared that his half share in the properties did not pass to debt. Nos. 1 to 4 at the court sale and to recover possession of his half share on equitable partition. Debt Nos. 1 to 4 contested the suit on the ground that the son's interest in the property passed by the Court sale.

Held, that the son's share in the property did not pass to debts Nos. 1 to 4 at the Court sale. (*Batchelor and Kemp, JJ.*) HANMANDAS v. VALLABHDAS

20 Bom L. R. 472.  
46 I. C. 133.

———*Joint Family—Father—Decree for money against—Execution sale of entire property including son's interest—Debt not illegal or immoral.*

A money decree against a Hindu father for a debt which was neither illegal nor immoral and whether incurred for family purposes or not, may be enforced in his life-time by the execution sale of the entire co-parcenary estate and is binding on his sons. 39 A 437 P. C. dist (*Shadi Lal and Le Rossignol, JJ.*) AMAR NATH v. RUSTOMJI.

15 P. R. 1918=  
24 P. W. R. 1318=43 I. C. 673.

———*Joint Family—Father—fraudulent exercise of powers of—What amounts to. See HINDU LAW—PARTITION.*

23 M. L. T. 307.

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———Joint Family—Father—Purchase in name of son. Presumption as to ownership—Benami. See BENAMI. 73 P. R. 1213.

———Joint Family—Father—Sale of family property in execution of money-decree against—Son's suit to recover his share of property sold—Proof—Onus—Quantum.

A Hindu suing to recover his share of family property sold in execution of a decree obtained against his father is bound to show that the debt for which the property was sold was not binding on him, because it was contracted for illegal or immoral purposes. In the absence of such proof by him his suit must fail. (*Spencer and Krishnan, JJ.*) SUBBA ROW v. SWAMIA FILLAI. 7 L. W. 427= 47 I. C. 334.

———Joint family—Gift—Gift of property of joint family property invalid even as regards undivided share of alienor. See HINDU LAW, JOINT FAMILY, SELF-ACQUISITION.

22 C. W. N. 649.

———Joint family—Khatris of Amritsar—Whether a son can enforce partition of ancestral property during his father's life-time—Burden of proof. See (1917) DIG. COL. 621, HARI KISHEN v. CHANDU LAL.

105 P. R. 1917=43 I. C. 667.

———Joint Family—Manager—Bond in favour—Payment to junior member, not a good discharge of liability. See CONTRACT ACT, S. 45. 7 L. W. 221.

———Joint Family—Manager—Debts—Necessity—Borrowing money for purchasing of her property nearer home—Speculation—Liability of other members. See (1917) DIG. COL. 6423. DIP NARAIN CHOWDHURY v. DEVENDRA NATH DAS. 3 Pat. L. W. 181= 43 I. C. 193.

———Joint Family—Manager—Decree against—Execution sale—What passes under—Question of fact depending on circumstances—Minor sons not necessary parties to suit—T. R. Act, S. 90—Personal decree under—Execution Sale—Whole property sold.

In order to ascertain what passes upon a sale in execution of a decree made against the Karta of a Mitakshara joint family it is necessary to look firstly, at the circumstances in which the debt was contracted, secondly, at the form in which the plffs. claim was passed, thirdly at the decree made, fourthly, at the attachment, fifthly, at the sale proclamation, and lastly at the certificate of sale.

It is not correct that decree against a Mitakshara father under S. 90 of the T. P. Act for the sale of properties not covered by the mortgage is in the nature of a personal decree and under that personal decree nothing but the personal property passes by the sale, 18 Cal 21 ref.

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Where a debt is contracted for family purposes it is not necessary to make the minor sons of the family parties to the case. (*Roe and Imam, JJ.*) JAGDISH NARAYAN PRASAD SINGH v. MANMATHA NATH DEY.

(1918) Pat. 71=4 Pat. L. W. 331= 45 I. C. 76.

———Joint family—Manager—Mortgage of joint property by manager who is not father—Burden of proving necessity—Whether a mortgage without necessity binds mortgagor's own share—Validity of mortgage to extent of benefit to joint family.

The mortgage of joint estate made by the manager of the property, who is not the father of the other members of the joint family, can only be justified so far as it is wanted for the joint family purposes. If the necessity cannot be established by direct evidence it may be assumed if it can be shown that reasonable care was taken to ascertain if such circumstances existed and the transferee acted in good faith. In either case the burden of proof lies on the person who claims the benefit of the mortgage.

If the mortgage debt was incurred for necessity, not even the mortgagor's own interest can be sold in enforcement of the mortgage. 39 All. 560 foll.

When the mortgage is for a larger amount than the necessity warrants, it will only be upheld to the extent to which the necessity has been proved.

A Zemindar, manager of a joint family, mortgaged three joint villages for Rs. 3,002 to pay the Government revenue. The lender suing on the mortgage, other members of the joint family contested the validity of the mortgage. It was proved that Rs. 1,658 odd were actually paid as revenue of two of the villages out of the money lent, but no evidence was given as to the disposal of the balance.

Held, that the mortgage was enforceable to the extent of Rs. 1,658 only against the joint villages and that as regards the balance, not even the mortgagor's own share in those villages was bound. (*Lord Buckmaster.*)

ANANT RAM v. THE COLLECTOR OF ETAH.

40 All 171=34 M. L. J. 291=

(1918) M. W. N. 446=7 L. W. 323=

23 M. L. T. 223=16 A. L. J. 245=

22 C. W. N. 484=27 C. L. J. 363=

4 Pat. L. W. 226=20 Bom. L. R. 524=

44 I. C. 290 (P.C.)

———Joint Family—Manager—Partition by will—Power to effect.

A Hindu proprietor or the manager of a joint Hindu family cannot make by Will any equal or unequal distribution of his ancestral property. Mad. 317 dist. (*Le Rossignol and*

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Wilberforce, JJ.) NAND LAL v. DEWAN CHAND. 36 P. R. 1918= 76 P. L. R. 1918=73 P. W. R. 1918= 45 I. C. 162.

----- Joint Family--Manager--Power of, to revive barred debt--Not binding on other members of the family. See MALABAR LAW, KARNAVAN. (1918) M. W. N. 144.

----- Joint Family--Manager--Representation of entire family--Mortgage suit--Other members not necessary parties.

The manager of a joint Hindu family occupies a position which entitles him to bring a suit to enforce a right belonging to the family without making the other members of the family parties to the suit.

This principle of representation is equally applicable to a suit on a mortgage, and particularly so in a case in which the contract was made with the manager who is the head of the joint family and conducts the family business. (Drake Brockman, J. C.) DAMODHAR NAMDEO CHIMOTEY v. KESHO GOVIND. 46 I. C. 727.

----- Joint Family--Minor member--Guardian for the property of not to be appointed.

No guardian can be appointed in respect of the property of a minor who is a member of an undivided Mitakshara family. 25 All. 407 and 7 C. W. N. 681 foll. (Mullick and Thornhill, JJ.) MAHANAND MISSIR v. DASRATH MISSIR. 46 I. C. 815.

----- Joint family--Minor--Trade started by father on behalf of himself and minor son--Debts incurred by father--Son not personally liable on attaining majority. See HINDU LAW, JOINT FAMILY, TRADE. 35 M. L. J. 473.

----- Joint family--Mortgage--Right to sue on--Mortgage in the name of manager--Suit by some of the members, others disclaiming interest therein.

A suit on a mortgage standing in the name of the manager of a joint Hindu family consisting of his sons and nephew was instituted by the sons of the mortgagee after his death. The nephew disclaimed all interest in the mortgage.

Held, that it was competent to the sons to sue without the production of a Succession Certificate. (Stuart and Kanhaiya Lal, J. C.) RAM SEWAK v. BALDEO BAKSH. 47 I. C. 649.

----- Joint Family--Partition--Agreement by a member of the joint family with the manager under which the latter is to pay certain sums for maintenance--Whether effects a severance of the joint family--Suit for partition by one member of the family alone against the manager--Other co-parceners not parties--Decree passed awarding the p'ff's. share--

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Whether effects a severance of the other co-parcener's shares--Provision in a partition for a stranger, not being a bona-fide family settlement, invalid. See (1917) DIG. COL. 645; PALANIAMMAL v. MUTHUVEKATA-CHALA MANIAGARAR. 33 M. L. J. 759= 33 I. C. 833

----- Joint family--Partition--Alienation from divided co-parcener--Right to misnomer profits.

Where the members of a co-parcenary have become divided in status, an alienation from a co-parcener who has not been in enjoyment of his share is entitled to his share of the profits from the date of his purchase.

The rule that profits cannot be claimed till after decree applies only to the case of a joint family where the members have not become divided before suit. 39 Mad. 265. 4 L. W. 99 (F. B.) 14 Cal. 493 and 16 Cal. 337 dist (Spencer and Krishnan, JJ.) VANJAPURI GOUNDAN v. PACHAMUTHU GOUNDAN. 35 M. L. J. 609=7 L. W. 225=45 I. C. 92.

----- Joint family--Partition--Unilateral declaration of intention--Deed containing declaration of intention to be divided--Non-registration of deed as regards some of executants--Effect--Deed if available as containing declaration of intention by contesting parties--Deed--Registration as regards interests of some of the executants only--Validity--Registration Act ss. 24, and 35--Effect--Hindu Law--Father might effect division as between sons--Exercise of what amounts to getting partition deed by himself, his sons registered though one of the sons does not consent.

M, a Hindu and his three sons (plffs. and defts. 1 and 2) signed a deed of partition of immoveable properties of the family. The 1st deft. objected to its registration on the ground that some of the schedules were inserted without his knowledge but M and the plff. applied to have the deed registered and it was registered under S. 35 of the Registration Act so far as they were concerned. M died leaving a will bequeathing his share to the 1st deft.

The plff. sued for a fresh partition and contended that the deed of partition was inoperative as it was not registered as to all the executants and inadmissible in evidence.

Held, that M as a Hindu father had the power of effecting a partition among the children without their consent and the partition deed registered by the father though without the 1st deft's. consent had effected a valid partition. 2 Mad. 217, 31 M. L. J. 147, 32 M. L. J. 439, foll.

Held, also that there is no irrebuttable presumption that a document intended to be executed by more than one person should not be construed as evidencing a contract by some only of the intended executants who have signed the deed, and the deed of

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partition could be used in evidence as containing a declaration of intention by M and the plff. to be separated from the rest of the family which was sufficient to establish the status of division. 39 Mad. 597 and 43 Cal. 1031 ref. 19 M. L. J. 50, 18 M. L. J. 161, doubted.

The partition deed provided that a sum of Rs. 15,000 due to the family upon a mortgage decree should be divided among the members when realized by the father and that if the mortgaged property itself was bought by the father, the property should be divided. Instead of purchasing the mortgaged property himself, he had it conveyed to the 1st deft.

Held that this was a fraud by the father on his power and the plff. was entitled to a share in the property itself and was not bound to accept a share of the mortgaged money (*Ayling and Seshagiri Iyer, JJ.*) NATESA IYER v. SUBRAHMANYA IYER

23 M. L. T. 367=(1918) M. W. N. 703=  
45 I. C. 535.

—Joint Family—Partnership—Power of attorney by several members to common agent—Death of one of the members if puts an end to power. See CONTRACT ACT, S. 253 (10). (1919) M. W. N. 194

—Joint Family—Partnership with stranger—Manager representing family—Co-parceners of manager, if can sue for dissolution of partnership—Right of co-parcener. See (1917) DIG. COL. 648: GRANDE GANG AYYA v. G. VENKATARAMIAH 41 Mad 454=  
34 M. L. J. 271=22 M. L. T. 527=6 L. W. 708=(1917) M. W. N. 805=43 I. C. 9.

—Joint family—Presumption of jointness—Suit for partition—Onus—Entry of names of different members, separately in record of rights—Effect—Properties held jointly with strangers whether ought to be included.

The presumption of the Hindu Law is that a Hindu family is joint, unless the contrary is proved and the burden of proving separation is on the party who sets it up.

The proceedings before a Settlement Officer engaged in preparing a Record of Rights are limited to a decision on the factum of possession without any reference to the rights of a co-parcener in such possession, and any order, passed by him, does not raise any presumption that the parties were separate in mass, worship and estate at the time when those orders were passed.

An acquisition of property bought in the name of one member of a joint family raises no presumption that it was bought as his separate property.

A plff. in a suit for partition of joint family properties is not bound to include in his action properties held by the family jointly with strangers. (*Dawson Miller, C.J. and Imam, J.*) RAM DAYAL MAHTO v. UTTIM MAHTO.

5 Pat L. W. 122=46 I. C. 255

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—Joint Family—Relinquishment by one member in favour of some members only—Release enures for the benefit of all.

A relinquishment of his share by one member of the co-parcenary body in a Joint Hindu family in favour of some members of the body does not enure to the benefit of those members only but enures to that of the entire co-parcenary body. 11 Mad. 406 and 27 M. L. J. 272 dist. (*Drake Brockman, J.C.*) VINAYAK RAO v. LAXMAN. 14 N. L. R. 56=44 I. C. 51.

—Joint Family—Relinquishment by one member of his share to a few of the other members—Benefit enures to all.

Under Mitakshara Law a co-parcener may relinquish his share in the co-parcenary estate but such relinquishment will be for the benefit of all members of that branch of the co-parcenary body to which he belongs and cannot enure to the peculiar benefit of some of them: its effect will be similar to that of the relinquishing co-parcener's death. (*Mitra, A. J. C.*) GADADHAR v. CHUNNILAL.

14 N. L. R. 55=44 I. C. 541.

—Joint Family—Self-acquisition—Acquisition out of savings from income of Patwari office. See HINDU LAW, IMPARTIBLE PROPERTY. 43 I. C. 137.

—Joint family—Self-acquisition—Blending of self-acquired property with ancestral property—Effect of entries in account books as showing whether funds are joint or separate—Evidence—Admissibility—Admission against interest. See (1917) DIG. COL. 649: SURAJ NARAIN v. RATAN LAL.

40 All. 159=15 A. L. J. 684=  
21 C. W. N. 1065=26 C. L. J. 267=  
33 M. L. J. 180=22 M. L. T. 121=  
6 L. W. 509=19 Bom. L. R. 737=  
20 C. C. 211=2 Pat. L. W. 160=  
40 I. C. 983=44 I. A. 201 (P. C.)

—Joint Family—Self-acquisition—Conversion into joint family property—Succession to such property—Divided and undivided son.

A Hindu, who was living with his two sons, obtained certain self-acquired property which he treated as joint family property. One of the sons next separated from the family, and the father and the other son lived joint as before. On their death, the separated son claimed to recover the property on the footing that it was the self-acquired property of his father.

Held, that the property was the joint family property of the father and his united sons; that, on their father's death the united son took it by survivorship; and that on their latter's death his widow had a life-estate, to which the reversionary interest of the separated son had been postponed.

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*Per Beaman, J.*—A member of a joint Hindu family who has acquired property of his own may convert it into joint family property in the ordinary sense of the term; and therefore all the members of the family who have the same rights in it as though it had been acquired originally by their joint exertions or descended to them from a common ancestor. (*Beaman and Heaton, JJ.*) RANGBHAT RAMACHANDRABHAT v. SITABAI BANDEHAT. 20 Bom. L. R. 532=45 I. C. 534.

—————*Joint Family—Self-acquisition—Gains of learning—Education at the expense of the family—General education—Special training for a profession, essential.*

In laying down that the gains obtained by a member of a joint Hindu family from an education received at the expense of a joint family should be partible, the author of the Mitakshara could not have intended that such gains should include gains which were the result, not of the education received at the expense of the joint family, but of the peculiar skill, mental abilities and individual effort in applying and improving such education exercised by the person who had been educated at the expense of the joint family.

There is authority in the texts of the Mitakshara for the contention that the gains made as a pleader's clerk, as a broker, or as a money-lender, personally and without the aid of the joint funds by a member of the family who received an ordinary education suitable to his position as a member of the family to which he belonged, should in law be regarded as partible and not as his self-acquired property.

The question whether a man who happening to be a member of a joint family carried on his business personally for his own personal benefit without detriment to the joint family fund or carried on such business as a member of the joint family, for the benefit of the family, is a question of fact to be determined on the evidence.

As a member of a joint family is entitled as such to be maintained at the expense of the joint family and to receive an ordinary education suitable to a person of his position as any other member of the family, no inference could be drawn from the fact that the member in question was maintained from the joint family funds until he became a pleader's clerk.

The Sanskrit word in Chapter 1, S. 4 of the Mitakshara which has been translated by Mr. Colebrooke as "science" means learning.

The author of the Mitakshara could not have intended to have penalised an education which has not in his contemplation and of which he necessarily knew nothing. Nor could he have intended to penalise and discourage self-acquired skill or the exercise of high men-

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tal abilities or great individual effort in winning success in an art, science or profession. He must have been writing of education such as he knew it to be and not of the education now obtainable and necessary for a successful career in the arts, sciences and professions of the present day (*Sir John Edge.*) METHARAM RAMAKHIO MAL v. REWACHAND RAMAKHIO MAL. 45 Cal 566=34 M. L. J. 327=

22 C. W. N. 377=27 C. L. J. 345=  
4 Pat. L. W. 197=23 M. L. T. 218=  
(1918) M. W. N. 537=7 L. W. 331=  
20 Bom. L. R. 556=16 A. L. J. 281=  
44 I. C. 269=45 I. A. 41 (P. C.)

—————On appeal from. 8 I. C. 930

—————*Joint Family—Self acquisition—Proof of—Property devised, the self-acquisition of the devisee.*

In a case of a joint Hindu family formed only of a father and only his minor son, the initial presumption of jointness of the property is rebutted by proof of the fact that the father's property is all self-acquired.

Property devised by will over which the testator had complete powers of disposal is self-acquired property in the hands of the devisee. (*Shadi Lal and Le Rossignol, JJ.*) AMAR NATH v. GURAN DITTA MAL.

14 P. R. 1913=16 P. W. R. 1918=  
43 I. C. 117.

—————*Joint Family—Self-acquisition—Property acquired by disposal of ancestral property—Joint family property—Gift of, invalid.*

The widow of A, who had been adopted into another family, made an absolute transfer of properties which A inherited from his adoptive father in favour of B, C and D, the surviving natural brothers of A in consideration of benefits received from the latter's ancestral funds, which was challenged as beyond her competence as a Hindu widow. D conveyed some of the properties which he thus got from A and others which he subsequently brought to his concubines and to a daughter by one of them. After D's death, D's son R with whom D lived jointly and R's son claimed these properties as joint family properties which D had no authority to alienate.

Held (without deciding whether the alienation by A's widow was valid or not and whether A's property which D got was his ancestral or self-acquired property, but assuming that it was D's self-acquired property) that the evidence showed such blanding of this authority of D, in which R and his sons as they were born became co-parceners, as to make it joint property.

As all the properties which were the subject-matter of the deeds of gift were joint properties of D, they did not operate even on the one-sixth share which D might have got by partition of the estate with his co-parceners

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since D had no separate sixth share and the whole property accrued on his death to the surviving members of the joint family. (*Sir Walter Phillimore.*) *RADHAKANT LAL v. MUSSAMMAT NAZMA BEGUM.*

45 Cal. 733=22 C. W. N. 649=  
27 C. L. J. 632=34 M. L. J. 99=  
23 M. L. T. 392=  
(1918) M. W. N. 386=  
20 Bom L. R. 724=  
16 A. L. J. 537=  
4 Pat. L. W. 72=45 I. C. 806. (P. C.)

—Joint family—Self-acquisition—Wife of plff living separately during husband's absence whether admission of separation—Burden of proof of separation.

Where in a suit for partition between brothers who were members of a joint Hindu family it was admitted that the wife of the plff. during his absence from home which lasted for a considerable time was, on account of her quarrelsome disposition, sent to live in a portion of the family house and to have her meals separate, *held* that this did not constitute such an admission of separation in estate among the members as would relieve the debt. from proving that the property in dispute was his separate property. (*Lindsay, J. C.*) *GOBINDEY v. RAM ADHIN* 20 O. C. 398=44 I. C. 78.

—Joint Family—Suit for partition by minor—Death of minor before written statement was filed—Severance of joint status if effected—Legal representative of minor if can continue the suit. See (1917) DIG. COL. 651; *CHELIM CHETTI v. SUBBANNA.*

41 Mad 442=34 M. L. J. 213=  
22 M. L. T. 432=(1917) M. W. N. 732=  
42 I. C. 860.

—Joint Family—Trade debts—Minor's share—Liability of, for debts of manager trading in partnership with stranger.

Debts contracted by the manager of a joint Hindu family for the purpose of a trade carried on by him for the benefit of the family in partnership with a stranger, are payable out of a minor's interest in the joint family property. The liability of the minor member is not restricted to his share in the partnership assets under S. 247 of the Contract Act but arises under the Hindu Law and the joint family property is liable for the debt 35 Mad. 692 dist. (*Seshagiri Aiyar and Napier, JJ.*) *DRULIPALLA KANAKAM v. NANDIPALLI VENKATABAJU.* (1918) M. W. N. 44=7 L. W. 218=43 I. C. 73.

—Joint Family—Trade—Minor, liability of—Personal liability none, for debts of the trade. See CONTRACT ACT, S. 247.

22 C. W. N. 488.

—Joint family—Trade started by father on behalf of himself and minor son—Liabi-

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lity of son for debts contracted during his minority—Contract Act, Ss 247 and 248, applicability of.

*Held*, by the Chief Justice and Spencer, J. (*Sadasiva Iyer, J. dissenting.*)—Where in a joint Hindu family having trade for its occupation, the father starts a business on behalf of himself and his minor son, the only other member of the family, and incurs debts for the conduct of such business during his son's minority, the son is not personally liable for such debts on attaining majority in spite of the fact that he continued to take an active part in the business after he became a major. Consequently the son on attaining majority, cannot be adjudicated an insolvent in respect of such debts.

Per Chief Justice:—The interest of a minor in a joint Hindu family business, whether existing at the date of his birth or founded during his minority, is acquired by virtue of his belonging to the family and does not depend on any agreement on his part or on his admission by the other members of the family to the benefits of the partnership. Consequently, such minors are not governed by Ss. 247 and 248 of the Contract Act.

Per *Sadasiva Aiyar, J.*:—Both under the Hindu Law and under S. 248 of the Contract Act, the son on attaining majority became personally liable for the debts in question.

Authorities on the subject reviewed. (*Wallis, C. J. Sadasiva Aiyar and Spencer, JJ.*) *THE OFFICIAL ASSIGNEE OF MADRAS v. PALNI-APPA CHETTY.* 41 Mad 824=35 M. L. J. 473=8 L. W. 580=(1918) M. W. N. 721=24 M. L. T. 216.

—Joint Family—Usufructuary mortgage of family property by father and son—Subsequent sale of entire property by father and possession obtained by vendee on redemption—Suit by son or his alliance to recover his (son's) share of property on payment of proportionate mortgage amount—Limitation Starting point, See LIM. ACT, ARTS. 126, 144 AND 148. 34 M. L. J. 528.

—Legal Necessity—Performance of Gaya Sradha—Recitals in deeds—Evidentiary value of. See H. LAW, SUCCESSION (1918) Pat. 323.

—Leprosy—Whether disqualifies a person from dealing with his own property or ancestral property for legal necessity. See (1917) DIG. COL. 653; *MAN SINGH v. GAINI.* 40 All. 77=15 A. L. J. 860=43 I. C. 62.

—Limited owner—Decree against, when binding on reversion—Arbitration—Award—Reversionary interest not protected—Reversioner not bound. See HINDU LAW, WIDOW 22 C. W. N. 409.

## HINDU LAW, LIMITED OWNER.

———Limited owner—Estate of, can be created by will. *See* WILL, CONSTRUCTION. 3 Pat L J. 199

———Maintenance — Arrangement for — Temporary in its nature — Liable to reduction — Long payment at uniform rate — Reduction of, owing to increase of relations. *See* GRANT, CONSTRUCTION. 43 I. C. 654.

———Maintenance—Arrears— Direction of courts—Demand when necessary.

The Courts, in dealing with claims for arrears of maintenance, possess a very large discretion to grant or withhold those arrears with special reference to the urgent need and necessities of the widow.

As soon as the widow satisfies the Court that she was in want at the time at which she was entitled to maintenance provided that time is within the period of limitation, the Court might in any given case award her, arrears to that extent, and that would be quite independent of any demand on her part. In other words, while a demand is allowed to be *prima facie* evidence of need on the widow's part, it is not in a demand that the right to obtain for arrears of maintenance is rooted. Nor indeed is any demand necessary. (*Beaman and Heater, JJ.*) KARBASAPPA v. KALLUAVA. 20 Bom L. R. 823=47. I. C. 623.

———Maintenance — Impartible estate — Junior members—No right to maintenance against transferee of estate, in the absence of proof of Special custom. *See* HINDU LAW, IMPARTIBLE ESTATE 3 Pat. L J. 648.

———Maintenance — Impartible estate — Right of junior members—Extent of rights—Degree of relationship. *See* HINDU LAW, IMPARTIBLE ESTATE. 45 I. A. 143.

———Maintenance — Rate of — Circumstances determining—Payment for a long time at a certain rate—Presumption of fairness of rate.

In fixing the amount of maintenance what is to be regarded is the condition of the estate and the number of people who have claims upon it for maintenance.

Remote relations are entitled to smaller amounts of maintenance than their predecessors. 20 M. L. J. 391 foll.

*Semble*:—Where the same rate of maintenance has been paid for a long time in a particular family, the presumption is that it is the rate to which members of the family are entitled. (*Wollis, C. J. and Seshavari Iyer, J.*) SUGUTUR IMMIDY REDDA CHIRKA v. SUGUTUR SAMBA SADASIVA CHIRKA. 43 I. C. 654.

———Maintenance— Rate of— Discretion of Court—Appeal, no interference, in.

## HINDU LAW.

Under the Mitakshara law a widow and her infant daughter are entitled to maintenance out of the properties in which the deceased member had a share. The rate of maintenance is always a question for the discretion of the Court and such discretion will be exercised having regard to all the circumstances affecting the case. Where the Courts below have assessed the maintenance at a particular rate, the Privy Council will not interfere with their discretion on appeal. (*Lord Buckmaster.*) RAJA BRAJA SUNDAR DEB v. SRIMATI SWARNA MANJARI DEB. (1918) M. W. N. 313=22 C. W. N. 433=47 I. C. 36. (P. C.)

———Maintenance—Right to—Basis of—Right by birth— Relationship— Existence of property—Limits of the right. *See* HINDU LAW, IMPARTIBLE ESTATE. 45 I. A. 143.

———Maintenance—Widow—Right to, not affected by residence away from family house. *See* HINDU LAW, WIDOW. 22 C. W. N. 433 (P. C.)

———Minor— Guardian —Step mother, if competent to act. *See* T. P. ACT S. 72. 34 M. L. J. 177.

———Minor— Guardian for property of Minor member of joint Hindu family— No power to appoint. *See* HINDU LAW, JOINT FAMILY. 45 I. C. 815.

———Minor—Partition—Institution of suit by—Severance in status effected. *See* HINDU LAW, PARTITION. 44 I. C. 143.

———Mitakshara—Ancestral property— Inheritance from maternal grandfather — Sons not entitled to right by birth. *See* H. LAW JOINT FAMILY, ANCESTRAL PROPERTY. 3 Pat. L. J. 168.

———Mitakshara—Debts of father — Sons liability for—Debt due under contract of Indemnity—Damages for breach of contract of indemnity—Sons liability for. *See* H. LAW DEBTS 4 Pat. L. W. 437=3 Pat. L. J. 396.

———Mitakshara—Joint family — Father Debt due under Contract of indemnity—Son's liability for—Damages due by father under Contract of indemnity—Son's liability for. (*Mullick and Thornhill, JJ.*) MAHABIR PRASAD v. SURI NARAYAN. 4 Pat. L. W. 437=3 Pat. L. J. 396=(1913) Pat. 323=43 I. C. 27.

———Mitakshara family—Separated member Suit by reversioners—Proof of claim—Form of Suit—Suit in ejectment — Pedigree, evidentiary value of.

Those who claim the property of a separated deceased Mitakshara Hindu as his reversionary

## HINDU LAW, PARTITION.

heirs, must show that they are both his next heirs and within fourteen degrees

Their Lordships accordingly condemned the plan of an ejectment suit where there were fifty nine plffs, and nearly twenty other parties in addition to the persons in possession of the property left by a separated Mitakshara Hindu were joined *pro forma*, as being members of the family, though they advanced no claim and the scheme of the action had been to bring into Court a large number of persons, more or less remotely akin in blood, in the hope of ousting the defts. in possession by a mass attack, and afterwards to assign the fruits of victory to the parties entitled by further litigation *inter se* (*Lord Sumner*) *MEWA SINGH v. BASANT SINGH*.

24 M. L. T. 429=28 C. L. J. 530  
=48 I. C. 540 (P. C.)

——— *Partition—Agreement to separate—Effect of—Tenancy in common.*

Once the members of a joint Hindu family have agreed and declared their intention to hold the joint family property in definite shares, the family is no longer a joint family. It may be that no actual division of the property takes place, but the result of such agreement and declaration is that from the time it is made the parties thenceforth hold the property not as joint tenants but as tenants in common (*Lindsay J. C. and Daniels A. J. C.*) *CHAUBAR SINGH v. BAKHTAWAR SINGH*.

5 O. L. J. 486=47 I. C. 897.

——— *Partition—Barred debt due from the joint family to a partnership consisting of some of the members—Not to be treated as an item of account. See LIM. ACT ARTS 57, 61, ETC.*

34 M. L. J. 32.

——— *Partition—Co widows—Daughters—Death of one—Effect of—Survivorship.*

If two widows or two daughters taking jointly the estate of their deceased husband or father make an arrangement for separate possession and enjoyment, the arrangement will not ordinarily deprive the survivor of the right to the whole estate or enable the ladies to confer a title on a third party which will not terminate at the latest with the life of that survivor. (*Richardson and Walmsley, J.J.*) *SHYAMADAS ROY CHOWDHURY v. RADHIKA PRASAD CHATTARAJ*.

22 C. W. N. 846  
=29 C. L. J. 24=47 I. C. 853.

——— *Partition—Decree—Mesne profits prior to—Right of member to See HINDU LAW, JOINT FAMILY, PARTITION.*

7 L. W. 225

——— *Partition—Deed of partition including only some items of property—Whether effects division of status—Intention—Presumption—Construction. See (1916) DIG. COL. 761.*

*SUBBA REDDI v. ALAGAMMAL*.

34 M. L. J. 896=18 M. L. T. 545=  
8 L. W. 84=31 I. C. 674=47 I. C. 552.

## HINDU LAW, PARTITION.

——— *Partition—Father, right of, to effect partition among sons and grandsons—Registration of deed against wishes of sons—Effect of—Valid partition—Division in status. See HINDU LAW, JOINT FAMILY, PARTITION.*

23 M. L. T. 307.

——— *Partition—Institution of suit by minor—Severance in status—Subsequent births, effect of.*

A minor can either himself or through his guardian express an intention to do that which is clearly not against his own interest. The institution of a suit by a minor member of a Joint Hindu family for the partition of the family property may, therefore amount to the indication of an intention to separate.

The institution of a suit for partition of joint family property is a sufficient indication to separate, so that the birth of a member subsequent to the institution of the suit does not affect the share which the plff. is entitled to receive. (*Dawson Miller, C. J. and Mullick, J.*) *KRISHNA LAL JHA v. NANDESHWAR JHA*.

44 I. C. 146.

——— *Partition—Intention to separate—Expression of, in will—Communication to other, if essential.*

In a Mitakshara family any member may exercise his intention without the assent of the other members to go out of the family and to have his share of the property; and if at any rate that intention is communicated to the other members of the family, there is a good separation. Where a member of a Mitakshara Hindu family executed a will which was admitted to Probate and his brother claimed his properties by survivorship. *Held*, that the will having been admitted to Probate must be taken to be a valid document and that the statement in the will that there had been a separation was a sufficient evidence of intention to separate and to go out of the family. (*Huda J.*) *SASHI BHUSAN PANIGRAHI v. LABANY-ABATI DEBYA*.

43 I. C. 981.

——— *Partition—Mesne profits—Right to, when partition entered into before suit. See HINDU LAW, JOINT FAMILY, PARTITION.*

7 L. W. 225.

——— *Partition—Mother and grandmother—Right of a share on partition between son and grandson—Property does not cease to be ancestral property—Property does not become stridhanam. See HINDU LAW, STRIDHANAM.*

44 I. C. 146.

——— *Partition—Mother—Share allotted to, not her stridhanam. See HINDU LAW, STRIDHANAM.*

44 I. C. 51.

——— *Partition—Mother's share on partition between her sons—Mother becomes entitled only*

## HINDU LAW, PARTITION.

*on actual partition—Mother's death after preliminary decree—Share lapses to sons.*

In a suit for partition, a preliminary decree was passed awarding one third share, each to the pfls., the defts., and the widow of the propositus (as the mother's share). The widow having died before any final decree could be passed, the pfls. applied to the Court praying that owing to the widow's death, his share should be held to have increased to one moiety.

*Held*, that the pfls. was entitled to succeed for, under the preliminary decree, the widow took no share which he should transmit to her heirs, her right to a share accruing only when a partition has actually been made. 9 W. R. 61 33 All. 118 ref. (*Batchelor, A. C. J. and Shah J.*) **RAOJI BHIKAJI v. ANANT LAXMAN.** 42 Bom. 535=20 Bom. L. R. 671=46 I. C. 750.

*Partition—Partial partition—Suit for by co-parcener against absence of one item—Maintainability of.*

It is open to a co-parcener to sue for partition of a single item alienated to a stranger by another co-parcener. (*Batchelor A. C. and Kemp, J.J.*) **HANMANDAS RANDAYAL v. VALABHDAS SHANKARDAS.** 20 Bom. L. R. 472=46 I. C. 133

*Partition—Partial status of other members—Jyeshthabagam, right to—Minor co-parceners—Partition how far binding—Extra share to one member—Relinquishment of share, how effected—Mother's right to act as guardian.*

K. a Hindu had four sons. The last one died leaving pfls. his sons. In a partition the family properties were divided into two schedules. The properties in one schedule were given to second and third sons. The other was given to the eldest son and the pfls. The deed of partition stated that as the eldest son had been managing the affairs as head of the family, one share in addition was included. Pfls. were minors and were represented by their mother as guardian. Pfls. brought the present suit for partition against the members of the first branch with whom since the original partition they were living in commensality.

*Held*, (1) that in the original partition there was a division in interest between the pfls. branch and the defts. branch and that thereafter they were living only as tenants in common as there could be no reunion with the minor members,

(2) that in the partition the eldest son was allotted an extra share,

(3) that under the terms of the partition the pfls. could claim only a third share of the properties that were allotted to them and the defts.

(4) that the claim of the eldest son under the Hindu Law to the *Jyeshthabagam* having

## HINDU LAW, PARTITION.

not become obsolete, the act of the guardian of the pfls. in assenting to such a share being given was not binding on them and that pfls. subject to the law of limitation were entitled to claim a fourth of the extra share given to the defts. branch,

(5) that the giving up of the extra share by the senior branch can only be by a registered deed and mere joint living, joint management failure to maintain accounts, incurring of expenditure in common and joint acquisitions would not render the extra share co-parcenary property, and

(6) that under the Hindu Law, the mother has no right to represent her sons in respect of joint family property except in case of a partition between her sons and the other members of the family. (*Abdur Rahim and Seshagiri Aiyar, J.J.*) **VENKATA REDDI v. KUPPA REDDI.** (1913) M. W. N. 630=8 L. W. 400=47 I. C. 716.

*Partition—Properties omitted in prior partition, if can be partitioned afterwards—Mitakshara Law—Scope of.*

C1. (1) and (2) of S 9 of the First Chapter of the Mitakshara refer to cases where property which is not partitioned is discovered after the partition.

*Sembla.*—The provisions contained in clause (1) S. 9, paras 1 and 2 of the Mitakshara are not rules of substantive law but rules of procedure. (*Woodroffe and Smither, J.J.*) **HARIHAR DUTTA TEWARI v. BHIM SANKER DUTTA TEWARI.** 46 I. C. 226.

*Partition—Re-opening of—Mutual mistake—Sufficient ground.*

Where by mutual mistake the parties to a partition included in the division certain property to which a third person was entitled and who got his share in the property by suit from the parties who had made the original division, *held*, that the partition was liable to be re-opened. 21 Bom. 333 ref. (*Piggott and Walsh, J.J.*) **GANESHI LAL v. BABU LAL.**

40 All. 374=16 A. L. J. 339=45 I. C. 4.

*Partition—Separation of one member, if effects a severance amongst all.*

Mere specification of shares among members of a joint family does not amount to an assertion that the family has ceased to be joint.

In order to ascertain whether there has been a separation or not, the whole circumstances of each particular case must be investigated and the intention of the parties ascertained.

Where after the separation of certain members of a joint Hindu family, the remaining members messed together, kept house together and held their property jointly;

*Held*, that they must be presumed to have continued joint. (*Roe and Coutts, J.J.*)

## HINDU LAW, PARTITION.

RAMESWAR MISSEER v. SURESHWAR MISSEER  
46 I. C. 252.

——— Partition—Severance in status—Unilateral declaration by major co-parcener—Minor co-parcener—Communication to natural guardian, if essential. *See* (1917) DIG. COL. 657; *AYILAMMA v. VENKATASWAMI*

33 M. L. J. 746—22 M. L. T. 503—  
8 L. W. 24—(1918) M. W. N. 136—  
43 I. C. 130.

——— Partition—Share of eldest son—No right to extra share—Minor co-parcener represented by mother as guardian—Act of, in consenting to extra share for eldest son, not binding on minor. *See* HINDU LAW, PARTITION. (1918) M. W. N. 680.

——— Partition—Step-mother, share of. Under the Mitakshara Law in a partition between sons, the step mother is entitled to a share equal to that of a son. (*Jwala Prasad and Couits, JJ.*) *SUBA RAUT v. MANLA RAUTAIN.* 47 I. C. 204.

——— Partition—Suit by alienee from a co-parcener of certain items—Suit for general partition.

It is open to an alienee of certain items of property from a co-parcener, to sue for a general partition of the family properties in case the other co-parcener's claim their share of the alienated property. (*Batchelor, A. C. J. and Kemp, J.*) *HANMANDAS RAMDAYAL v. VALABHDAS SHANKARDAS.* 20 Bom. L. R. 472—46 I. C. 133.

——— Partition—Suit by one member—Subject-matter of—Properties held by family jointly with strangers—Need not be included in the suit. *See* HINDU LAW, JOINT FAMILY. 5 Pat. L. W. 122—46 I. C. 255.

——— Partition—Suit for Parties—Alienee from father—Necessary party

A purchaser or mortgagee of the whole or a portion of a joint Hindu family property from a Hindu father is a proper and even necessary party to a suit brought by the sons for partition of the said property, questioning the validity of the transfer as against them. The Court is quite competent to determine in such suit the extent of the sons liability under the transfer.

The object of a suit for partition of a joint family is to determine the share of the joint property which is due to each co-sharer, and for the purpose all the liabilities of the family must also be taken into account. If the liabilities bind the whole family, the debts must be distributed at the time of partition. If, on the other hand, the debts are contracted by only one member and are personal to him and not binding on the others, they must be charged against the share. (*Lindsay, J. C.*) *MAHADEO SINGH v. BHAWANI BHIKH SINGH* 5 O. L. J. 193—46 I. C. 281.

## HINDU LAW, REVERSIONER.

——— Partition—What constitutes—Reunion—Burden of proof.

Where by means of a compromise petition filed in a suit five brothers governed by the Mitakshara School of Hindu Law effected a partition of the joint family estate.

*Held*, that there was a commission of the property from the joint to separate ownership.

Once the members of a family have separated the onus is heavy on any members who plead re-union.

In order to establish a case of re-union it is necessary to show not only that the parties already divided lived or traded together, but they did so with the intention of thereby altering their status and of forming a joint estate with all its incidents. (*Ree and Couits, JJ.*) *NANDLAL SINGH v. MUSSAMMAT BHAGWATI KUMARI.* 5 Pat. L. W. 127—46 I. C. 529.

——— Religious Endowments—Hereditary archaka of temple—Status of—Servant of temple trustee. *See* LIM. ACT ARTS. 102 AND 63. 23 M. L. T. 283.

——— Religious office—Archaka—Right of females to succeed. *See* RELIGIOUS OFFICE. 33 M. L. J. 196 (F. B.)

——— Relinquishment—Of share by one member of a Joint Hindu family in favour of some of the members, enures for the benefit of all the members. *See* HINDU LAW, JOINT FAMILY, RELINQUISHMENT. 44 I. C. 5.

——— Re-union—Onus heavy on those setting up—Proof of re-union—Mere living together, insufficient. *See* HINDU LAW, PARTITION. 5 Pat. L. W. 127.

——— Reversioner—Alienation by widow—Right of remote male reversioner to sue for a declaration that gift by widow in favour of her daughter's son is invalid beyond her lifetime—Right of suit even during life-time of daughter. *See* HINDU LAW, WIDOW. 16 A. L. J. 493.

——— Reversioner—Alienation by widow—Suit to declare its invalidity by reversioner—Incidental declaration as to reversioners in title. *See* SP. REL. ACT S. 42. 34 M. L. J. 67 (P. C.)

——— Reversioner—Caveat—Right of remote reversioner to enter caveat and contest the suit, if immediate reversioners keep quiet. *See* WILL, PROBATE. 27 C. L. J. 320.

——— Reversioner—Compromise of disputed claims to inheritance with widow—Reversioner taking the benefit of compromise, debarred from asserting reversionary rights on death of widow. *See* HINDU LAW, WIDOW. 45 I. A. 118 (P. C.)

## HINDU LAW, REVERSIONER.

—Reversioner—Decree against limited owner—Reversionary estate not properly protected—Reversioner not bound. See HINDU LAW, WIDOW. 22 C. W. N. 409.

—Reversioner—Interest of a spes successionis—Contract relating to or dealing with null and void. See T. P. ACT, S. 6 (A). 22 C. W. N. 409.

—Reversioner—Right to sue for declaration that gift by widow is invalid—Remote reversioner not entitled to sue merely because the presumptive reversioner is a minor.

The right to maintain a suit, that a gift made by a Hindu widow in possession of her husband's estate as heir, is not binding on the reversion does not belong to any one having a possibility of succeeding to the estate of inheritance held by the widow for her life; as a general rule the suit must be brought by the presumptive reversionary heir. It may be brought by a more distant heir if those nearer in the line of succession, are in collusion with the widow or have precluded themselves from interfering. The minority of the presumptive reversioner does not enable a remote heir to bring such a suit. (*Piggott and Walsh, JJ.*) GUMANAN v. JAHANGIRA. 40 All. 518=16 A. L. J. 465=46 I. C. 186.

—Reversioners—Suit—Delay in filing suit—No estoppel by acquiescence. See (1917) DIG. COL. 660; BHAG MAL v. BHAGWAN DAS. 11 P. R. 1918=125 P. W. R. 1917=41 I. C. 636

—Reversioners suit by one of two to recover lands alienated by a widow—Other reversioners joined as defendants—Offer by latter in written statement to pay court fee—If entitled to a share—Procedure. See HINDU LAW, WIDOW, ALIENATION. 35 M. L. J. 183.

—Reversioner suit by set to aside alienation or adoption by widow—Representative character of reversioner's suits. See LIM. ACT, ARTS. 120 AND 125. 35 M. L. J. 57.

—Sanyasam—Renunciation of the world—What constitutes—Burden of proof.

Where it appeared that in 1893, the pfl. mortgaged his share in the house and left the village, that he then adopted a life of an itinerant mendicant and attached himself as chela to a guru, that he never re-visited his village and that he had not married:

Held, that under the circumstances the inference was not unwarranted that the pfl. had renounced the world and abandoned his property and that the burden of proving the contrary was on the pfl. and he had failed to discharge it. (*Battigan, C. J., and Shah Din, J.*) LACHMAN GIR v. GOPI. 18 P. W. R. 1918=43 I. C. 167.

## HINDU LAW, SUCCESSION.

—Self-acquisition—Gains of learning—Maintenance and general education out of family funds—Absence of special training for a profession—Acquisitions of member not joint family property. See HINDU LAW, JOINT FAMILY, SELF-ACQUISITION. 22 C. W. N. 377 (P. C.)

—Stridhanam—Partition—Share allotted mother and paternal grandmother—Share does not cease to be ancestral property—Reverter to family.

According to the Mithila School of Hindu Law a paternal grandmother is entitled to a share of the partition of the joint property between her son and her grandson. Such share, however, is not her stridhan, and on her death goes back to the estate from which it came.

The mother or grandmother's share on partition is taken in lieu of maintenance and on her death reverts to the general estate and does not cease to be ancestral property. (*Muller C. J. and Mullick, J.*) KRISHNA LAL JHA v. NANDESHWAR JHA. 44 I. C. 146.

—Stridhanam—Share allotted to mother on partition.

Obiter.—A share taken by a mother on a partition of the family property between her sons will not be her stridhan.

It will devolve after her death upon all the heirs of her husband. (*Drake Brockman, J. C.*) VINAYAK RAO v. LAXMAN. 14 N. L. R. 56=44 I. C. 51.

—Stridhanam—Yautaka and Ayutaka—Succession—Sons, maiden daughters and unmarried daughters.

The burden of proving that the property which a Hindu lady purchased long after her marriage was her Yautaka property, because the purchase was made from a special fund obtained during her nuptial ceremony, is on the person who asserts it.

To the Yautaka property, left by a Hindu female the sons and the maiden daughters may be entitled in equal shares, but the married daughters are postponed to the sons. (*Richardson and Beauchroft, JJ.*) DELALUNEY v. PRANHARI GUHA. 22 C. W. N. 990=45 I. C. 879.

—Succession—Bandhus—Benares School—Sister's son and father's sister's son.

The general principle about the succession of the bandhus under the Benares School of Hindu Law is that the nearer in consanguinity excludes the more remote and that under the Mitakshara at least, the order of succession does not follow religious efficacy. A sister's son therefore is superior to the father's sisters son though both are *ajma bandhus* or cognates of the propositus.

## HINDU LAW, SUCCESSION.

The position of a step-sister's son cannot be distinguished from that of a sister's son in the line of heirs. A father's daughter's son being nearer in consanguinity than the son of the grandfather's daughter the former succeeds in preference to the latter. 3 Bom. 353 and 36. Bom. 120 rel.; (*Stanyan, A. J. C.*) GANNO v. BENI

14 N. L. R. 82=43 I. C. 943

—Succession—Bandhus—Maternal uncle and sister's daughter's son—Preference between—Mitakshara law.

Held, by the Full Bench (*Miller C. J. and Imam J. dissenting*) under the Mitakshara law the maternal uncle of the last male owner is preferred to the sister's daughter's son as heir to the estate.

Texts of the Hindu law critically examined and discussed. 6 Cal. 119, 42 C. 354, 37 A. 604, 29 M. 115, 20 M. 342, 18 M. 193, 30 M. 406, 25 B. 710, 6 C. L. J. 190, 38 A. 416, 12 M. I. A. 397, 3 A. L. J. 461, 6 M. H. C. R. 273 reviewed. (*Miller, C. J., Mullick, Jwala Prasad, Imam and Thornhill JJ.*) UMASHANKAR PRASAD PARASARI v. MUSSANMAT NAGESWARI KOER:

3 Pat. L. J. 663=  
48 I. C. 625.

—Succession—Bandhu—Sister's son—New and inconsistent defence if and when can be raised at late stage—Benami—Proof of quantum—Recitals in documents—Evidentiary—Value of.

A sister's son is a bhinna gotra sapinda and is therefore a bandhu. The term 'bandhu' has been defined in the Mitakshara as a bhinna gotra sapinda, that is to say, sprung from a different family but connected by common corporeal particles, or by consanguinity. (*Roe and Coutts, JJ.*) BABU BISHENDAYAL SINGH v. MUSST JAISERI KUER

(1918) Pat. 323=43 I. C. 748

—Succession—child en ventre matris—Adopted son—Son of adopted son in the world—Status of the son—Rights only in the adoptive family. See HINDU LAW, ADOPTION

20 Bom. L. R. 703.

—Succession—Daughter's son—Position of—Rights to property of maternal grandmother. See (1917) DIG. COL. 661: BISHWANATH PRASAD SAHU v. GAJADHAR PRASAD SAHU.

3 Pat. L. J. 168=  
3 Pat. L. W. 286=(1917) Pat. 356=  
43 I. C. 370

—Succession—Daughter's sons. position of. See HINDU LAW JOINT FAMILY ANCESTRAL PROPERTY. 3 Pat. L. J. 168.

—Succession—Dancing girl's property—Son and daughter—Daughter's daughter if can be traced to son.

## HINDU LAW, SUCCESSION.

The property of a dancing girl will pass to her female issue first and then to her male issue.

Its devolution is by custom similar to the devolution of Stridhanam.

Consequently, a daughter's daughter succeeds to such property in preference to the son. 5 M. H. C. R. 161 foll. (*Bakerell and Phillips, JJ.*) NAGALINGAM PILLAI v. VADUGUNATHA ASARI.

24 M. L. T. 81=  
45 I. C. 672.

—Succession—Females—Religious Office—Archaka—Right to succeed. See RELIGIOUS OFFICE 35 M. L. J. 196 (F. B.)

—Succession—Females—Unchastity—Disqualification

The rule as it obtains in the Bengal School of Hindu Law is that any female who was unchaste before the succession opened out is excluded from the inheritance (*Fletcher and Huda, JJ.*) SRIMATI RATABALA DAS v. SHYAMA CHARAN BANERJEA.

22 C. W. N. 566=45 I. C. 714.

—Succession—Gotraja Sapinda—Limits of relationship—Widow of Gotraja—Right to inherit in Berar.

Under the Bombay School of Hindu law which is also the Hindu *lex loci* in Berar, the widow of a gotraja is herself a gotraja. 2 Bom. 338; 5 Bom. 110 ref.

In the order of succession a female gotraja sapinda is postponed to all male gotraja sapinda in the same line as her husband, but she has precedence over a male in a remoter line. 21 All. 128, 133; 16 Bom. 716; 30 Bom. 339, 6 N. L. R. 39 ref.

Each line or sapinda (leaving aside lineal descendants and ascendants of the propositus) includes all males within the limits of gotraja relationship lineally descended from the same ancestor common to them and the propositus, *v. g.*, the grandfather's line and the great grand-father's line. (*Stanyan, A. J. C.*) SADASHEO v. JAIKRISHNA.

14 N. L. R. 6=43 I. C. 475.

—Succession—Mitakshara law—Exclusion from share of family property—Permanent blindness after birth—No bar. See (1917) DIG. COL. 630 GUNJESHWAR KUNWAR v. DURGA PRASHAD SINGH.

45 Cal. 17=  
22 C. W. N. 74=26 C. L. J. 557=  
16 A. L. J. 1=26 Bom. L. R. 38=  
34 M. L. J. 1=22 M. L. T. 403=  
(1918) M. W. N. 16=7 L. W. 94=  
42 I. C. 849=44 I. A. 229 (P. G.)

—Succession—Rules of, not to be altered by agreement of parties. See GRANT, CONSTRUCTION. 47 I. C. 402.

—Succession—Sister's son and grandson whether bandhus. See (1917) DIG. COL. 656,

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BEAG MAL v. BHAGWAN DAS.

11 P. R. 1913=125 P. W. R. 1917=  
41 I. C. 636.*Succession—Samanodakas, who are—  
Strict proof of relationship essential.*

The agnatic relations of a deceased Hindu even beyond the 18th degree may be regarded as his samanodakas provided the agnatic relationship is clearly established. 32 A 534 dist. It is only on strict proof of such relationship that a near *bandhu* like the sister's son will be excluded. (*Rattigan, C.J. and Shah Din, J.*) HIRA SINGH v. VIR SINGH.

47 P. R. 1918=20 P. W. R. 1918=  
43 I. C. 460.

*Succession—Sanyasam—Essentials of—Renunciation and abandonment of property—Proof of, essential. See HINDU LAW, SANYASAM.*

43 I. C. 167.

*Succession—Sister, step-sister—Benares school.*

The special rule under which females succeed in Bombay has no application to a case governed by the Mitakshara as interpreted by the Benares School where the principle is that a female does not inherit unless her claim is supported by a special rule or she is expressly placed in the table of succession. Under the Benares school of law, neither a sister, nor a step-sister, nor a step-mother is an heir. (*Stanyon, A. J. C.*) GANNO v. BENI.

14 N. L. R. 82=43 I. C. 943.

*Succession—Widow—Re-marriage—Effect on her right of succession to property of son dying after re-marriage.*

A re-married Hindu widow is entitled to succeed to the property left by her son born of her first marriage, the son having died after the re-marriage.

The *obiter dictum* to the contrary effect in 11 N. L. R. 116, 3 C. P. L. R. 95 and 6 N. L. R. 171 not foll (*Drake Brockman, J. C.*) APA v. DAMDIA.

14 N. L. R. 149=47 I. C. 647.

*Succession—Widow—Unchastity of, during husband's life—Condonation by husband—No bar to succession on his death. See HINDU LAW, WIDOW.*

16 A. L. J. 91=  
43 I. C. 553.*Succession—Widow—Unchastity—Condonation of by husband—No bar to succession on his death.*

A Hindu widow who had been living in peace and harmony with her husband at the time of his death and had obtained possession of his estate, is not to be divested of the estate on the mere ground that an adulterous act was committed by her many years prior to her husband's death. (*Piggott and Walsh, J.J.*) RADHNY LAL v. BHAWANI RAM.

40 ALL. 178=16 A. L. J. 91=42 I. C. 553.

## HINDU LAW, WIDOW.

*Sudra—Who is—Test of—Non-Hindu cannot be a Sudra. See HINDU LAW, CASTE.*

44 I. C. 435.

*Surrender by widow—Registration—Necessary—Document if in writing must be registered. See HINDU LAW, WIDOW SURRENDER.*

34 M. L. J. 239.

*Unchastity of a Hindu woman whether severs relationship—Succession to property of unchaste woman.*

Immorality on the part of a Hindu woman, does not sever the tie of blood relationship and there appears to be no rule of Hindu law which would prevent the blood relations succeeding to her property on her death.

Held further, that this mode of succession was also consonant with Justice, equity and good conscience. (*Lindsay, J. C.*) SATISH CHANDER MUKERJI v. PANDIT MAHABALI PRASAD.

21 O. C. 272=48 I. C. 750.

*Widow—Acquisition from savings of life-estate—income—Accretion, no presumption of. See (1917) DIG. COL. 663. BABU SHIV SARAN LAL v. MAHARAJA KESHO PRASAD SINGH.*

(1918) Pat. 86=  
3 Pat. L. W. 302=42 I. C. 122.*Widow—Acquisitions out of income of the estate, if part of the corpus of the estate—Intention.*

Property acquired by the widow out of the income of the estate became part of the corpus of the estate where it appeared that her intention was to treat the purchased property as part of the original estate. 10 C. 432; 14 Cal. 387, 393 ref. (*N. R. Chatterjee and Smither, J.J.*) UPENDRA KISHORE MANDAL v. NOBO KISHORE MANDAL.

23 C. W. N. 64.

*Widow—Adoption under authority from husband—Right of adopted, son to set aside alienation by widow prior to adoption, during her life-time. See (1917) DIG. COL. 663. VAIDYANATHA SASTRI v. SAVITRI AMMAL.*

41 Mad. 75=33 M. L. J. 337=22 M. L. T.  
275=(1917) M. W. N. 653=42 I. C. 245.

*Widow—Alienation by—Consent of reversioner—Effect of on partial alienation—Presumption of necessity from—Consent of reversioner.*

The Full Bench in 40 Cal. 731 has decided that the doctrine of relinquishment and acceleration cannot apply to partial transfers by a limited owner, which can be supported only by legal necessity. The consent of the next reversioner is merely strong presumptive evidence of the necessity. 17 C. W. N. 1062 ref.

The propriety of an alienation with the consent of the next reversioner may come in

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question not only with reference to the conduct of the widow, whether or not she was justified by necessity, but also with reference to the conduct of the next reversioner, whether or not his conduct was honest. If in the absence of legal necessity he engineered the transaction to suit his own ends and for his own immediate gain, his consent would lose all virtue. The transaction would stand no higher than a partial alienation in his favour and would have to be judged from that standpoint. Nevertheless, whatever might be said of the conduct of the widow or the next reversioner, the transferee, if he made due enquiry and acted *bona fide*, would still be entitled to the benefit of the equitable rule laid down by the Privy Council in 6 M. I. A. 293 and now enacted in S. 33 of the T. P. Act. Nor would the antecedent mismanagement of the estate affect him unless he was in some way a contributory party thereto. (*Richardson and Walmsley, J.J.*) **SHYAMADAS ROY CHOWDHURY v. RADEIKA PROSAD CHATTERJI.**

22 C. W. N. 346=  
29 C. L. J. 24=27 I. C. 353.

—Widow—Alienation of husband's estate by—Suit by one of two reversioners for recovery of the property—Other reversioner impleaded as defendant—If entitled to a decree for a share—Offer to pay court-fee in written statement—Effect of—Procedure in partition suit, if applicable

Plf. sued the first deft. to recover his half share of property alienated to the latter by a widow whose husband's reversioners plf. and the second deft. were. The 2nd deft. made no attempt to disclaim his position as a deft. but he offered in his written statement to pay the necessary court-fee in case a decree should be given for his share purposing apparently to follow the procedure open to a co-sharer deft. in a suit for partition of joint property.

Held, that the scope of the present suit was different from that of a suit for partition and that it was not open to the Court to give a decree in favour of the 2nd deft. for his share of the property. (*Oldfield and Bakewell, J.J.*) **ADHIKARI VISHNUMORTHIAYYA v. AUTHAIYAY.**

35 M. L. J. 153=47 I. C. 533.

—Widow—Alienation—Consent of reversioner—Necessity, presumption of—Attestation in if amounts to consent.

Where the consent of the nearest reversioners for the time being, to an alienation by a Hindu widow, is proved there is a strong presumption that there was legal necessity in fact, or that the alienee acted with circumspection and made inquiries which induced the honest belief that such legal necessity did in fact exist, and the alienation is valid and binding on the actual reversioners if the said presumption is not rebutted by very cogent proof.

Mere attestation of the deed of transfer is not sufficient proof of consent to the alienation.

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There must be a clear proof of real consent, by showing that the consent was given with a knowledge of its effect upon the interest of the person who gave it and that there was an intelligent intention to consent to the production of that effect. (*Lindsay, J. C.*) **BALWANT v. RAM DAT.**

44 I. C. 611.

—Widow—Alienation of husband's estate for purchase of other property—Alienation for benefit—Validity—Test. See HINDU LAW, JOINT FAMILY.

23 M. L. T. 245.

—Widow—Alienation—Ijara granted to manager of her estate 40 years before—Value of recitals of legal necessity in the deed—Alienation if may bind reversioners apart from legal necessity.

The recitals of legal necessity in an alienation by a Hindu widow made more than 40 years before suit could not be given the weight attached to similar recitals in 44 Cal. 186 inasmuch as in this case evidence was available as to the pecuniary condition of the estate at the time of the alienation and it was made to a person who in fact managed the estate for the widow.

Held, on the evidence, that the alienation in this case, a permanent Ijara, was not made for legal necessity nor was it binding on the reversioners apart from legal necessity as being for the "benefit of the estate". 40 Mad. 709; P. C. 33 Cal. 334; 41 C. 793 P. C.; 20 C. W. N. 210 considered.

Held also, that the reversioners did not by getting themselves substituted as the legal representatives of the widow in a suit for arrears of Ijara rent which had fallen due in her life-time did not ratify the Ijara. (*N. R. Chatterjee and Smither, J.J.*) **UPENDRA KISHORE MANDAL v. NOBO KISHORE MANDAL.**

23 C. W. N. 64=48 I. C. 993.

—Widow—Alienation—Legal necessity Onus—Recitals in deed—Effect against third parties—Attestation by reversioner—No estoppel against or implied consent—Delay in prosecuting appeal—Costs. See (1916) DIG. COL. 779: **NANDA LAL DHUR BISHWAS v. JAGAT KISHORE ACHARYA CHOWDHRY.**

44 Cal. 186=31 M. L. J. 563=20 M. L. T. 335  
=(1916) 2 M. W. N. 336=3 L. W. 448=  
18 Bom. L. R. 868=24 C. L. J. 487=  
14 A. L. J. 1103=21 C. W. N. 225=  
1 Pat. L. W. 1=36 I. C. 420=43 I. A. 241=  
10 Bur. L. T. 177 (P. C.)

—Widow—Alienation—Legal Necessity Recitals, value of.

Recitals in a document are not always sufficient to prove legal necessity. (*Ros and Courts, J.J.*) **BALM BISHEN DAYAL SINGH v. MT. JAISAI KUEB.**

(1918) Pat. 323=48 I. C. 746

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—Widow—Alienation—Necessary purpose  
Expenses of performing Gaya Shradh—Necessity to borrow funds

The performance of the gaya Shradh is a legal necessity which will justify an alienation if it is shown that the expenses of the Shradh could not have been met out of the funds in the hands of the widow. (*Roe and Coutts, JJ*) **BABU BISHENDAYAL SINGH v. MT. JAISERI KUER.**

(1918) Pat. 323=48 I. C. 745.

—Widow—Alienation—Necessity—Cost of litigation.

Per *Imam, J.* Costs of litigation are a recognised head of necessity, but the power to borrow for that reason is not unlimited. See **RAIRADHA KRISHNA v NAURATAN RAI.** 3. Pat L. J. 522=46 I. C. 627.

—Widow—Alienation—Necessity—Debts of husband undertaken to be discharged by a third person with consent of creditor—Debts not so paid—Alienation for discharging those debts if valid.

Where a Hindu widow in possession of her husband's estate as heiress executed sale deeds to third persons in lieu of her husband's debt which has been agreed to be discharged by a relative of the husband, with the creditor's consent but the obligation was not fulfilled by the relative, held, that since the date when the liability to discharge the debt was undertaken by the relative, the debt had ceased to be the debt of either the husband or the widow, and the non-fulfilment of the obligation would not revive the debt so to make it a good consideration for the alienation of the property. (*Richards, C. J. and Banerji, J.*) **NATHU v MUSSAMAT TULSHA.**

16. A. L. J. 443=45 I. C. 0. 728.

—Widow—Alienation—Necessity—Maintenance of widow.

A Hindu widow is not bound to incur debts for her maintenance. She may, if it is more to the benefit of her husband's estate, sell a portion of it, instead of mortgaging the whole, to defray her maintenance expenses. (*Chitty and Smither, JJ*) **KULAK CHANDRA DAS v. KULA CHANDRA DAS.** 46 I. C. 269.

—Widow—Alienation—Necessity—Permanent lease by widow to pay off usufructuary mortgage—Validity of.

A permanent lease granted by a Hindu widow for a premium and an annual rent for the purpose of paying off a usufructuary mortgage executed by her husband is binding on the reversioners. (*Fletcher and Huda, JJ*) **BAIKUNTHA NATH SARKAR v. SATISH CHANDRA BRUSAN** 46 I. C. 876.

—Widow—Alienation—Necessity, proof of Bona fide inquiry as to necessity.

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Under the Hindu Law, the onus of proving the necessity for a loan contracted by a limited owner is on the lender and to discharge this burden he must show not merely that the object for which the money was required was a legitimate one but also that the funds available to the limited owner were insufficient. If the creditor fails to prove legal necessity, he can succeed nevertheless by proving he made proper inquiries and was honestly satisfied that such necessity existed. (*Miller, C. J. and Imam, J.*) **RAI RADHA KISHAN RAI v. NAURATAN LAL.**

3 Pat. L. J. 522=46 I. C. 627.

—Widow—Alienation—Necessity, proof of—Recitals, value of.

Where a conveyance had been executed 25 years before the institution of the suit recitals made at or about the time of the conveyance might be accepted as proof of the existence of legal necessity. (*Chapman Atkinson and Imam, JJ*) **RAM BAHADUR v. JAGER NATH PRASAD.** 3 Pat. L. J. 199=

4 Pat. L. W. 377=(1918) Pat. 181=45 I. C. 749

—Widow—Alienation—Necessity—Proof of—Inquiries by lender, extent of—Necessity brought about by mismanagement to which lender is not a party—Effect of.

Where a loan is advanced to a Hindu widow for legal necessity, the lender is not bound to ascertain how the necessity for the loan was brought about. Even if it is found that the necessity arose owing to the mismanagement of the estate by the widow the lender is entitled to recover the loan, unless it is shown that he acted *mala fide*.

Where the necessity for the loan is apparent the lender is not required to make any particular enquiry about it.

A creditor who advances money to a Hindu widow for legal necessity at a high rate of interest is not entitled to recover interest at that rate, unless he explains why that rate was fixed. In such cases the creditor should be allowed a reasonable rate of interest. (*Lindsay, J. C.*) **DWARAKA PRASAD v. PRITHI PAL SINGH.** 5 O. L. J. 271=47 I. C. 106.

—Widow—Alienation—Necessity, proof of—Lapse of time, effect of—Absence of recitals in sale deed—Effect of.

Persons holding under deeds of transfer executed by a Hindu female long before they are challenged, cannot be held to any very strict proof of legal necessity. The court can assume its existence from circumstantial evidence.

Where money is advanced for legal necessity, it is not essential that the deed evidencing the transaction should recite that fact (*Lindsay, J. C.*) **RAJ BAHADUR LAL v. BINDESHRI.**

5 O. L. J. 219=45 I. C. 344.

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—Widow—Alienation—Necessity—Widow in possession under a partition—Propriety of alienation to be judged with reference to whole value of property.

The propriety of an alienation by one of several limited owners of a portion of the property in her separate possession should be determined with reference to the separated portion in her possession (*Richardson and Walmsley, JJ.*) SHYAMDAS ROY CHOWDHURY v. RADHIK PRASAD CHATTARAJ.

22 C. W. N. 846=29 C. L. J. 24=47 I. C. 853.

—Widow—Alienation of property inherited from father—Right of husband's collaterals to question.

In regard to property inherited by the widow from her father the collaterals of her deceased husband, as such, have no *locus standi* to contest her power of disposition. (*Shah Din, C. J. and Le Rossignol, J.*) RAMJI DAS v. DURGA PARSHAD.

6 P. R. 1918=45 I. C. 90.

—Widow—Alienation—Reversioners joining in subsequently estopped from setting up title to properties conveyed. See ESTOPPEL, HINDU REVERSIONER.

28 C. L. J. 123

—Widow—Alienation—Reversioner, right of, to sue for declaration of invalidity of alienation beyond the life-time of the widow—Right to sue belongs only to the presumptive reversioner except on proof of collusion with widow—Minority of nearest reversioner not a ground for allowing remoter reversioner to sue. See HINDU LAW, REVERSIONER.

16 A. L. J. 465.

—Widow—Alienation—Suit to set aside by remote reversioner when daughter is alive—Gift in favour of daughter's son.

It is open to a remote reversioner to sue for a declaration that a gift by the widow to her daughter's son is of no effect after her death, even though the daughter herself was alive at the date of the suit 34 All 207 foll. (*Richards, C. J. and Banerjee, J.*) JAINT. SINGH v. GOSAIN.

16 A. L. J. 493=46 I. C. 85

—Widow—Compromise—Estate conferred by—Restriction on alienation—Limited estate.

Where a compromise deed entered into between a Hindu widow and her husband's reversioners provided that if the widow made any transfer or created any incumbrance, it would be null and void and that there would be no injury to the title of the reversioners.

Held that the compromise gave the widow the rights of a Hindu widow in her husband's estate. (*Jwala Prasad and Coutts, JJ.*) RAMA SINGH v. HARAKHDHARI SINGH.

47 I. C. 710.

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—Widow—Compromise—Reversioner party to—Taking benefit of compromise—Bar of reversionary claim.

A Hindu who was the last surviving male co-parcener of a joint family governed by the Mitakshara died and thereupon his sister's son (the appellant) and other members of the family disputed the right of the widow of the deceased to succeed to the property left by him. The appellant was a party to a compromise made in 1893 by which the property was immediately divided. He did not take a share under the compromise, but he was thereby recognised as the adopted son of another deceased uncle whose widow took a share, and in 1898 obtained by relinquishment possession of the share of the property allotted thereby to her. In 1912 the widow of the original holder died, and the appellant and his brother claimed the entire property as reversioners.

Held, that the appellant having entered into and taken the benefit of the compromise, was precluded from claiming as reversioner (*Sir John Edge*) KANHAI LAL v. BRIJ LAL.

40 All. 487=35 M. L. J. 459=16 A. L. J. 825=22 C. W. N. 914=8 L. W. 212=(1918) M. W. N. 709=24 M. L. T. 236=28 C. L. J. 394=20 Bom. L. R. 1148=5 Pat. L. W. 294=47 I. C. 207=45 I. A. 118 (P. C.)

—Widow—Compromise by when binding on reversion—Family arrangement. See. (1917) DIG. COL. 668; ANUPNARAIN SINGH v. MAHABIR PRASAD SINGH.

3 Pat. L. J. 83=3 Pat. L. W. 295=42 I. C. 95.

—Widow—Compromise of litigation—Binding on reversion in the absence of proof of collusion—Onus.

A Hindu widow is entitled to compromise a *bona fide* claim against the estate if the compromise is made for the benefit of the estate and not for the personal advantage of the widow.

Where the reversioners seek to set aside such a compromise, the burden is on them to show that the compromise was entered into by the widow collusively for the purpose of conferring upon herself a benefit at the expense of the estate. (*Roe and Jwala Prasad, JJ.*) RAM SUMRAN PRASAD v. SHYAM KUMARI.

47 I. C. 697.

—Widow—Co-widows—Partition. Death of one—Survivorship, operation of. See HINDU LAW, PARTITION. 22 C. W. N. 846.

—Widow—Decree against—Binding nature—Reversioner—Award—Compromise decree, effect on.

A decree fairly obtained against Hindu a widow binds the reversioners. The principle

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does not apply either to a compromise or an award decree. The above limitation of the principle has been founded upon the necessity of determining in each case whether the decree can be properly said to have been fairly obtained against the widow as representing the whole estate including the rights of the reversioners, and upon the necessity of proceeding with special caution where the decree is a compromise or award decree on the same grounds upon which it has been held that legal necessity must definitely be proved in the case of purchases from Hindu widows and that transactions must definitely be shown to have been explained and fully understood in the case of purdah ladies. (*Heaton and Hayward, JJ.*) *RAMA SANTU v. DAIL.*

20 Bom. L. R. 947=48 I. C. 125

—Widow—Decree against, binding on reversion—Fair and bona fide contest.

Where in a suit on a mortgage executed by the last male owner, the mortgage obtained a decree for foreclosure against the widow. Held, that, inasmuch as there had been a fair trial between the widow and the mortgagee and the widow had done all that she could to protect the property, the decree in favour of the mortgagee put an end to the original owner's proprietary rights and consequently to the reversionary right also. (*Le Rossignol, J.*) *DUNI CHAND v. THUNIAN.*

44 P. L. R. 1918=32 P. W. R. 1918=43 I. C. 523

—Widow—Decree against when binds estate—Sale in execution—Auction-purchasers, title of, if defeasible by actual reversioners after death of judgment-debtors—Fraud in securing decree, effect of. See (1917) DIG. COL. 669; *GANGA NARAIN DUTT v. INDRA NARAIN SAHA.* 22 C. W. N. 380=25 C. L. J. 391=35 I. C. 49.

—Widow—Decree against in suit by her disclaiming the validity of—Adoption made by her under a deed of authority—How far binding on reversioners—Representation of the estate by the widow—Estoppel against widow—Effect—Suit by reversioner on death of widow—Whether barred—Res judicata rule of applicability of C. P. Code, S. 11.

Where the estate of a deceased Hindu has been vested in a female heir a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir; and where in a suit the merits are tried and the trial is fair and honest a Hindu lady, does not cease to be so qualified merely owing to a personal disability or disadvantage as litigant.

A suit by a Hindu widow for a declaration that she had not validly adopted the deft. as a son to her deceased husband was dismissed by the court in India on the ground that by her own acts she was personally estopped from

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denying the validity of the adoption. The Privy Council affirmed that decision and also held that she had authority from her deceased husband to make the adoption in question and that the deft. had been validly adopted. On the death of the widow the next reversioner sued to eject the adopted son on the ground that inasmuch as the widow had no authority from her deceased husband to make an adoption the deft. had not been validly adopted:

Held, that though the rule of *res judicata* as enacted in S. 11 of the C. P. Code was not strictly applicable, the principle of *res judicata* as stated above applied, and that the decision in the widow's suit on the question whether the deft. had or had not been validly adopted, barred the suit of the reversioner, (*Sir John Edge*) *RISAL SINGH v. BALWANT SINGH.* 40 All. 593=24 M. L. T. 361=28 C. L. J. 519=9 L. W. 52=48 I. C. 553=45 I. A. 163 (P. C.)

—Widow—Decree against, when binding on reversion—Arbitration—Award—Reversioner's not bound.

Disputes between R, the daughter of a deceased Hindu and his agnates over the right to succeed to his estate were referred to arbitrators, before whom her husband purporting to act as well for her as for her infant son A came to an agreement with the agnates, by which some moveable property and two small fractional shares of certain lands which stood in her and her mother's name were given to her, and all right to the immoveable property of her father was abandoned in favour of the agnates. Her infant son was a solutely ignored in the compromise. The arbitrators passed an award on the basis of this compromise and later on a decree was passed upon the basis of the award, in spite of R's opposition. In a suit by A, *inter alia* for a declaration that the compromise did not bind him, that the bargaining of the reversionary interest of A, in the guise of an arbitration was ineffective and null and void; that even if A had an existing right in the property his father had no power to enter into an arrangement which wipes out all the interest of the minor without consideration; and that as the conditions which make a decree against a Hindu widow binding on the estate were wanting in this case, the decree against R did not bind A. (*Mr. Ameer Ali*) *AMRIT NARAYAN SINGH v. GAYA SINGH.* 45 Cal. 590=22 C. W. N. 409=34 M. L. J. 298=23 M. L. T. 142=27 C. L. J. 296=4 Pat. L. W. 221=16 A. L. J. 265=(1918) M. W. N. 306=20 Bom. L. R. 546=7 L. W. 581=44 I. C. 408=45 I. A. 35 (P. C.)

—Widow—Decree for maintenance against—Effect on reversioner—*Res Judicata.* See RES JUDICATA. 3 Pat. L. J. 426

—Widow's estate—Creation of, by will valid. See WILL, CONSTRUCTION. 3 Pat. L. J. 499.

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—Widow—Family arrangement—Agreement for maintenance—Rights of adopted son if barred.

After the death of a divided Hindu governed by the Mitakshara his business was carried on by the deft. his divided nephew. Disputes having arisen between the nephew and the widow of the deceased, regarding the latter's maintenance, agreements were entered into between the parties on the footing that on the death of the widow the deft. would be entitled to the estate of the deceased and the deft. in pursuance of the agreements deposited a sum with a Bank providing for the maintenance of the widow with interest thereon. Subsequently the plff. was validly adopted by the widow.

*Held*, that the deeds of agreements entered into by the widow only with reference to her maintenance could not be set up as deeds of family arrangement between the members of the family then in existence as barring the rights of the adopted son. (*Fletcher and Huda, J.J.*) *MATHURA DASS KARNANI v. SRIKISSEN KARNANI*. 27 C. L. J. 517=44 I. C. 5

—Widow—Gift of entire property to daughter and daughter's son not binding on the reversion. See (1917) DIG. COL. 669; *VIRASAWMI NAIDU v. BOMMADEWARA PICHAYYA*. 32 M. L. J. 536=6 L. W. 753=43 I. C. 167

—Widow—Gift of estate—Religious or charitable purpose.

Under the Hindu Law, a gift by a widow for the religious benefit of her husband is invalid if it be a gift of the whole or of practically the whole of the husband's property. 22 C. 506; 84 M. 238; 6 B. H. C. R. 1 Ref. (*Batchelor, A. C. J. and Shah, J.*) *PANACHAND v. MANOHAR LAL*. 42 Bom. 136=20 Bom. L. R. 1=43 I. C. 729

—Widow—Maintenance—Right to—Living away from family house for good cause—Right to maintenance not affected—Custom.

Where the plea set up in defence to a suit for maintenance by a widow who had ceased to reside in the family dwelling house was a family custom under which it was alleged, a widow, unless she resided at the place appointed for her residence, forfeited her right to maintenance.

*Held*, that such a custom even if established does not deal with the question of an absence from the appointed residence due to just and reasonable causes and that the widow was entitled to claim maintenance (*Lord Buckmaster, J.*) *RAJA BRAJA SUNDAR DEB v. SRIMATI SWARNA MANJARI DEBI*.

22 C. W. N. 433=(1918) M. W. N. 313=47 I. C. 36 (P. C.)

## HINDU LAW, WIDOW

—Widow—Relinquishment—Ghatwali interest—Widow incompetent to divest herself of the interest See LAND TENURE, GHATWALI. 5 Pat. L. W. 16.

—Widow—Re-marriage after conversion to Islam—No forfeiture of inheritance. See. HINDU WIDOW'S RE-MARRIAGE ACT, S. 2. 23 M. L. T. 81.

—Widow—Re-marriage—Forfeiture of estate held as mother.

A Hindu widow on re-marriage forfeits the life-interest which she holds as the mother of a deceased son who survived her husband. (*Roe and Coutts, J.J.*) *SHEOBARAN MANTO v. BHOGEA*. 3 Pat. L. J. 639=46 I. C. 884.

—Widow—Re-marriage after conversion to Mahomedanism—Forfeiture of first husband's estate—Act (XXI of 1850—Hindu Widows Re-marriage Act (XV of 1856) S. 2—Effect.

Per Chief Justice and Oldfield, J. (*Seshagiri Aiyar, J. diss.*) Under the Hindu Law a Hindu widow who becomes a convert to Mahomedanism and then marries a Mahomedan forfeits by her re-marriage her right to her first husband's estate.

Per Chief Justice (*Oldfield and Seshagiri Aiyar, J. dissenting*) S. 2 of the Hindu widows Re-marriage Act also applies to the case and entails the forfeiture 1 M. 226, foll. 23 M. L. T. 81 (S. 1510 of 16) overruled; 19. C. 233, 31. All. 170 32 All. 439; 35 All. 466 ref. (*Wallis, C. J. Oldfield and Seshagiri Aiyar, J.J.*) *VITTA TAYARAMMA v. CHATEKOUNDU SIVAYYA*. 41 Mad. 1078=35 M. L. J. 317=24 M. L. T. 183=(1918) M. W. N. 625=8 L. W. 430=43 I. C. 50 (F. B.) [But See 23 M. L. T. 81=7 L. W. 411=43 I. C. 299]

—Widow—Residence, right of—Alienation of house by husband—Effect of See (1917) DIG. COL. 671, *RAMZAN v. RAMDAIYAL*. 40 All. 96=15 A. L. J. 922=42 I. C. 944.

—Widow—Reversioner—Alienation by Hindu widow—Declaratory suit by presumptive heir to protect his interests—Right to a decree. See SP. REL. ACT, S. 42. 34 M. L. J. 67 (P. C.)

—Widow—Reversioner—Confiscation of widow's estate—Right of reversioners put an end to—Regrant to widow—Sanad—Settlement—Right of reversioners not revived. See OUDH ESTATES ACT, S. 8. 21 O. C. 1.

—Widow—Reversioner—Relinquishment of right to portion of the inheritance in lieu of widow surrendering her rights in the reversioner and his heirs estopped from disputing the arrangement. See ESTOPPEL. 47 I. C. 978.

## HINDU LAW, WIDOW.

—Widow—Surrender—Essentials of a valid surrender—Surrender to be in favour of the entire body of next reversioners.

In order that a surrender by a Hindu widow of her life-estate should accelerate the reversion the withdrawal of the life estate must be effective, and there cannot be an effective withdrawal of the life-estate in favour of one of the heirs without the consent of the others:

Therefore, the surrender of the entire estate of a Hindu widow in favour of one of the two persons constituting the next reversion without the consent of the other is invalid.

*Quere.*—Whether such a surrender with the consent of the other heir would be valid (*Shah and Memon, JJ.*) DODBASAPPA v BASAWANBAPPA 20 Bom L. R. 733. —46 I. C. 239.

—Widow—Surrender—Nature and essentials of surrender to a daughter's son with consent of daughters, validity—Alienation by guardian of minor—Suit by minor after attaining majority to recover possession—Lim. Act, Art. 44.

The rule that a surrender by a Hindu widow to be valid must be of the whole of the life-estate, simply means that she must reserve nothing for herself. The gift of a portion of the estate to a daughter in consideration of her past and future protection of the widow would not invalidate the surrender.

There may be a valid surrender to a daughter's son with the consent of the daughters (the intervening life estate holders)

A surrender is not a conveyance of any right by the widow to a reversioner but only an extinguishment of her rights so that the rights of the reversioner vest at once. The reversioner gets the estate in his own right, and not because anything is conveyed to him by the widow, her surrender being tantamount to her civil death.

No registered instrument is necessary for a surrender by the widow, but if there be a written instrument, it must be registered

No person can sue to recover possession of properties alienated by his guardian during the minority without setting aside the alienation, and a suit to set aside alienations by the guardian is governed by Art. 44 Sch. I of the Lim. Act.

*Quere.*—Whether sales by reversioners could take effect when the reversion actually falls in on the principle embodied in S. 43 of the T. P. Act having regard to the prohibition of transfers of mere expectancies by S. 6 of the same Act. (*Spencer and Krishnan, JJ.*) MUNUGARRA SATYAL KSMI NARAYA v MUNUGARRA JAGANNATHAM.

34 M. L. J. 229=42 I. C. 939.

—Widow—Surrender of portion of estate validity of.

## HINDU LAW, WILL.

A surrender in favour of her husband's reversioners made by a Hindu widow, in order to be valid, must be of the whole of her interest in the estate (*Fletcher and Huda, JJ.*) MOHANANDA DUTTA CHOWDHURY v. BAI KUNTHA NATH DUTTA. 45 I. C. 872.

—Widow—Surrender by widow and daughter in favour of next reversioner—Provision for maintenance of widow and daughter—Validity of surrender.

Where a Hindu widow and her only daughter surrendered all their rights in the estate of the last male owner, in favour of the next reversioner, viz, the daughter's son with a condition that the latter should maintain the widow and the daughter, held that the surrender was valid and operative to vest the estate absolutely in the daughter's son. 31 M. L. J. 406; 30 M. 145; 31 M. 446, 34 M. L. J. 229 Ref. to. (*Sadasiva Aiyer and Napier, JJ.*) CHINNA. SWAMY PILLAI v. APPASWAMI PILLAI

42 Mad. 25=35 M. L. J. 512=8 L. W. 512=

24 M. L. T. 403=

(1918) M. W. N. 756=48 I. C. 147.

—Widow—Unchastity—Condonation by husband—No bar to Succession on his death. See HINDU LAW SUCCESSION

40 All. 178.

—Widow—Waste—Grant of permanent leases—Effect of.

The mere grant of darmukurari leases or creation of rent-fee brahmottar grants or causing a portion of private lands to be converted in to raiyati lands is not waste since such acts are not binding on the reversioner. (*Roe and Coultis, JJ.*) RANI KESHO BATI KUMARI v. KUMAR SATYA NARAIN SINTRA.

5 Pat. L. W. 167=(1918) Pat. 292=

47 I. C. 55

—Will See ALSO WILLS.

—Will—Bequest of a limited owner's estate—Validity of. See WILL, CONSTRUCTION.

3 Pat. L. J. 199.

—Will—Construction—Bequest to adopted boy—Adoption invalid, Effect—Persona designata.

When a Hindu widow makes a will in favour of a boy whom she has adopted and it is found that the adoption is invalid, it has to be ascertained whether the mention of the legatee as an adopted son is merely descriptive or whether the assumed fact of his adoption is the reason and motive of the bequest and indeed a condition of it and if the latter is found as a fact the will is of no effect.

As however in this case it was clear that the widow wanted the boy to succeed to her own property quite apart from, and independently

## HINDU LAW. WILL.

of his capacity of an adopted son. the bequest was good. (*Shah Din, C. J. and Le Rossignol J.*) *RAMJI DAS v. DURGA PRASAD*  
6 P. R. 1418=45 I. C. 90

—Will—Elements of—Testamentary declaration. See WILL 20 O. C. 369.

—WILL—Expression of intention to separate by member of Mitakshara joint family in his will—Severance effected. See HINDU LAW, PARTITION. 43 I. C. 981.

—Will—Joint family—Manager not empowered to effect unequal distribution of ancestral property by will. See HINDU LAW, JOINT FAMILY. 45 I. C. 162

—Will—Testamentary Guardian—Appointment of, by father or manager in respect of co-parcenary property of minor members, if valid.

Under the Hindu Law, it is not competent to the only adult co-parcener of a Mitakshara joint family consisting of himself and his minor co-parceners to appoint a testamentary guardian to the co-parcenary properties of the minor co-parceners. Authorities on the subject considered (*Ayling, Coutts Trotter and Seshagiri Aiyar JJ.*) *CHIDAMBARAM PILLAI v. SUBBAYA PILLAI*. 41 Mad. 561=34 M. L. J. 331=23 M. L. T. 266=(1918) M. W. N. 265=7 L. W. 454=45 I. C. 905 (F. B.)

**HINDU WIDOWS RE-MARRIAGE ACT (XV of 1856) S. 2—Effect of—Re-marriage of Hindu widow after conversion to Mahomedanism—forfeiture of first husband's estate. See HINDU LAW, WIDOW RE-MARRIAGE. 35 M. L. J. 317 (F. B.)**

—S. 2—Scope of.—Hindu widow—Conversion to Mahomedanism—Marriage to a Mahomedan—Rights in property of first husband not lost.

The Hindu Widows Re-marriage Act is confined in its operation to a Hindu widow marrying as such. It does not apply to a Hindu widow who becomes a convert to another religion and then re-marries.

Where a Hindu widow becomes a convert to Mahomedanism and then re-marries a Mahomedan husband, she cannot be deprived of the estate which she has inherited from the Hindu husband. (*Seshagiri Iyer and Napier, JJ.*) *CHOWDAPPA v. KARNAM NARSAMMA*. 23 M. L. T. 81=7 L. W. 411=(1918). M. W. N. 274=44 I. C. 299.

**HIRE—Of boats—Conversion—Damages. See. (1916) DIG. COL 796, MAUNG BA GYAN v. HENG SINGH & CO. 16 Bur. L. T. 187=36 I. C. 276**

**HIRE PURCHASE AGREEMENT—Rent—Omission to pay according to terms of agree-**

## IMMOVEABLE PROPERTY.

ment—Right of owner to recover full amount from heir as well as guarantor—Rights of vendee from hirer.

Under a hire purchase agreement with the plaintiff owner of a sewing machine it was agreed as follows:—the plaintiff agreed to let a sewing machine with accessories for which the hirer, having paid Rs. 20 as the first month's rent in advance agreed to pay the owner Rs. 5 regularly every month in advance. On failure of the hirer to perform the agreement the owner could re-take possession of the machine. The hirer could at any time during the hire become the purchaser of the machine by payment in cash of the price endorsed on the agreement. The guarantor agreed to guarantee the due payment of any sum of money which might become payable to the owner under the agreement. The hirer sold the machine to one P who sold it to F, from whom the plaintiff sought to recover it.

Held, that the contract was a contract of hiring and letting and did not amount to a sale, and the plaintiff was entitled to recover from the hirer and guarantor jointly and severally the full amount which the hirer agreed to pay for the monthly hire of the machine.

F, acquired no good title to the machine which he obtained at a time when the alienor was still merely a hirer of it and had not exercised the option of purchasing it from the plaintiff company, (1895) A. C. 471; 6 Bom L. R. 871 foll.

S 108 Exception 1, of the Contract Act does not apply where there is only a qualified possession such as a hirer of goods has. 12 Beng L. R. 42 foll. (*Rattigan, C. J.*) *THE SINGER MANUFACTURING CO. LAHORE v. NIAZ ALI*. 144 P. W. R. 1918=46 I. C. 888.

**HYPOTHECATION—Chattels—Hypothecation without transfer of possession—Validity of. See CONTRACT ACT, S. 172. 44 I. C. 211.**

—Moveables, bona fide purchaser from mortgagor without notice of encumbrances—Rights of.

A bona fide purchaser of hypothecated goods from the hypothecator, without notice of the encumbrance, takes the goods free of it. (*Phillips and Kumaraswami Sastri, JJ.*) *SREERAM v. BOMMIREDDI VENKATARAMIAH*. 35 M. L. J. 456=24 M. L. T. 454=8 L. W. 517=(1918) M. W. N. 718=47 I. C. 976.

**IJARA—Permanent lease—Distinction between. See LEASE, CONSTRUCTION. 46 I. C. 852.**

**IMMOVEABLE PROPERTY—Turn of worship, whether. See LIM ACT, ART. 120, and 132. 22 C. W. N. 994.**

—See HINDU LAW, IMPARTIBLE ESTATE.

**IMPLIED CONTRACT.**

**IMPLIED CONTRACT**—Nature and meaning of. *See* MADRAS RENT RECOVERY ACT, S. 11.  
35 I. A. 195—(1918) M. W. N. 732 (P. C.)

**INAM**—Resumption—Liability to—Grant of land burdened with service—Grants of office to which lands are annexed by way of remuneration—Distinction between—Onus of proving right to resume on person—Resumption setting up right. *See* GRANT.

20 Bom. L. R. 779.

—Service inam—Partition of members of family having interest in a karnam's inam—Subsequent enfranchisement by Government—Right to share.

A person who belongs to a family having a hereditary interest in a karnam's inam and becomes divided in status from the holder of the office for the time being, cannot on enfranchisement of the inam subsequently claim a share in the land of the office of karnam (*Spencer and Krishnan, JJ.*) PYRAPPA. v. SYAMA RAO.

(1918) M. W. N. 849—8 L. W. 614.

**INCOME TAX**—Composition with collector—Suit for declaration that agreement is binding on collector jurisdiction—High Court—Original Side, to entertain suit. *See* GOVT. OF INDIA ACT S. 106 (2).

35 M. L. J. 23.

**INCOMETAX ACT (II OF 1886), S. 31 (3)**—*Income Tax Amendment Act (V of 1916), S. 4*—Effect of an agreement for composition of Income Tax.

The effect of the new sub-section 3 of S. 31 of the Income Tax Act is to put an end to any subsisting agreement for composition of the income tax on the first of April 1916 when the enhanced rates of assessment came into force and to any future agreement, when any further change of the rate of tax is made. The operation of sub-section 3 is, however limited to sums which have not become payable and the agreement still subsists as to sums which have become payable but have not been actually paid at the date of the change of rate. (*Bakewell, J.*) ABDUL SUKUR SAHIB v. SECRETARY OF STATE FOR INDIA.

34 M. L. J. 210—23 M. L. T. 159—

7 L. W. 326—46 I. C. 285.

**INDIAN COUNCILS ACT (24 and 25 Vic C. 67) S. 22**—Defence of India Act—Regulations under—Ouster of jurisdiction of ordinary tribunals—Provision not *ultra vires* the legislature. *See* DEFENCE OF INDIA ACT SS 8 AND 11.

46 I. C. 577.

—S. 22—Indian legislature—Power of to constitute special tribunals—Defence of India Act (1915) Ss. 2 and 4, not *ultra vires*. *See* DEFENCE OF INDIA ACT, SS 2, 4, ETC.

4 Pat. L. W. 157.

**INHERENT POWER.**

**INDIAN EXTRADITION ACT (XV of 1903) Ss 18 7 8, and 8A**—*Extradition for cheating—Cheating not mentioned in treaty with Hyderabad State—Power of British Magistrate to grant bail when no provision has been made for it in the warrant—Bail—Cr P Code S. 496.*

The offence of cheating is an extradition offence so far as Br. India is concerned, in view of S 18 of the Indian Extradition Act, 1903, notwithstanding its omission from Art. 4 of the Treaty between the British Govt. and the Hyderabad State

A British Indian Magistrate to whom a warrant has been addressed under S. 7 of the Indian Extradition Act has no power to admit to bail a person arrested under it apart from the provisions of Ss 8 and 8A of the Act. (*Henton and Hayward, JJ.*) *In re* MURLIDAR, 20 Bom. L. R. 1069—48 I. C. 874

**INDIAN SOLDIERS (LITIGATION) ACT, (XII OF 1915) Ss. 4 and 8**—Person serving under war conditions—Decree against—Right to have decree set aside. *See* (1917) DIG. COL. 678; SOBHA SINGH. v. THAKAR SINGH.

94. P. R. 1917—172 P. W. R. 1917—43. I. C. 272.

**INHERENT POWER**—Appellate Court—Stay of sale in execution of decree, during pendency of appeal. *See* C. P. Code O. 41 Rr. 5 and 6 (2).

34 M. L. J. 47.

—Consolidation of appeals—Powers of appellate Court. *See* PRACTICE, CONSOLIDATION.

34 M. L. J. 279.

—Consolidation of cases. *See* C. P. CODE, S. 151 AND O. 45, R. 4.

45 I. C. 551.

—Decree—Wrong execution—Power of interference by Court passing decree. *See* C. P. CODE, S. 151.

3 Pat. L. J. 435.

—Restitution—Inherent power of court—case not coming within S. 144, C. P. Code—Limits to the exercise of the power. *See* C. P. CODE, SS. 144, 151 AND O. 21, R. 90.

41 Mad. 447.

—Revenue Court—Dismissal of appeal for default—Restoration.

A Revenue Court when exercising final powers, must be regarded as possessing inherent power to rectify its errors and mistakes and take such action as the ends of justice may demand. A Commissioner of a Division possesses the power to restore to his file an appeal under S. 25 of the Bengal Revenue Sales Act of 1869, which he has decided *ex parte*, if he considers it to be necessary to meet the ends of justice (*Moore, J. M.*) D. N. RAY v. NALIN BEPARI BOSE.

46 I. C. 321.

## INJUNCTION.

**INJUNCTION**—Decree for, perpetual—Execution, mode of. See C. P. CODE, O. 21, R. 32.  
16 A. L. J. 700.

—Decree for prohibitory injunction—Enforcement of—Separate suit—Application under O. 21, R. 32 C. P. C. See C. P. CODE, O. 21, R. 32.  
27 C. L. J. 566.

—Easement—Interference with—Form of decree—Right to discharge water as lower land.

Injunctions against interference with natural rights or easements should not descend to details but should be confined to a direction to the deft. not to obstruct its exercise.

The mandatory injunction granted by the lower Courts against the servient owner to restore the original level of his lands was set aside. (*Sadasiva Iyer and Phillips, JJ.*) *DORAISWAMI MUTTIRIYAN v. NAMBIAPPA MUTHIRIAN*.  
23 M. L. T. 210=  
(1918) M. W. N. 167=44 I. C. 500.

—Easement—Interference with—Right to discharge water artificially brought on the land—Interference with—Form of decree for injunction. See EASEMENTS, ACT, SS. 7 AND 22.  
23 M. L. T. 210=44 I. C. 500.

—Easement—Possessory right—Right to the use of water in a Govt. channel, not based on prescription—Mere possessory right—Suit for injunction restraining interference with, not maintainable.

In a suit by plffs. for recovery of possession of certain ryotwari lands from their lessees, the defts. the plffs. also asked for a declaration of their rights and an injunction restraining the defts. from causing obstruction to the flow of water from a Government channel called Diguva to the suit lands. The Government however was not made a party to the suit. It was found that according to the Government, register the source of supply to the suit lands was another Government channel but that the defts. who were in possession of the suit lands as lessees had, under some arrangement with the Government, been irrigating them for the last 20 or 30 years with the water of Diguva channel which was the proper source of irrigation for the deft's own lands. It was also found that the plffs. had not acquired a right of easement or any right to take water from Diguva channel by prescription. The plffs. claimed that they must be deemed to have been in possession of the right to take water for the suit lands from the Diguva channel through their lessees, the defts. and that as their possessory right had been threatened by the defts. they were entitled to a prohibitory injunction consequent upon a declaration of their rights.

Held, that, in the circumstances of the case, the plffs. were not entitled to the declaration and injunction prayed for. The plffs.

## INJUNCTION.

had established no right as against anybody in the water of the Diguva channel, whatever right they might have as against the Government for the supply of water to the lands in question. Nor could the plffs. be said to have been in such possession of the channel or any easement with reference to it, as to entitle them to an injunction. The grant of a declaration being discretionary, the Court should not grant a declaratory decree to the plffs. in the absence of the Government, the owner of the channel in question. 33 Mad 290. 34 Mad. 173; 20 M. L. J. 823 ref (*Abdur Rahim and Navier, JJ.*) *MAHANKALI LAKSHMI v. KARNAM NARAYANAPPA MAHANAKALI*.

34 M. L. J. 425=(1918) M. W. N. 276=  
23 M. L. T. 337=45 I. C. 80.

—Effect of order—Order restraining Karnavan of Tarward from contracting loans—Loan contracted for family purposes not withstanding order—Effect of injunction—Binding nature of as against Tarward. See, MALABAR LAW, KARNAVAN. 35 M. L. J. 96.

—Grant of—Case not coming within O. 39 R. 1 C. P. Code—Injunction not to be issued against a person not a party to the suit—Injunction in the exercise of inherent power, not to be granted except in exceptional cases. See C. P. CODE, O. 39, R. 1. 3 Pat. L. J. 456.

—Highway—Right to go in procession—Threatened obstruction—Suit for injunction—Proof of special damage—Suit maintainable. See HIGHWAY. 23 M. L. T. 258=  
44 I. C. 834.

—Mandatory—Co-owners—Building on common land—No material detriment or substantial injury—No relief. See CO-OWNERS. 29 P. R. 1918.

—Meaning of—Relief consequential on infringement of legal right—Every order of Court directing a person to do a certain act, not an injunction. See C. P. CODE, O. 21, R. 32. 3 Pat. L. J. 106.

—Municipality—grant of permission by, to build privy—Subsequent revocation of order—Validity. See BOM. DT. MUN ACT, S. 35 (2) (3). 20 Bom. L. R. 756.

—Suit by villagers to present members from taking the skins of their dead animals—Mahars claiming right on—Vatandars—Right to injunction—Depending on mahars proving hereditary right on Vatani. See JURISDICTION, CIVIL COURT. 20 Bom. L. R. 993.

—Temporary—Suit for permanent injunction—Duty of court to grant temporary injunction, when refusal would amount to denial of justice. See C. P. CODE, O. 39, R. 1. 43 I. C. 24.

## INJUNCTION.

—Trespass—Branches of trees overhanging on neighbouring lands—Right to cut off—Injunction to remove the growth—Whether dependent on ability to prove damages. *See* TRESPASS. 29 Ecm. L. R. 826.

**INSOLVENCY**—Adjudications—Priority of adjudications test of—Rival Jurisdiction—Proceedings in—Annulment of—Balance of convenience. *See* PRES. TOWN INSOL. ACT, 35 M. L. J. 533. SS. 17 AND 51.

—After acquired property of insolvent—Cause of action accruing after order of adjudication—Suit by undischarged bankrupt—Security for costs—Nominal plaintiff—Amounts claimed far in excess of the debts proveable in insolvency—Trustee intervening—C. P. Code S. 151—English Law.

An undischarged insolvent brought an action for the recovery of a sum due in respect of brokerage from the defendant company and earned by him subsequent to his adjudication the amount claimed being in excess of the amount of his debts proveable in insolvency. The defendant applied for an order that the plaintiff be directed to give security for the costs of the suit.

*Held*, that the plaintiff was not a nominal plaintiff suing merely for the benefit of the Official Assignee and so no order as to security for costs should be made.

That the application is not covered by any provision in the C. P. Code but that Code is not exhaustive and it must be dealt with under the general law.

That it is well settled in English law that a cause of action which accrues to a bankrupt subsequent to the adjudication in respect of after acquired property, remains vested in him and does not vest in his Trustee in Bankruptcy and that he is the proper plaintiff to sue in respect thereof and that anything recovered by him remains in the Bankrupt until the Trustee intervenes and the same principles are applicable in this country.

That it is also well settled that a plaintiff will not be compelled to give security for costs merely because he is a pauper or a bankrupt. *Rhodes v. Dawson*, L. R. 16 Q. B. D. 548, *Cock v. Wellock*, L. R. 24 Q. B. L. 658 and *Cowell v. Tylor*, L. R. 31 Ch. D. 34 ref. (*Greaves, J.*) *E. D. MURRAY v. EAST BENGAL MAHARAJAN FLOATING CO. LTD.* 22 C. W. N. 1018—48 I. C. 622.

—Annulment—Proceedings in rival jurisdictions—Balance of convenience. *See* PRES. TOWNS INSOL. ACT, SS. 17 AND 51. 35 M. L. J. 533.

—Annulment—Suit by—Receiver commenced before annulment—Maintainability of after.

One G. R. started a firm in which, he associated as partner.

## INSOLVENCY.

ners without contribution of capital. Subsequently a brother of G. R. sued him for partition. Instead of fighting that suit G. R. made an application to be adjudged an insolvent and a composition was accepted by the creditors. Thereupon the insolvency was annulled. Before this however the Receiver had commenced a suit against the brothers of G. R. in respect of their liability to G. R. in certain other concerns in which the brothers of G. R. had no interest. The suit was decreed and upon appeal to the High Court it was objected that the suit by the Receivers after annulment of the insolvency was not maintainable:—*Held* that the suit was maintainable. (*Richards, C. J. and Banerji, J.*) *MANNU LAL v. NELIN KUMAR MUKERJI*. 16 A. L. J. 933—48 I. C. 443.

—Arrest before judgment—Deposit of money in court sufficient to answer claim—Insolvency of judgment-debtor before decree—Right of receiver in insolvency and decree-holder. *See* C. P. CODE, O. 38, R. 2. 35 M. L. J. 355.

—Debt proveable in—English mortgagee—No right to prove in insolvency, until his security has been valued or realised. *See* CROWN DEBTS. 22 C. W. N. 793.

—Official Receiver—Right of, to initiate proceedings—Execution of decree—Judgment-debtor declared insolvent—Order in execution that certain properties were fraudulently concealed by debtor from creditors—Right of appeal.

A judgment-debtor who has been adjudicated an insolvent, cannot maintain an appeal against an order in execution proceedings that certain properties belonging to him were fraudulently concealed by him from his creditors. The only person who can appeal against such a decision is the Official Receiver. (*Fletcher and Huda, JJ.*) *BONOMALI DUTTA v. LALIT MOHAN GHOSAL*. 47 I. C. 152.

—Petition for—Dismissal for default—Petitioner examined and evidence taken—Adjournment—Petitioner absent on adjourned date—Dismissal of petition—Legality. *See* PROV. INSOLVENCY ACT, SS. 6, 15, AND 16. 16 A. L. J. 703.

—Procedure—Mofussil—Summary procedure for discovery of properties concealed by insolvent—No provision for—Remedy of creditor to move Official Assignee to file suit. *See* PROV. INS. ACT, SS. 36, 37 AND 43. 44 I. C. 143.

—Proceedings—Insolvent—Suit against without leave of Court—Maintainability of. *See* (1917) DIG. COL. 68. *MAHOMED YAKUB v. BIJAI LAL*. 20 O. C. 304—43 I. C. 262.

—Receiver—Suit on money claim—Receiver of necessary party—Suit for rent.

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To a suit for arrears of rent where one of the tenants has been adjudicated an insolvent, the Receiver of his estate in insolvency is not a necessary party, if the suit is regarded as a simple money suit.

A Receiver in a Mofussil insolvency stands on much the same footing as the Official Assignee in the Presidency Towns, so that he is not a necessary party to a suit against the insolvent for the recovery of a simple money debt. (*Chetty and Smither, J.J.*) ANRITA LAL GHOSE v. NARAIN CHANDRA CHAKRA-BARTY. 46 I. C. 395

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**INSOLVENCY PROCEEDINGS**—Insolvent—Suit against without leave of court—Maintainability of. See (1917) DIG. COL. 681. MAHOMED YAKUB v. BIJAI LAL. 20 O. C. 304=43 I. C. 262

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In Berar it has been the practice from time immemorial to apply the rule of Damdupat to all cases, of debt including mortgage contracts. (*Stanyon, A. J. C.*) JAIRAM v. DEBIDAYAL. 46 I. C. 789.

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from date of deposit. See C. P. CODE. O. 24 RR. 1, 2 AND 3. 16 A. L. J. 15.

—Heavy and exorbitant rate of interest—Debt contracted by Hindu father on credit of family property Power of court to interfere.

In case of debts contracted by Hindu fathers on the credit of the family property courts have a discretion to interfere if the interest charged is excessive or exorbitant.

Held further, that the appellate court will be slow to interfere where it can be shown that such discretion has been exercised in a reasonable manner. (*Lindsay, J. C.*) DARGAHI v. CHAUDHRI RAJESHWARI PRASHAD. 21 O. C. 265=48 I. C. 753.

—Money in deposit in court—Dispute regarding—One party withdrawing amount on giving undertaking to the party found entitled—Whether entitled to interest—C. P. CODE. S. 144—Applicability of. See (1917) DIG. COL. 633; ALAGAPPA CHETTIAR v. MUTHUKUMARA CHETTIAR.

41 Mad. 316=22 M. L. T. 162=42 I. C. 836.

—Penalty. See also CONTRACT ACT, S. 74.

—Penalty—Decree for money—Time granted on condition of payment of higher interest—Sanction of Court—Power of Court to disallow higher rate as penalty. See C. P. CODE. O. 20, R. 11 (2). (1918) Pat. 76.

—Reasonable rate, what is—Compound interest on failure to pay regularly—Stipulation by way of penalty. See (1917) DIG. COL. 634; CHHANNU LAL v. RAJ KUAR. 20 O. C. 318=43 I. C. 295.

—Right to—Depends on contract or Statute.

The right to interest depends on contract express or implied or on some rule of law allowing it. (*Lord Sumner*) LALA KALYAN DAS v. SHEIKH MAQBUL AHMAD.

40 All. 497=22 C. W. N. 866=35 M. L. J. 169. 24 M. L. T. 110=8 L. W. 179= (1918) M. W. N. 535=20 Bom. L. R. 864=16 A. L. J. 693=5 Pat. L. W. 189=23 C. L. J. 181=46 I. C. 543 (P. C.)

—Tender of large sum than the amount due on the mortgage—Right to interest. See T. P. ACT, S. 68. 34 M. L. J. 439.

—Thavane rate—Nattukkottai Chetties—Practice of.

The expression thavanai interest in the case of deposits made with Nattukkottai Chetty firm means the customary rate of interest which is fixed by Nattukkottai Chetties every two months. (*Wallis, G. J. and Kumaraswami*)

## INJUNCTION.

—Trespass—Branches of trees overhanging on neighbouring lands—Right to cut off—Injunction to remove the growth—Whether dependent on ability to prove damages. *See* TRESPASS. 20 Bom. L. R. 326.

**INSOLVENCY**—Adjudications—Priority of adjudications test of—Rival Jurisdiction—Proceedings in—Annulment of—Balance of convenience. *See* PRES. TOWN INSOL. ACT, SS. 17 AND 51. 35 M. L. J. 533.

—After acquired property of insolvent—Cause of action accruing after order of adjudication—Suit by undischarged bankrupt—Security for costs—Nominal plaintiff—Amounts claimed far in excess of the debts proveable in insolvency—Trustee intervening—C. P. Code S. 151—English Law.

An undischarged insolvent brought an action for the recovery of a sum due in respect of brokerage from the defendant company and earned by him subsequent to his adjudication the amount claimed being in excess of the amount of his debts proveable in insolvency. The defendant applied for an order that the plaintiff be directed to give security for the costs of the suit.

*Held*, that the plaintiff was not a nominal plaintiff suing merely for the benefit of the Official Assignee and so no order as to security for costs should be made.

That the application is not covered by any provision in the C. P. Code but that Code is not exhaustive and it must be dealt with under the general law.

That it is well settled in English law that a cause of action which accrues to a bankrupt subsequent to the adjudication in respect of after acquired property, remains vested in him and does not vest in his Trustee in Bankruptcy and that he is the proper plaintiff to sue in respect thereof and that anything recovered by him remains in the Bankrupt until the Trustee intervenes and the same principles are applicable in this country.

That it is also well settled that a plaintiff will not be compelled to give security for costs merely because he is a pauper or a bankrupt. *Rhodes v. Dawson*, L. R. 16 Q. B. D. 548, *Cock v. Wellock*, L. R. 21 Q. B. L. 658 and *Cowell v. Tylor*, L. R. 21 Ch. D. 34 ref. (*Greaves, J.*) E. D. MURRAY v. EAST BENGAL MAHARAJAN FLOATING CO. LTD. 22 C. W. N. 1018=48 I. C. 622.

—Annulment—Proceedings in rival jurisdictions—Balance of convenience. *See* PRES. TOWNS INSOL. ACT, SS. 17 AND 51. 35 M. L. J. 533.

—Annulment—Suit by—Receiver commenced before annulment—Maintainability of after.

One G. R. started a firm in which he associated his two brothers and his father as part-

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ners without contribution of capital. Subsequently a brother of G. R. sued him for partition. Instead of fighting that suit G. R. made an application to be adjudged an insolvent and a composition was accepted by the creditors. Thereupon the insolvency was annulled. Before this however the Receiver had commenced a suit against the brothers of G. R. in respect of their liability to G. R. in certain other concerns in which the brothers of G. R. had no interest. The suit was decreed and upon appeal to the High Court it was objected that the suit by the Receivers after annulment of the insolvency was not maintainable:—*Held* that the suit was maintainable. (*Richards, C. J. and Banerji, J.*) MANNU LAL v. NELIN KUMAR MUKERJI. 16 A. L. J. 933=48 I. C. 443.

—Arrest before judgment—Deposit of money in court sufficient to answer claim—Insolvency of judgment-debtor before decree—Right of receiver in insolvency and decree-holder. *See* C. P. CODE, O. 38, R. 2. 35 M. L. J. 355.

—Debt proveable in—English mortgagee—No right to prove in insolvency, until his security has been valued or realised. *See* CROWN DEBTS. 22 C. W. N. 793.

—Official Receiver—Right of, to initiate proceedings—Execution of decree—Judgment-debtor declared insolvent—Order in execution that certain properties were fraudulently concealed by debtor from creditors—Right of appeal.

A judgment-debtor who has been adjudicated an insolvent, cannot maintain an appeal against an order in execution proceedings that certain properties belonging to him were fraudulently concealed by him from his creditors. The only person who can appeal against such a decision is the Official Receiver. (*Fletcher and Huda, JJ.*) BONOMALI DUTTA v. LALIT MOHAN GROSAL. 37 I. C. 152.

—Petition for—Dismissal for default—Petitioner examined and evidence taken—Adjournment—Petitioner absent on adjourned date—Dismissal of petition—Legality. *See* PROV. INSOLVENCY ACT, SS. 6, 15, AND 16. 16 A. L. J. 703.

—Procedure—Mofussil—Summary procedure for discovery of properties concealed by insolvent—No provision for—Remedy of creditor to move Official Assignee to file suit. *See* PROV. INS. ACT, SS. 36, 37 AND 43. 44 I. C. 143.

—Proceedings—Insolvent—Suit against without leave of Court—Maintainability of. *See* (1917) DIG. COL. 68. MAHOMED YAKUB v. BIJAI LAL. 20 O. C. 304=43 I. C. 262.

—Receiver—Suit on money claim—Receiver if necessary party—Suit for rent.

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## INTEREST S. 1.

*Sastri, J.* MUTHIA CHETTIAR v. RAMA-NATHAN CHETTIAR. (1918) M. W. N. 242=7 L. W. 330=43 I. C. 972.

INTEREST ACT (XXXII OF 1839), S. 1.—Interest—Award of, as damages in the absence of contract to pay and notice of demand. *See* INTEREST. 22 C. W. N. 438.

INTERPRETATION.—Proviso to section—Effect of. *See* LAND IMPROVEMENTS LOANS ACT, S. 4. 34 M. L. J. 446.

————Punctuation marks, value of.

Per *N. R. Chatterjea, J.* It is an error to rely on punctuation in construing Acts of the legislature. (*Fletcher, Teunon, Richardson Chaudhuri and N. R. Chatterjea, JJ.*) MANI LALL v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA. 45 Cal 343=22 C. W. N. 1=27 C. L. J. 1=44 I. C. 770.

————Statute, affecting jurisdiction—Strict construction

An act by which the jurisdiction of the ordinary Courts of Judicature is taken away must be construed strictly. (*Drake Brockman, J. C.*) KAMA v. BHAIJANLAL CHANTANLAL. 45 I. C. 654.

————Statute—Alternative remedies—Election by party.

In cases where a statute provides a special remedy for a right or liability already existing unless the statute contains words which either expressly or by necessary implication exclude the common law remedy the person suing has his election to pursue either that or the statutory remedy. (*Drake Brockman, J. C.*) BALA v. VITHU. 44 I. C. 237.

————Statute—Ambiguous language—Interpretation so as to avoid extreme or anomalous consequences.

If a statutory enactment is ambiguous and capable of two interpretations, courts are entitled to take into consideration that there are certain consequences which it may be presumed the Legislature did not intend to bring about and to prefer a construction which would avoid such consequences rather than one which would lead to them. (*Miller, C. J. Mullick and Imam, JJ.*) SHEO NANDAN PRASAD SINGH v. EMPEROR. 3 Pat. L. J. 581=(1919) Pat. 1=5 Pat. L. W. 324=46 I. C. 977=19 Cr. L. J. 833.

————Statute—Heading to a group of sections—Not to restrict scope of the operative part of the section.

The heading to a group of sections in a statute ought not to be pressed into a constructive limitation upon the exercise of the

————Statute—Principle of, general words cover things not specially named.

Per *Richardson, J.* The general rule for the construction of statutes is that the legislature

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powers given by the express words of the Act. (*Lord Sumner.*) NARMA v. BOMBAY MUNICIPAL COMMISSIONER.

42 Bom. 462=20 Bom. L. R. 937=

23 C. W. N. 110=8 L. W. 548=

24 M. L. T. 297=(1918) M. W. N. 840=

48 I. C. 63=45 I. A. 125) 129 (P. C.)

————Statute—Illustrations—How far a guide. *See* CONTRACT ACT, S. 16.

35 M. L. J. 614. (P. C.)

————Statute—Illustrations to a section—Authoritative exposition of the meaning of the section. *See* CONTRACT ACT, S. 73.

23 M. L. T. 320.

————Statute—Illustrations to a section—explanatory of its meaning—Value and relevancy of. *See* CONTRACT ACT, S. 83.

11 Bur. L. T. 9.

————Statute of Limitation—Exceptions not recognised by the Limitation Act, not to be introduced. *See* LIMITATION ACT, SS. 9 AND 15. 47 I. C. 122.

————Statute—Preamble, value of—*See* WORKMAN'S BREACH OF CONTRACT ACT. 16 A. L. J. 715.

————Statute—Presumption of—Conformity existing legal notions.

It must always be presumed that the Legislature does not intend to make any alteration, in the law beyond what it expressly, declares, either in express terms or by implication, or in other words beyond the immediate scope and object of the Statute. In all general matters beyond the law remains undisturbed. It is in the highest degree improbable that the Legislature would overthrow fundamental principles or depart from the general system of law without expressing its intention with irresistible clearness. (*Crouch and Hayward, A. J. C.*) SOBHRAJ DWARKADAS v. EMPEROR.

11 S. L. R. 113=45 I. C. 399=

19 Cr. L. J. 591.

————Statute—Previous legislation, reference to, when permissible.

In construing a statute the Court is entitled to look and see the course of legislation previous to the passing of the Act in question, and if the words of the previous statute are re-enacted it may be assumed that it was intended that the law should be continued as it existed. (*Dawson Miller, C. J. and Mullick, J.*) NARAIN SINGH v. GABRIEL UBOAN.

4 Pat. L. W. 189=(1918) Pat. 181=

44 I. C. 262.

————Statute—Principle of, general words cover things not specially named.

Per *Richardson, J.* The general rule for the construction of statutes is that the legislature

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means what it says. The words best declare the intention. But owing perhaps to the imperfection of language as an instrument, or to the fact that language is sometimes misled even in the legislative enactments, it may always be easy to say what the meaning is. The language may be doubtful or ambiguous. The Courts may have a choice between different possible constructions and in such cases there may be subsidiary rules or principles more or less controlling the choice according to the nature of the subject-matter, whether the Act is penal or remedial and so forth. Beyond that there is more delicate ground where the strict literal meaning would lead to a result so absurd as to be rational, and it may be found to be possible to modify the meaning so as to avoid the result.

It is the function of general words to include things not specially named (*Fletcher, N. R., Chatterjee, Tennon, Richardson and Choudhuri, JJ*) **MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA.** 45 Cal 343=22 C. W. N. 1=27 C. L. J. 1=44 I. C. 770

—Statute—Re-enactment of terms of earlier statute—Recognition of judicial interpretation of earlier statute, by legislature.

The Legislature must be presumed to have known the interpretation put by courts and others on the terms of a statute and when a provision of an earlier statute is re-enacted in practically the same language in a later Statute, it is a Legislative recognition of the correctness of the earlier interpretation. 4 C. 172; 11 A. 490; (1891) A. C. 59. (*Dawson, Miller, C. J., Chapman, Rao, Atkinson and Mullick, JJ.*) **PARMESHWAR AHIR v. EM PEROR.** 3 Pat. L. J. 537=

4 Pat. L. W. 157, 175=  
(1918) Pat. 97=44 I. C. 185=  
19. Cr. L. J. 281.

—Statute—Retrospective operation, not presumed it vested rights affected—Right to have a decision final and not open to appeal—Substantive right. See C. P. CODE, S. 102  
23. M. L. T. 255.

**JOINT CREDITORS**—Payment to one—Not a discharge of liability. See CO-MORTGAGEES.  
22 C. W. N. 1621.

**JAGIR**—Grant of land and not revenue only—Property attachable in execution. See C. P. CODE, S. 40 (g).  
22 C. W. N. 577 (P. C.)

**JAIL REGULATIONS AND MANUALS**—Breaking of—Effect of. See C. P. CODE, O VI R. 14.  
16 A. L. J. 64.

**JOINT DECREE-HOLDERS**—Payment to one or some of them—Not a discharge of the decree. See C. P. CODE, O. 21, R. 2 (1).  
(1918) M. W. N. 507.

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**JUDGE**—Change of—Findings recorded by predecessor with consent of parties—Right of successor to reconsider them. See PRACTICE. JUDGMENT.  
11 Bur. L. T. 27.

**JUDGMENT**—Basis of—Presumptions and suspicions, not a ground for decision. See SECOND APPEAL, GROUND FOR.  
44 I. C. 433.

—Decision of High Court in a Land Acquisition appeal whether a judgment within cl. 15 of the letters patent. See LAND ACQUISITION ACT, S. 54.  
35 M. L. J. 110.

—Rectification of—Remedy by suit if and when available—Mistake—Effect of. See DECREE, SETTING ASIDE  
3 Pat. L. J. 465.

**JUDICIAL COMMISSIONER**—Review of decision in rent cases—Jurisdiction. See REVIEW.  
21 O. C. 254

**JUDICIAL ORDER**—Collateral attack—Error of law—Irregularity in the exercise of Jurisdiction—Not a ground for. See DECREE, SETTING ASIDE.  
22 C. W. N. 250

—Collateral attack—Illegality of order not a ground for—Jurisdiction, meaning of. See DECREE, SETTING ASIDE.  
43 I. C. 804.

**JURISDICTION** — British Indian Court — Extra territorial jurisdiction—Offence by a subject of a Native State on a foreign ship on the high seas—No jurisdiction to try the accused. See PENAL CODE, S. 4.  
20 Bom. L. R. 98.

—Of British Indian Courts—Accused a Patiala subject—Arrest on railway lines in Patiala territory—Charge of abetment in Patiala territory—Offence committed in Br. India.

The arrest of the accused, a subject of the Patiala State, on the Railway lines within State territory was lawful, as full and exclusive power and jurisdiction of every kind over the railway lines and over all persons within those lines had been ceded by the State to the Br. Govt.

Held also, that a subject of a Native State cannot be tried in Br. India for abetment within that state of an offence committed in Br. India. (*Shadi Lal and Martineau, JJ*) **BALWANT SINGH v. EMPEROR.**

31 P. R. (Cr) 1918=43 I. C. 865.

—British Court — Non resident foreigner — Claim for freight — Illegally collected—Claim for damages for short delivery or in the alternative for general average—Cause of auction See C. P. CODE, S. 20 (c).  
35 M. L. J. 189.

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—Objection as to if and when can be raised for first time in appeal. *See* C. P. C. S. 222. (1918) M. W. N 661.

—Objection to—Acquiescence by parties—Subsequent objection *See* (1917) DIG. COL 694 IMPERIAL OIL SOAP AND GENERAL MILLS AND CO *v.* RAM CHAND. 91 P. R. 1917=9 P. L. R. 1918=36 I. C. 980.

—Objection to—Waiver of—Case triable by superior Court tried by inferior Court—Prejudice presumption of.

Where an inferior Court disposes of a case which should have been heard by a superior Court there is ground for thinking that the parties were prejudiced. A party is not estopped from questioning the jurisdiction of a Court to hear an appeal though he himself presented the appeal in that Court. 16 P. R. 1907 foll. 36 P. R. 1902 dist. (*Broadway, J.*) CHELOO *v.* KALI DAS. 21 P. R. 1918=34 I. C. 316.

—Pres. Small Causes Courts—Suit in ejectment—Actual rental of portion in occupation less than Rs. 100—Right to go into question of title to determine jurisdiction. *See* PRES. SMALL CAUSE COURTS ACT, S. 4. 7 L. W. 610.

—Question as to—Deft. plea will not affect. *See* MADRAS ESTATES LAND ACT, Ss. 189 AND 77. 34 M. L. J. 309.

—Revenue Courts—Power to decide finally on validity of documents.

The proposition laid down in 19 O. C. 58, to the effect that the Revenue Courts have exclusive jurisdiction to decide finally upon the validity of document of title though correct as a general statement of the law is subject to the obvious qualification that the Civil Courts cannot decide any matter in which jurisdiction has been exclusively reserved to the Revenue Courts. (*Lindsay, J.*) *See* office NATH *v.* DRIGBIJAY SINGH. 50 L. J. 61.

—Of Revenue Court—Suit to recover rent—Ryoti Land—Person in possession or of legal right or as trespasser. *See* M. P. ESTATES LAND ACT, Ss. 6 (4) 45. 168. 35 M. L. J. 9.

—Small Cause Court—Attachment of immovable property before judgment. *See* SMALL CAUSE COURT. 13 N. DRAS

—Small Cause Court—Attachment of sale of mortgage decree in execution. 419.

A Small Cause Court is not competent to attach and sell preliminary decrees for foreclosure of immovable property. (*Mitra, A. J. C.*) KRISHNAJ BALIRAM. 44 I. C. 20.

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—Small Cause Court—Objection to—Duty of court to hear and decide on the objection, before trial on merits. *See* PROV. SM. C. C. ACT, SCH. II ART. S. 4. Pat. L. W. 218.

—Small Cause Court—Plff. and deft. jointly carrying on cultivation—Agreement by deft. to pay plff. half share of profits—Suit to recover money due thereunder—Whether suit for rent. *See* (1917) DIG. COL 695 RAM NATH *v.* SEEDHAR SINGH. 40 All. 51=15 A. L. J. 862=45 I. C. 323.

—Small Cause Court—Suit for definite sum alleging other transactions for which right to sue was reserved. *See* PROV. SM. CAUSE COURTS ACT, ART 31. 1918 M. W. N 717.

—Small causes court—Suit for Specific performance of a contract to pay money by vendor of land against vendee. *See* SPECIFIC PERFORMANCE. 1918 M. W. N. 896.

—Submission to, in trial Court—Objection to—Jurisdiction, not to be raised on appeal. *See* C. P. CODE S. 86. 47 I. C. 558.

—Test of—Allegations in the plaint alone to be looked into.

The venue of a case must be determined by the nature of the claim as laid, and not by the nature of the defence set up. (*Drake Brockman, J. C.*) KAMA *v.* BHAIJAN LAL CHANDANLAL. 45 I. C. 654.

—Valuation of suit for purposes of relief—Good for purposes of determining jurisdiction. *See* COURT-FEES ACT, S. 7, (4) (c). 24 M. L. T. 257.

—Waiver—Want of—Effect of decree passed by Court having no jurisdiction—No waiver subject to jurisdiction—No Waiver of objection of jurisdiction—Bengal United Provinces and Assam Civil Courts Act XII of 1907, S. 21 cl. a)—District Judge Decree in a case not within his competence—The p. n.

under p. n. under p. n. a Court has no inherent jurisdiction disposes case it cannot pronounce any decree landlord does. that decree is null and void. An at the time as to jurisdiction can be taken at any first road in any state of the case and cannot the heir of: so held with regard to a case falling Held, t 21 (v) Bengal and United Provinces, tenant in Civil Courts Acts, XII of 1907 and the p. n. and *Atkinson, J. J.*) RAGU. SINGH dispute, *see* LI. Pat L. W. 445= Court 13. 45 I. C. 920. A. J. C.) SINGH. HILL TRIBES REGULATION 11 (3) and 11)—C. P. Code, Ss. 9

—Civil jurisdiction—Matter arising in places suit—Revenue tract.

## KARACHI PORT TRUST ACT.

The Kachin Hill Tribes Regulation applies to Kachins in the defined hill tracts and does not apply outside those hill tracts.

S. 14 of the Kachin Hill Tribes Regulation applies to suits triable within a hill tract by an officer exercising jurisdiction therein. It is permissive and gives the Special Court power to try any suit of the nature described, but it does not lay down, and it cannot be inferred, that where a suit is triable outside a hill tract, the jurisdiction of the ordinary Civil Courts is superseded (*Saunders, A. J. C.*) *PANKSI HOW v. SINWA NAUNG.* 44 I. C. 659.

KARACHI PORT TRUST ACT (VI of 1886)  
Ss 87 and 88—Board of trustees for Karachi port—Suit against—Limitation.

The word 'person' in S. 87 of the Karachi Port Trust Act technically includes and was intended to include the Board.

Ss. 87 and 88 of the Karachi Port Trust Act do not distinguish suits against private individuals from suits against the Board, but S. 87 deals with the limitation of suits against the Board or any servant or officer of the Board, while S. 88 defines the responsibility of the Board for the acts of their officers and servants (*Patt, J. C. and Croun, A. J. C.*) *MOOSANI AHMED & CO v. THE KARACHI PORT TRUST.* 11 S. L. R. 126=45 I. C. 410.

## KAYAM SASWATHAM PATT—Permanent lease. See LANDLORD AND TENANT.

35 M. L. J. 129.

**KHOTI SETTLEMENT**—Khoti village—Dunlop's proclamation—Introduction of survey settlement in the village—Tenants of Khot registered as Khatedars—Fixity in the amount of rent payable—Kabulyats passed by Kh. ND. to Government—Bombay Survey and Settlement Acts, (I of 1865) Ss. 37 and 38—Trees on Varkas lands—Sale by Govt. to Khatedars—Khots' right to the sale proceeds. *BOM. SURVEY AND SETTLEMENT ACT, Ss. 37 and 38.* 20 Bom. L. R. 38.

**KHOTI VILLAGE**—Occupancy holding, hapman fer of without Khot's permission—Mortgage from Khot's purchasing—Occupancy right mortgagor—Mortgagee cannot recover improvement from mortgagor Khot—*Br. India S. 63.* not a Br.

A Khoti tenant in the Kholaba cannot transfer his occupancy holding without the permission of the Khot, and, if he has no jurisdiction, the Khot is entitled to re-enter.

The decision in 18 Bom. L. R. 446 in a Native case of the Kholaba District as a whole area actually be restricted to the particular village in which the litigation came.

When a mortgagee of a Khoti village purchases, while he is in possession, the Khoti village, the mortgagee is not bound to pay the market value at the date of acquisition.

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rights of occupancy tenants without the permission of the Khot and makes accretions to the mortgaged property. he is not entitled to rely upon S. 63 of the T. P. Act and to call upon the mortgagor Khot to reimburse him for the moneys spent in making purchases of occupancy holdings without the Khot's permission. (*Butcher, A. C. J. and Kemp, J.*) *GOPAL v. BHAGITRI.* 20 Bom. L. R. 681. 46 I. C. 628.

**LAKHIRAJ**—Presumption of, from long possession without payment of rent. See *B. T. ACT, S. 106* 22 C. W. N. 396

**LAMBARDAR**—Ejectment Tenant or trespasser—All co-sharers must be joint—Lambardar can act only as agent of the entire body of Co-sharers. See *CO-SHARER.* 3 Pat L. J. 88.

Successor—Appointment of in default of an heir of last incumbent Rival claimant Collector's discretionary power of appointment not ordinarily to be interfered with—Lambardari rule No 15.

In making an appointment as successor to a lambardar in default of heir the officer making the appointment is at liberty to consider, in addition to the points set out in rule 15 all matters which may reasonably be regarded as relevant to the suitability of the appointment and as between rival candidates he is expected to decide according to the general balance of their respective claims and of the administrative advantages or disadvantages of appointing each respectively.

If such officer has exercised his discretion in a reasonable manner neither ignoring any of those matters which he ought to consider nor perversely running counter to the general sense of the rule his decision ought to be allowed to stand and the mere fact that an appellate or revising officer takes a different view of personal claims is not a good reason for upsetting or modifying that decision. (*Maynard, F. C.*) *CHAUDHURI MASRIALI v. MALIK CHIRAGH KHAN.* 1 P. R. (Rev) 1918=2 P. W. R. (Rev.) 1918=45 I. C. 87.

**LAND ACQUISITION ACT, (I OF 1894)**—Power of Corporations to acquire land to build Bridge—Compensation. See *BOMBAY CITY MUNICIPAL ACT, Ss. 267, 269, 299 AND 303.* 20 Bom. L. R. 937. (P. J.)

**S. 9—Damages claim for, if sustained, valid at market value at the date of acquisition.**

Code, suit for enhancement of compensation by the Collector for land acquired by the body for a public purpose a claim for damages for severance cannot be entertained by the Civil Court unless it was originally made before the Collector.

The question of the market value of land at the date of the acquisition does not depend

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that the amount of the award should be enhanced by Rs. 7,000 while the other Judge on the method of valuation adopted by him was for awarding on the whole an additional sum of Rs. 56,000. The Judges of the Divisional Bench thereupon agreed that the decision of the Dt. Judge should be modified by adding Rs. 8,050 to the award. On appeal by the claimant under cl. 15 of the Letters Patent.

*Held*, that the decision of the High Court was not a judgment, within the meaning of cl. 15 of the Letters Patent and was not therefore open to appeal. 40 Cal. 21 and 17 C. W. N. 421 ref. Under S. 98 (2) of the C. P. Code which applied to the case, the result of the hearing before the Division Bench must be taken to be the confirmation of the award of the Dt. Judge. 12 C. L. J. 525 ref.

Per *Seshagiri Iyer, J.*—The conclusion of the Judges of the Division Bench to increase the amount of the award, not being based on any point or principle on which they agreed, S. 98 of the C. P. Code was not applicable to the case. The result was that there was no 'judgment' so as to attract the provisions of cl. 15 of the Letters Patent. Cl. 36 of the Letters Patent governs appeals from the mofussil in cases where S. 98 of the C. P. Code does not apply. 25 Mad. 548; 18 M. L. T. 591; 29 Mad. 1; 20 Bom. L. R. 185 ref. (*Abdur Rahim, Oldfield and Seshagiri Iyer, JJ.*) MANAVI KRAMAN TIRUMALPAD v. THE COLLECTOR OF THE NILGIRIS. 41 Mad. 943=35 M. L. J. 110=24 M. L. T. 155=(1918) M. W. N. 540=8 L. W. 261.

**LAND IMPROVEMENT LOANS Act, (XIX of 1883) Ss. 4, 7 (1) (c)**—*Loan for improvement what is—Sale of land if free of prior incumbrances—Madras Revenue Recovery Act, S. 12—Proviso to Section—Effect of.*

The provisions of S. 42 of the Madras Revenue Recovery Act apply to a sale under S. 7 (1) (c) of the Land Improvement Loans Act and a sale of land under the provisions of the latter enactment 7 Mad. 431; 25 Mad. 572; 34 Mad. 493 ref.

A loan which was applied for and obtained for the purpose of effecting an agricultural improvement does not cease to be such, simply because the borrower started the "improvement" before he actually received the loan from the Government or because a second instalment of the loan was disbursed by the Government when the first had not been fully utilised within the time prescribed by the rules framed by the Government.

The words of a proviso cannot be used to extend the operation of the section to which it is attached. But where there is doubt as to the true meaning of the substantive part of section, it is legitimate to look to the words of a proviso, in order to determine the proper

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interpretation of the section (1917) A. C. 63 rel. (*Ayling and Seshagiri Iyer, JJ.*) SANKARAN NAMBUDRIPAD v. RAMASWAMI IYER.

41 Mad. 691=34 M. L. J. 446=23 M. L. T. 346=8 L. W. 12=47 I. C. 361.

**LANDLORD AND TENANT.** See also T. P. ACT, SS 105-117.

—*Abadi Land, tenant's house in—Termination of tenancy—Right of tenant to retain his house against Landlord's wishes.*

Where a tenant is found occupying a house in the *abadi* of an agricultural village, the village site being the landlord's property, there is a presumption that he holds the site appurtenant to his tenancy and he has no right to retain it against the wishes of the landlord on ceasing to be a tenant in the village (*Lindsay J. C. and Daniels, A. J. C.*) RAM HARAKH v. BHAIYA AMBIKA DATT RAM. 21 O. C. 237.

—*Abadi—Right of tenant to rent free house site with permission of Malguzar. See ABADI.* 43 I. C. 508

—*Abadi—Tenant ejected from holding if can continue to occupy house.*

Where a tenant is ejected from the agricultural holding in a village, he has no right to occupy a house in the village *abadi* against the will of the zemindar (*Lindsay, J. C.*) GHERAO v. KARAM SINGH. 47 I. C. 645.

—*Breach of covenant—No provision for re-entry—Effect of.*

Where a permanent and heritable lease is granted without any reservation as to the right of re-entry in case of a breach of that condition of the grant, the lessor cannot claim forfeiture of the lease by reason of such breach. (*Kanhiya Lal, A. J. C.*) KATESAR ESTATE v. MUHAMMAD AMIR. 5 O. L. J. 149=46 I. C. 73.

—*Cesses—Implied Contract to pay—Long continued payment—Contract supported by consideration. See ABWAB.* 22 C. W. N. 823.

—*Cesses.—Undertaking to pay by landlord.*

Where a landlord let out a tenure at Rs. 90 per annum including the cesses.

*Held*, that the landlord clearly undertook by contract, as between himself and the tenure holder that he would bear the cesses. (*Fletcher and Huda, JJ.*) JOGENDRA NATH MITTRA v. APARA PROSAD MUKHERJEE. 35 I. C. 618.

—*Denial of landlord's title—Estoppel—Adverse action of third party—Effect. See EVIDENCE ACT S. 116 (1918) M. W. N. 376.*

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—Ejectment—Notice to quit—Requirements of a valid notice—Test of its sufficiency—Service of notice to quit—Service on one joint tenant raises presumption of notice reaching others—Delivery of notice to quit by post—Presumption in favour of its reaching the addressee—Effect of registering letter, containing notice to quit, T. P. Act, S. 106.

The principle governing sufficiency of notices to quit served by landlords upon their tenants are the same in India as in England. Such notices may be good and effective in law, even though not strictly accurate or consistent. The test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with such facts and circumstances. Such notices are to be construed so as to effectuate the intention of the parties *ut res magis valeat quam pereat*.

S. 106 of the T. P. Act only requires that a notice to quit should be tendered or delivered to the party intended to be bound by it either personally or to one of his family or servants at his residence or if such a tender or delivery be not practicable, affixed to a conspicuous part of the property. The personal tender or delivery may take place anywhere. The vicarious tender or delivery must be made at the residence of the person intended to be bound.

In the case of joint tenants service of a notice to quit upon one is *prima facie* evidence that it has reached the others.

If a letter properly directed containing a notice to quit is proved to have been put into the Post Office, it is presumed that the letter reached its destination at the proper time, according to the regular course of business of the Post Office and was received by the person to whom it was addressed. That presumption would apply with greater force to registered letters.

Service of a notice upon or delivery to an agent would be good service or delivery to the principal though in fact the notice was destroyed by the agent and never was seen or heard of by the principal. It is an entire mistake to suppose that the addressee must sign the receipt for a registered letter himself or that he cannot do so by the hand of another person or that if another does sign it on the addressee's behalf, the presumption is that it never was delivered to the addressee himself immediately or immediately. (*Lord Atkinson*.) **HABIBAH BANERJI v. RAMSASHI ROY.** 23 C. W. N. 77=35 M. L. J. 707=16 A. L. J. 969=29 C. L. J. 117=48 I. C. 277=45 I. A. 222. (P. C.)

—Ejectment—Plea of permanent tenancy—Burden of proof—Structures, erection of—Compensation—Equitable estoppel. See (1917) DIG. COL. 109; **THAVASI AMMAL v. SALAI AMMAL.** 22 M. L. T. 530=7 L. W. 178=43 I. C. 643.

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—Ejectment—Raiyat acquiring occupancy right by twelve years adverse possession, evicting tenant in favour of landlord, if liable to be ejected.

Where a raiyat acquires a right of occupancy in his holding by virtue of twelve years possession and cultivation and subsequently executes a fresh lease, he cannot be ejected by the landlord on the expiry of the term of the lease. (*Fletcher and Huda, JJ.*) **SATYAD SHA MAIDAL v. SRIDHAR DULET.**

47 I. C. 157.

—Ejectment—Service tenancy—Omission to perform services—Provision in lease for recovery of Rs. 2 in lieu of services at the option of the landlord—Ejectment

A lease was granted prior to the date of the T. P. Act in consideration of the tenant undertaking to render those services which his predecessor had rendered in the house of the landlord's predecessors and to duly perform those which he would be required to do in the landlord's house at the time of marriages with an option to the landlord on the tenant's failure to perform the services to recover Rs. 2 as rent in lieu thereof or to eject the tenant.

*Held*, that the lease was a perfectly good one and under its terms the landlord was not bound to accept Rs. 2 in lieu of the services, but was competent to eject the tenant in the event of the latter's refusal to perform the services. (*Fletcher and Huda, JJ.*) **SANCHIRAM DE BEHARI v. HARA PRIYA THAKURANI.**

45 I. C. 611.

—Ejectment—Terminable tenancy—allegation of onus on landlord to prove terminable tenancy and its valid termination. See EJECTMENT.

7 L. W. 194=

43 I. C. 977.

—Encroachment by tenant on land of stranger—Acquisition *prima facie* for the benefit of the landlord. See LANDLORD AND TENANT, TRESPASS. (1918) M. W. N. 35.

—Eviction from non-transferable raiyati holding—Sale of by Tenant—Surrender afterwards of same to landlord, and re-settlement of rent—Implied surrender—Eviction by landlord of purchaser of portion. See BENG. T. ACT, S. 50 (6).

22 C. W. N. 967;

See also 22, C. W. N. 965 and

22 C. W. N. 972

—Fixity of rent—Presumption—B. T. Act, Ss. 31 A, 50 (2) 113 and 115—Effect of Ss. 31 and 113—Enhancement of rent—Prevailing rate.

Where the settlement officer settled, in proceedings under Ch. X of the B. T. Act, the rent of the holdings, the rent cannot be enhanced under S. 113 for fifteen years even on the ground of the prevailing rate.

Where the tenants have been recorded as occupancy rights in the Record of Rights in

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right in the land as a raiyat even where it is proved that the latter had no such right (*Fletcher and Panton, JJ*) **AMAR CHANDRA v. NOOR KHATUN.** 47 I. C. 777

—Occupancy tenant—Sublease by—Validity—Landlord's consent—Necessity.

The transfer by the sub-lessee of an absolute occupancy tenant of his interest under a sublease binding on the landlord does not, in the absence of a contract to the contrary, require the landlord's consent. (*Kothwal, Offg A.J.C.*) **SETH NARAYAN DAS v. KRISHNA RAO** 14 N. L. R. 183.

—Occupancy Tenant—Sub-tenancy from year to year—Termination—Notice—Intention of parties—Presumption See OCCUPANCY TENANT. 14 N. L. R. 3

—Permanent lease—Forfeiture by denial of landlord's title—Applicability of rule to denial of title of heir or assignee of landlord—Landlord's denial of tenant's title—Effect of—English and Indian law on the subject—Lease prior to T. P. Act—modes of determining tenancy—Forfeiture, Institution of suit in ejectment—Lease—Construction—*Kayam Saswatham patta*—Permanent lease.

In a suit in ejectment brought by the successor in interest of the grantor of a *Kayam Saswatham patta* granted prior to the T. P. Act against the transferees from the original grantee thereunder, held (a) that the principle of interpretation enunciated in 12 Cal. 117. P. C. with reference to *Istimrari Mukurari pattas* was applicable to the construction of *Kayam Saswatham pattas* and the estate granted under the suit patta was of a permanent character, 15 Mad. 199 foll.

(b) that the general rule regarding forfeiture by denial of landlord's title applied even to a permanent lease and, inasmuch as the defts. had prior to suit clearly set up the title of a third person and denied plaintiff's title they had incurred a forfeiture and the fact that plaintiff prior to suit himself denied their rights as lessees did not affect the result. 24 Cal. 400 and 36 Cal. 1003 ref.

(c) that the suit lease was not governed by the T. P. Act, the institution of the suit was a sufficient determination of the lease and no other previous act determining the same such as a notice to quit was necessary for maintaining the action.

*Quare* as to leases governed by the Act.

The rule of forfeiture by denial of title extends to cases where the title denied is that of the heir or assignee of the person who let the tenant into possession or to whom the tenant attorned.

Discussion of provisions of the T. P. Act relating to forfeiture by denial of title in case of permanent leasehold tenures and comparison thereof with English Law. (*Abdur Rahim and Gladfield, JJ.*) **RAMA IYENGAR v. ANGA GURUSWAMI CHETTY.**

35 M. L. J. 129—8 L. W. 109—46 I. C. 62.

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—Permanent tenancy—Proof of change in rate of rent, effect of—Circumstances at the time of the grant of the lease—Value of.

A mere change in the rate of rent does not necessarily extinguish the original grant, and the mere fact that the rent is enhanced does not incapacitate the lessee from showing that the original grant was intended to be permanent.

Where the origin of a lease is known and the circumstances under which it was given and the subsequent conduct of the parties show with certainty that the grant was perpetual, a mere change in the amount actually paid to the lessor would not put an end to the original lease. (*Drake Brookman, J.C.*) **MATHO RAO v. GOVINDABHAT.** 43 I. C. 794.

—Permanency of tenure—Tanjore Dt.—Temple holding land as ryotwari proprietor—Claim of occupancy right by tenants—Onus of proof—Temple recognised as Ekabogam mirasdar—Lease by manager—Tharam faisal muchilika—Execution of by tenants describing themselves as ulavadaikani mirasdar and Purakudi—Assertion of Permanent tenancy—Effect.

The village of Sellur in the Tanjore District belonged to a temple which was registered as the ryotwari proprietor thereof paying to the Government. The pymash account of 1916 showed that the temple was the sole proprietor of the soil of all the lands in the village at the time and was paying revenue in the shape of paddy to the Government. In the pymash register of 1929 the temple was described as the sole Ekabogham Mirasdar of the village and some of the tenants of the nanjah lands were described as ulavadaikani mirasi tenants. During the year 1920 to 1928 the Collector of Tanjore who was then in management of the temple and its properties left the lands of the village for cultivation to the highest bidders for short terms of 1 to 3 years. The actual cultivation was done generally by purakudis who held under no definite terms and who were entitled only to purakudi waram to be paid by the lessee out of the gross produce. In the year 1931 several persons, the predecessors-in-title of the defts. applied for and obtained a lease of the temple lands from the Collector on execution in his favour of a "tharam Faisal Muchilika." The executants of the Muchilika were variously described, some of them as Purakudis and others as Ulavadaikani Mirasdars but they all agreed to pay a fixed cash revenue to the Government though the same was due directly from the lessor (the temple) and also to pay the price of the paddy grain besides the punjah cash rent, due to the temple as swamibhogam, so long as the lands were in their possession. There were also the provisions for payment of additional cash revenue to the Government and thunduwaram or additional swamibhogam

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to the temple, if garden crops etc. were raised or if waste lands were brought under cultivation by the tenants. It was also in evidence that the defts. and the predecessors in title had all along been selling and mortgaging the lands to the knowledge of the successive trustees of the temple. In 1910 the trustee of the temple brought a suit to eject the defts. after serving them with proper notice to quit.

*Held*, that on the facts of the case and having regard to the muchilika executed by their predecessors in title in the year 1831 the defts. had no occupancy rights in the land in their possession but were merely holding them under a yearly tenancy and that they were liable to be ejected.

Permanent holdings under a ryotwari proprietor being unusual and exceptional the onus of proving that a tenant holding a ryotwari proprietor has a permanent right of occupancy in the land, is on the tenant.

Where it is proved that a tenant came into possession of land under a lease for a term the subsequent assertion of a permanent tenancy by the tenant cannot confer such right upon him, especially when the landlord is a temple whose trustee cannot grant a permanent lease of the temple lands without committing a breach of trust. (*Wallis, C. J. and Sadasiva Iyer, JJ.*) MUNA MOHAMED LOWTHER v. MUTHU ALAGAPPA CHEETIAR.

34 M. L. J. 234=23 M. L. T. 116=  
7 L. W. 380=44 I. C. 895.

—Permanent tenancy—Evidence—Ryotwari waste lands—Presumption of—Temple lands—Occupancy rights in—Recognition of, not a breach of trust.

Where the Courts below had inferred occupancy rights from the facts that the tenants have been in possession of the lands for nearly 50 years paying a uniform rent, being equivalent to the Government assessment on a single-crop land, that the tenants have been selling and mortgaging their lands to the knowledge of the landlord without any objection, that there has been devolution of the property from father to son, the landlord recognising the son, as tenant in the father's place and that there has been no successful attempt to raise the rent during all the period.

*Held*, that the presumption that the tenancy was a permanent one was properly raised.

It does not follow, that because the lands were unoccupied Government ryotwari lands at one time, cultivating tenants can never acquire occupancy rights in them. 21 M. L. J. 845, and 34 M. L. J. 659 ref. (*Spencer and Krishnam, JJ.*) MUTHUSWAMY IYER v. NAINAR ANNAL.

(1913) M. W. R. 219=  
7 L. W. 104=43 I. C. 877.

—Relationship between—Contract defining terms of—Assertion of higher right, effect of.

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Where the relationship of landlord and tenant is founded upon contract, a mere assertion by the tenant, in the absence of a clear statutory provision to the contrary, cannot confer upon him rights other or higher than those embodied in the contract. (*Sanderson, C. J. and Teunon, J.*) BIRENDRA KISHORE v. MAHOMED DOULAT KHAN.

22 C. W. N. 858=43 I. C. 59.

—Relationship between—Creation of—Execution and registration of Kabuliyaat—Effect of.

The execution and registration of kabuliyaat without the landlord's sanction either before or after registration does not create a tenancy, even though there may have been some previous talk of settlement. (*Chitty and Wainwright, JJ.*) EDON MOLLAH v. BADAM.

46 I. C. 559.

—Relationship between—Implied contract—Inference from acts and conduct of landlord towards the tenant.

A contract of tenancy like any other contract may be either express or implied.

Where a tenant brings under cultivation waste land adjoining his holding with the knowledge of the landlord who allows him to spend money and labour on the land and himself stands by and signs the *jamabandis* which record the cultivator as a tenant although not yet fixed with rent it is reasonable to infer no tenancy. Though the cultivator might be a licensee in the first instance where the cultivation and improvement go on for a number of years continuously and the landlord does not object to the cultivator being shown as a tenant in the village papers, a contract of tenancy may be implied. (*Stanyon, A. J. C.*) RATNOO v. NABIDAD KHAN.

45 I. C. 909.

—Rent—Abatement of—Diluvion and Alluvion—Contract not to claim reduction of—E. T. Act, S. 52.

A holder of a temporary tenure under a Kabuliyaat which provided that diluvion or no diluvion, the tenant would remain liable for the full rent payable, is not entitled to claim reduction of rent on the ground of diluvion. (*Richardson and Beachcroft, JJ.*) SECRETARY OF STATE v. KAMAL KRISHNA PAI.

44 I. C. 222

—Rent—Abwab—Test. See (1917) DIG. COL. 729; BEJOY SINGH DUDHURI v. KRISHNA BEHARI BISWAS. 45 Cal. 259=  
21 C. W. N. 959=41 I. C. 561.

—Rent—Abwab—Consent to pay rent in Sikka rupees—Batta claim to, if sustainable.

Where the tenant agreed by virtue of a Mokarati deed of 1848 to pay rent in Sikka rupees to the landlord, and in a rent suit of the previous years, the landlord obtained his decree

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The sanad issued to the holder by the British Government made the tenure one held directly under the Government, and resumable at the death of the life tenant. The sanction of the Government, is necessary to validate the succession on the death of each holder. The permanent Settlement of 1796 might destroy a military tenure by a new contract with the holder of the tenure but it does not affect the position of a tenure-holder with whom the new settlement was made. The mere fact that Ghatwali service had not been demanded or rendered does not show that the services could not be demanded by the Government. Where a ghatwali had been held for generations without rendering military services and the defacto holder of the ghatwali mortgaged it, it is not open to his heirs to impugn the mortgage on the ground that it is inalienable. (*Roe and Coutts, JJ*) RANI KESHOBAJI KUMARI v. KUMAR SATYA NIBANJAN CHAKRAVARTHY (1918) Pat- 305=47 I. C. 179.

——Ghatwali — Widow in possession — Relinquishment, bad.

Where the interest of ghatwali tenure-holder devolves on his widow, she is not competent to divest herself of that estate.

5 Pat. L. W. 167.

——Ghatwali Tenure — Rights of the Ghatwali and the family over the property subject to the tenure

In the Zemindari of Kharakhpur in Bengal the Ghatwali tenure is ordinarily hereditary the estate descending to such male member of the family as the Zemindar approves as competent, and it is the right of the family so long as they have male members competent to perform the duties to have one or more of appointed Ghatwals, but the incidents of the tenure are not such as to give the family any right over the property while it is in the hands of the Ghatwali.

Where the Zemindar on being released from the performance of Ghatwali duties gave the potnah to four Ghatwals members of a family, granting the lands (which were till then subject to the Ghatwali tenure) in perpetuity of an annual fixed juma, held, that the members of the family other than the four grantees took no beneficiary interest in the lands granted. (*Lord Phillimore*.) RAJA DURGA PRASAD SINGH v. TIBBENI SINGH.

24 M. L. T. 407=28 C. L. J. 508=9 L. W. 66=48 I. C. 527=45 I. A. 231 (P.C.)

——Military tenure — Inalienability — Permanent Settlement — Regulation (XXV of 1902) — Issue of a sanad, under — Effect of Removal of restriction of alienation. See HINDU LAW, IMPARTIBLE ESTATE

7 L. W. 36.

——Noabad Taluq Chittagang — Permanent settlement — Presumption as to.

A Noabad taluq in Chittagang may or may not be a permanently settled one. 30 C. W. N. 695 dist. (*Fletcher and Huda, JJ*) ASHRAF ALI v. KARIM ALI. 22 C. W. N. 1025.

=49 I. C. 527.

## LAND TENURE.

——Palayam Alienability and liability for debts of holder for time being — Lands, held on service tenure — Enfranchisement of service tenure effect of an alienation prior and subsequent — Omission to issue sanad under Regulation 25 of 1862. — Restraint on alienation, cessation of — Spes successionis, mortgage and sale of, not operative on mortgagor's interest when it falls into possession — Execution sale supportable on foot of personal liability clause in decree — Possession if adverse to the estate so as to bar successors — Limitation Act. Art. 120, 142 and 144.

In India, apart from statute lands held on service tenure are inalienable beyond the lifetime of the holder. Where however, an estate is freed from its connection with a public office and the services are abolished, it is subject to the same incidents of the ownership and the devolution as ordinary property. 7 Mad. 85, 14 M. L. J. 184 and 9 Bom. 193 ref.

Where lands held on service tenures have been alienated, the subsequent enfranchisement of the lands from service will not validate the alienation so as to give an absolute interest to the alienee. 34 M. L. J. 17 and 24 Bom. 556, rel.

An unsettled palayam held originally on condition of rendering military and police services, ceases to be inalienable on the abolition of such services by the British Government notwithstanding the omission of the Government to issue a sanad under Regulation 25 of 1862 finally, settling the peishcush payable by the holder of the estate. 1 I. A. 283 and 1 I. A. 268 rel.

Where a person having merely a *Spes successionis* in respect of a particular property purports to transfer it such transfer deed does not operate on the interest of the transferor if and when he actually succeeds to the property. 30 Mad 255 foll.

Obiter: — Assuming that the estate of poligar is one for life the poligar for the time being would ordinarily represent the estate. If, therefore, the poligar for the time being is dispossessed and he fails to sue for possession within 12 years of the dispossession, the person in possession gets an absolute title to the estate and the successor for the poligar has not got a fresh starting point from the date of his succession unless he shows that his predecessor had effectually decarrad himself from suing and there was no one else who would have sued successfully for possession. 5 B and A 204, (1894) 2 Q. B. 352 and 48 I. A. 113 ref. (*Walke, G. J. and Spencer J.*) THE MIDNAPORE ZEMINDARY CO., LTD. v. MALAYANDI APPAYASWAMI NAICKER.

41 Mad. 749=24 M. L. J. 563=24 M. L. T. 1=8 L. W. 382=47 I. C. 733.

——Palayam — Issue of Zemindari sanad — Effect of — Removal of restriction on alienation — Property subject to some incidents as ordinary property. See HINDU LAW, IMPARTIBLE ESTATE. 7 L. W. 36=43 I. C. 371

——Service tenure — Inalienability of — Enfranchisement of service — Tenure — Absolute

## LAND TENURE.

property of holder—Alienability. *See* LAND TENURE, PALAYAN. 41 Mad. 748

—Service Tenure—Omission to perform services—Forfeiture at the option of landlord. *See* LANDLORD AND TENANT, EJECTMENT 43 I. C. 611.

—Service tenure—Prodhan, status of  
—Neither an occupancy raiyat nor non occupancy raiyat—Quasi service tenure-holder. *See* CHOTA NAGPUR TEN. ACT, S. 139 (6) AND (8). (1918; Pat. 65.

—Service tenure—Right of occupancy in—Surrender of tenure—Rights of Zemindar.  
A right of occupancy cannot be acquired in land held under a service tenure.

Where a Kotwali jagir is surrendered or given up, the Zemindar is entitled to have land that was given to the Kotwal for the purpose of performing his duties returned to him in the same condition in which it was given to the Kotwal apart from the rights of any other person. (*Fletcher and Huda, JJ*)  
JAFARUDDIN LAHA v. JAMANI BALDAY SEN.  
23 C. W. N. 136=23 C. L. J. 249=  
46 I. C. 341.

LEASE—Assignment—Option to the lessee to purchase the land leased, whether enures to the assignee—Estoppel by conduct *See* (1917) DIG. COL. 781. LADHABHAI v. JAMSETJI JEEJEEBHAI. 42 Bom. 103=  
19 Bom. L. R. 813=42 I. C. 382.

—Construction—Co proprietors of an estate—Lease by some in favour of others—Status and rights of lessee under. *See* BENGAL TENANCY ACT, RAIYAT. 4 Pat. L. W. 428.

—Construction—Grant of specified share in a village and of all rights appertaining thereto—Provision for payment of malguzari to Government and malikana to grantor every year, Grant of a perpetual lease and not of an under proprietary right. *See* DEED CONSTRUCTION. 45 I. C. 208

—Construction—Grant of permanent and heritable tenure—Right of re entry, reservation transferable by custom.

When a landlord grants a permanent and heritable tenure in land, he has no estate left in him, unless he reserves to himself a right of re-entry or reversion.

A lease dated 19th March 1877 creating a permanent and heritable tenure, contained the following clause. "God forbid, if the said land and bari be not used for dwelling purposes the right under the pattah shall be void."

Held, that the clause did not contain any reservation of the right of re-entry by the landlord. That such tenure was transferable by custom (*Sanderson C. J. and Mookerjee, J.*)  
MAHOMED REAJUDDIN AHMED v. BASU DA SUNDARI DAS. 28 C. L. J. 278=48 I. C. 330.

## LEASE.

—Construction—Ijara—Permanent lease.

A power to lease by way of ijara conferred by a will upon the executor excludes by the very nature of it the power to grant a permanent lease. (*Fletcher and Smither, JJ.*, PRAN KRISHNA DAS v. SATIBALA SEN. 46 I. C. 852.

—Construction—Kabuliyat—Provision for payment of rent in company's sicca rupees  
—Meaning of. *See* DEED, CONSTRUCTION. 47 I. C. 109.

—Construction—Kayam Saswatham Patta—Permanent lease. *See* LANDLORD AND TENANT. 35 M. L. J. 129.

—Construction—Land held by proprietors of an indigo factory for term of years—Sale of factory to stranger—Fresh lease in respect of same land to purchaser of factory  
—Right of occupancy if acquired by purchaser  
—Suit by proprietor for ejectment—Limitation.

Where lands had been held for a considerable time by an Indigo factory in virtue of leases renewed from time to time and after expiry of the lease the factory was sold and the purchaser took a fresh lease for a term of 9 years in respect of the same lands.

Held, that if the proprietors of the factory had occupancy rights in the land, they could not have passed to the purchaser of the factory in virtue of his purchase especially when the term of the previous proprietor's tenure had just expired and it was not shown that they were holding over.

Whatever rights the purchaser acquired were under the lease granted to him, and under that lease he acquired the status of non-occupancy raiyat. The term of the lease having expired and no suit for ejectment, having been instituted within 6 months of the expiry of the lease, the suit was barred by limitation.

On the question whether the suit was premature on the ground that the defts. having an option to renew were not given an opportunity of doing so.

Held, that there is a time limit for an option to renew and the defts failure to come to terms within 3 years of the expiry of the lease amounted to a failure to avail himself of the option to renew. (*Roe and Jwala Prasad, JJ.*)  
BRIJNANDAN SINGH v. MAHARAJAH SIR RAMESHWAR SINGH BAHADUR. 5 Pat. L. W. 52=46 I. C. 580.

—Construction of—Land leased for a shop—Provision for payment of toll in respect of goods sold in shop or boat or road—Effect of.

A lease of certain property for the purpose of carrying on a shop, provided for the payment of a certain amount of rent and also for the

## LEASE.

payments of a toll over the stipulated rent as parts of the rent in respect of goods that should be sold in the shop or on boat or stand on certain terms.

*Held*, on a construction of the lease, the deft. was liable to pay the toll not only in respect of goods which, having been taken from the shop to the nearest boat or road, would be sold there but that his liability did not extend to the case of goods sold on boats and roads far away from the shop. (*Fletcher and Huda, JJ.*) KISHORE LAL GO:WARI v. TARAPADA BHATTACHARJEE.

25 I. C. 875.

Construction—Lease in consideration of services—Option to landlord to demand a penalty or to eject in case of omission to render services—Ejectment right to. See LANDLORD AND TENANT EJECTMENT. 45 I. C. 611.

Construction—Lease to tenant for term with liberty to landlord to settle land on expiry of term—Fresh lease or confirmation.

A document which gives the tenant a lease for a particular term at a fixed rent and which fixes to the landlord the right at the expiration of the term to settle the land with whom so ever he pleases cannot be taken as a mere recognition of pre existing tenancy. (*Fletcher and Huda, JJ.*) DHARANI KANTA LAHARI CHOWDHURI v. ISMAIL SZEIKH.

46 I. C. 221.

Construction—Mining lease—Right of lessee to surrender on six months notice and on payment of all arrears of royalties—Time for payment—Expiry of 6 months after notice—Royalties not paid in time—Waiver by landlord—Suit by landlord for royalties treating lease as subsisting.

The appellant by lease for 999 years granted to the respondents coal mining rights in certain villages. Under the lease Royalties on every ton of coal mined were to be paid quarterly and if at the end of each Bengali year the amount so paid had not reached a fixed minimum the difference was to be paid within the following two months; rent for surface rights was to be paid annually. Clause 9 of the lease provided that the respondents should be entitled to surrender any of the villages upon giving 6 months' written notice and "paying the minimum royalty for the said six months" and that the respondents should not be entitled to surrender so long as any rent or royalty remains unpaid.

On May 11, 1912 the respondent gave six months' notice of their intention to surrender all the villages. The appellant's manager requested that a formal deed of surrender should be executed. On May 22, 1912 the deed not having been yet tendered or the amount due ascertained the appellant denied that the surrender was effectual on the grounds that the notice did not expire at the end of the Bengali

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year, and that the amount due had not been tendered: the appellant subsequently sued for royalties upon the basis that the lease was subsisting.

*Held*, that the right to give notice under clause 9 could be exercised at any time that that clause not requiring a tender of the amount due when the notice was given, and that the appellants manager having requested that the surrender should be effected the payment had not to be made until the deed was tendered: and that the lease had been terminated and the suit therefore failed. (*Lord Buckmaster.*) RAJA DURGA PRASAD SINGH v. TATA IRON AND STEEL COMPANY LIMITED.

46 I. A. 275 (P. C.)

Construction—Municipal taxes—Liability of lessee to pay. See LESSOR AND LESSEE. 42 I. C. 634.

Construction—Permanent tenancy—Dowl Kabuliyaat—Provision for entry by landlord in case a new rate of rent could not be agreed upon—Effect of.

Where a Dowl Kabuliyaat provided *inter alia* that in the event of the landlord and the tenant not being able to arrive at a new rate of rent at the expiration of the temporary term covered by the Dowl Kabuliyaat, the landlord would be entitled to take possession of the land leased.

*Held*, that the provision was absolutely inconsistent with the fact that the tenant had a permanent interest in the land leased. (*Fletcher and Huda, JJ.*) MOHIM CHANDRA PAL v. PRODYAT KUMAR TAGORE. 45 I. C. 651.

Construction—Rent payable in kind—A sum of money fixed as the price, payable on default of payment of rent in kind—Right of landlord to recover current market price. See LANDLORD AND TENANT. 47 I. C. 134.

Covenant for renewal under raiyati lease—Provision, *in void*.

A covenant for renewal, contained in an under-raiyati lease for nine years, under which the parties undertook that a further term of nine years would be granted to the under-raiyat on the expiry of the lease, is a perfectly valid contract and the under-raiyat remaining in possession under the terms of that contract is not liable to be ejected. (*Fletcher and Panton, JJ.*) AMINUDDIN DAFADAR v. ANANDA CHANDRA PAUL.

23 C. L. J. 597—45 I. C. 924.

Covenant for renewal—What amounts to—Effect of Terms of removed tenancy.

A settlement was made with the predecessor of the pfr. for a term of 22 years on a progressive rate of rent from 1825 to 1906. The kabuliyaat executed by the grantee contained a covenant to the following effect: "If I agree

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to the enhancement of the rent to be fixed at the time of the next settlement in future the Government shall have the power to settle the lands with me, then with others."

*Held*, that the clause in the lease was in essence a covenant for renewal. That the lessee was entitled at the expiration of the term to obtain a renewal of the lease on the same terms as were contained in the original lease, except as to the amount of rent and the covenant for renewal. 16 C. L. J. 217 20 C. W. N. 948 ref. (*Mockerjee and Beachcroft, JJ*) SECRETARY OF STATE FOR INDIA v. SIBA-PROSAD. 27 C. L. J. 447=45 I. C. 983.

———Covenant for renewal—What amounts to—Effect of terms of renewed tenancy.

Where a lease granted by Government contained a covenant in the following terms. If you agree to pay the enhanced rent which will be fixed at the time of the re-settlement in future, the Government will have the right to settle with you and if you decline, with some other person, *held* that the covenant was a covenant for renewal; on the expiry of the lease, the lessee became entitled to a fresh lease on the same terms as before, except as to the amount of rent and the covenant for renewal. *Quare* whether, notwithstanding the covenant in the lease, the Government might not on the expiry of the term decide not to settle the land with anybody.

Where there is a covenant for renewal, if the option does not state the time of renewal, the new case would be for the same period and in the same terms as the original lease in respect of all the essential conditions thereof, except as to the covenant for renewal itself. (*Mockerjee and Beachcroft, JJ*) SECRETARY OF STATE FOR INDIA v. DIGAMBAR NANDIA. 27 C. L. J. 334=43 I. C. 43.

———Duration of—No period specified—Whether from year to year.

Where no term is mentioned in a lease it must be regarded as a lease from year to year terminable upon notice by either side according to law. (*Roe and Jwala Prasad, JJ*) KAILASPATI CHOUDHURY v. MUNESHAWAR CHOUDHURY.

3 Pat. L. J. 576=4 Pat. L. W. 109=43 I. C. 965.

———Forfeiture -- Surrender by lease—Effect on sub lease by lessee—C. P. Tenancy Act, S. 85 (4)—Surrender under—Effect on encumbrances created by tenant—Implied surrender—Plea of, to whom available.

When a lessee creates a sub lease or any other legal interest, then when the lease is forfeited, the sub-lessee or the person who claims under the lessee, loses his estate as well as the lessee himself. But if the lessee surrenders, he cannot by his own voluntary act in surrendering prejudice the estate of the sub-lessee or person claiming under him.

## LEGAL PRACTITIONER'S ACT, S. 13.

A statutory surrender under S. 35 (4) of the Tenancy Act works a forfeiture, and therefore any interest which has been grafted on to the tenant's right by the tenant (*e. g.*, a mortgage) is annulled by operation of law, or the extinguishment of the tenant's right.

The plea of implied surrender under S. 35 (d) may be taken even by a person who is not the *malguzar e. g.*, by a person put in possession as a purchaser from the tenant. (*Mitra, A. J. C.*) SARJERAO v. TUKARAM. 14 N. L. R. 107=46 I. C. 244.

———Minor—Lease in favour of, void. See MINOR. (1918) Pat. 241.

LEGAL PRACTITIONER—Admission on point of law—Effect on client. See PLEADER AND CLIENT. 27 C. L. J. 447.

———Impropriety of counsel who appeared for one party appearing in subsequent proceedings for the opposite—Professional honour. See (1917) DIG. COL. 734; MARY LILIAN HIRA DEVI v. KUNWAR DIGBIJAI. (1917) M. W. N. 636=7 L. W. 133. =21 C. W. N. 1137=42 I. C. 236 (P. C.)

LEGAL PRACTITIONER'S ACT (XVIII OF 1879) Ss. 12, 13 and 14—Pleader convicted of keeping a common gambling house—Suspension from practice—Procedure.

The conviction of a pleader under S. 6 of the Towns Nuisances Act for using his office as a common gaming house implies a defect in character which unfits him to be a pleader within the meaning of S. 12 of the Legal Practitioner's Act. Having regard to the fact that this was the first time that any such case came before the Courts—the High Court thought it sufficient to suspend the pleader from practice for a period of six months.

In a proceeding under S. 12 of the Legal Practitioner's Act the whole of the procedure prescribed with regard to charges under Ss. 13 and 14 need not be followed. Nor is the Court to re-try the case which ended in a conviction of the pleader. The only question to be considered is whether the offence of which the pleader has been convicted implies a defect of character unfitting him to be a pleader. (*Walsh, C. J. Aiyling and Seshagiri Aiyar, JJ.*) In re A SECOND GRADE PLEADER. 42 Mad. 111=35 M. L. J. 650=25 M. L. T. 71=(1918) M. W. N. 847=8 L. W. 621=48 I. C. 341=19 Cr. L. J. 1001. (F. B.)

———S. 13—Professional misconduct—Intimidation so as to prevent witness from giving evidence.

A pleader who intimidates a witness in order to prevent him from giving evidence in Court is guilty of professional misconduct (*Richards, C. J. Tudball and Raoof, JJ.*) HAR PRASAD SINGH In re. 46 I. C. 819=19 Cr. L. J. 803. (F. B.)

## LEGAL PRACTITIONER'S ACT, S. 13.

—S. 13 (b)—*Legal practitioner appearing for both sides in a case—Gross negligence—Misconduct.*

The conduct of a pleader in acting for both sides in the case is grossly improper conduct within the meaning of S. 13 (b) of the Legal Practitioner's Act.

When a pleader negligently or intentionally disobeys the rules of his profession, he is guilty of grossly improper misconduct and it is no excuse that his action does not involve a moral stigma or that it has not resulted in actual injury to his client. 2 P. L. J. 259 foll (Mullick, Imam and Thornhill, JJ.) IN THE MATTER OF BIR KISHORE RAI, PLEADER.

3 Pat. L. J. 390=(1918) Pat. 229=  
45 I. C. 634=19 Cr. L. J. 636.

—S. 13 (f)—*Grossly improper conduct writing letter to judicial officer asking him to decide case before him in particular manner.*

A legal practitioner who writes a letter to a judicial officer asking him to decide a case pending before him in a particular manner is guilty of grossly improper conduct within the meaning of S. 13 (f) of the Legal Practitioner's Act. (Leslie Jones and Broadway, JJ.) IN THE MATTER OF NARINDRA SINGH.

3 P. W. R. (Cr) 1918=44 I. C. 123=  
19 Cr. L. J. 287.

—S. 14—*Removal of petition of complaint from court and substituting another in its place without consent, or complaint whether gross misconduct. See (1917) DIG. COL. 736; EMPEROR v. MATHURA PRASAD*

(1917) Pat. 265=43 I. C. 93=  
19 Cr. L. J. 61.

—S. 14—*Unprofessional conduct—Acceptance of vakalat from unauthorised person—Punishment—Suspension.*

The rule relating to the acceptance of Vakalatnamas and Muktearnamas must be scrupulously and punctiliously observed.

Where a Muktear though not influenced by any dishonest or corrupt motive accepted a Muktearnama from an authorised person known by him to be such, held that the conduct of the Muktear called for something more than censure it being the duty of gentleman of his profession to set a high standard of honour and integrity to the people around them. The Muktear was suspended from practising for a period of three months. (Richardson and Beachcroft, JJ.) BRINDABAN CHANDRA DAS IN THE MATTER OF.

43 I. C. 815=  
19 Cr. L. J. 227.

—S. 36—*Tout—Declaration of—Validity—Notice to person affected and taking of evidence in his presence—Necessity. See (1917) DIG. COL. 737. ABU MAHOMED v. EMPEROR*

5 Pat. L. W. 229=(1917) Pat. 136=  
42 I. C. 996=19 Cr. L. J. 38.

## LESSOR AND LESSEE.

—S. 36—*Tout—Person seen canvassing and introducing litigants to members of the Bar—Inference—List of tous—Removal from—Order declaring a person tout—Revision.*

It is a reasonable and legitimate inference of fact that if a man, is shown to spend the greater portion of his working hours in canvassing and introducing the clients to members of the profession he is not rendering gratuitous service such as a casual friend and an acquaintance may do.

An order of a Judge declaring that the applicants are tous and putting up their name in the list of tous is an order against which revision can be obtained. Mere removal of the list of tous exhibited in one Court or failure to exhibit them in one of the Districts has not the effect of cancelling the list altogether. (Walsh, J.) KALKA PRASAD v. EMPEROR.

40 All. 153=15 A. L. J. 76=  
44 I. C. 125=19 Cr. L. J. 269

## LEGAL PRACTITIONER'S RULES (MAD)

Rule. 41—*Rules framed under—Vakil's fee—Two sets—Special importance of the case owing to the heavy amount involved.*

Their Lordships allowed fees for two vakils under the new rule 41 framed under the Legal Practitioner's Act on the ground that the case was of special importance having regard to the amount involved, namely about 7 lakhs of rupees, though there was no specially difficult question involved in the appeal and the vakil for the respondent was not even called upon to reply. (Abdur Rahim and Oldfield, JJ.) VENKATACHARYANIM GARU v. VENKATASUBHA-DRAYAMMA.

34 M. L. J. 438=  
24 M. L. T. 56=3 L. W. 416=  
(1918) M. W. N. 371=45 I. C. 437.

—Decision as to pendente lite—Duty of Court to decide as to who is the proper person—Order of court not appealable. See C. P. CODE, O. 22, R. 5.

(1918) M. W. N. 198.

—LEGITIMACY—*Posthumous son—Burden of proof of legitimacy—Succession to large estate.*

In a case of disputed succession to property of a large value as well as to a jagir, more than ordinary care should be taken to place the legitimacy of a posthumous son beyond all possible disputes and the onus of proving legitimacy is on the posthumous son. (Chevis and Shad, Lal, JJ.) JAGIR SINGH v. DALIP KUMAR.

42 P. W. R. 1318=44 I. C. 57.

—LESSOR AND LESSEE—*Agreement to lease—Lessee admitted to possession on payment of rent—Subsequent lease to third person, effect of.*

Deflt., was tenant of certain land which the landlord agreed to relet to him on his paying a certain sum of money in cash. Deflt. paid the amount and continued in possession of the land agreed to be let to him. The landlord subsequently granted a lease of the same to the pld., who sued to eject the deflt. Held that

## LESSOR AND LESSEE.

the landlord was not entitled to grant a lease to the plaintiff inasmuch as he had already, by reason of the agreement with the defendant, followed by the acceptance of the money, constituted the latter as a tenant on the land and that plaintiff when he came to deal with the landlord, must be deemed to have had constructive notice of the rights of the defendant, who was actually in possession and cultivating the land. (*Fletcher and Ruda, JJ*) **EDON MOLLAH v. BADAN.** 35 I. C. 49.

—Forfeiture—Denial of title—Assignment—Denial of title by lessee, after assignment—No forfeiture. See T. P. ACT S. 115.

20 Bom. L. R. 830.

—Municipal Taxes—Liability for—Covenant by lessee to pay taxes on buildings and by lessor to pay quit rent—Tax on land and buildings separately—Liability for.

Under a lease the lessee undertook to pay all the municipal taxes payable for buildings erected on the land demised and the lessor agreed to pay only quit rent. Subsequently to the lease the Municipality began to levy separate assessments on the buildings and the lands.

Held, that on the construction of the lease, the lessee was bound to pay all taxes leviable under Ss 139 145, 148 of the City of Madras Municipal Act and that the liability was not affected by any arrangement to levy separate assessment on the lands and buildings standing thereon. (*Wallis C. J. and Oldfield, J.*) **RAMACHANDRA IYER v. DURAIVELU MUDALIAR.** (1918) M. W. N 130=7 L. W. 140= 43 I. C. 634.

—Option to renew—Exercise of option to be made within a reasonable time. See LEASE, CONSTRUCTION. 5 Pat. L. W. 52= 46 I. C. 580

—Permanent heritable tenure, creation of—No estate left in landlord, unless right of re-entry reserved. See LEASE, CONSTRUCTION. 28 C. L. J. 278.

**LETTERS OF ADMINISTRATION**—Application by heirs—Refusal to grant letters in respect of whole estate—Validity—Probate Proceedings—Compromise of—Binding nature on minors—Equitable Estoppel.

Although an executor, who has been appointed by the testator for the administration of a particular fund is competent to take probate limited to that particular fund, yet where there is no direction as to any particular fund, and where the applicants for letters of administration apply in their capacity as heirs, there is no provision of law which empowers the court to refuse administration of the whole estate and to limit it to a fractional undivided portion thereof.

The only issue before a Probate Court is whether the will has been proved to be genuine

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and duly executed and the court has no concern with the devolution of the property. Although it can record a contract or agreement made between the applicant for administration and a caveator, in consideration of the withdrawal of the latter's objection, the court is wholly powerless to enforce such contract of agreement.

Where N applied for letters of administration in respect of a twoanna share on behalf of his three minor sons to whom the testatrix had bequeathed the half of a four-anna share, and T to whom the other half had been bequeathed, entered a caveat, and the objection was withdrawn on the understanding that N should be given letters of administration in respect of one anna share only, and this limited grant was given to him, held, that it became the duty of the court, on the withdrawal of the objection, to grant probate or letters of administration, as the case might be in respect of the whole estate, and if N was unwilling to administer the whole estate, the court should have dismissed the application altogether. Held, further, that the mere fact that one of the minor sons, on attaining majority ratified the acceptance of the partial grant did not amount to an equitable estoppel which would prevent the three sons from applying for revocation of the grant. 1. P. L. J. 377 ref. (*Mullick and Atkinson, JJ.*) **SARADA PRASAD TEJ v. TRIGUNA CHARAN ROY.** 3 Pat. L. J. 415=(1918) Pat. 349= 46 I. C. 117.

—Cause of action—Survival of—Application for letters, by residuary legatee—Death of legatee—Substitution of heir of residuary legatee—Cause of action does not survive to heir. See C. P. CODE O 22 RE. 3 AND 10. 45 I. C. 862.

—Grant of—Preference among rival claimants—Tests of.

The grant of the Letters of Administration should ordinarily follow the interest and where the interests of the applicants are unequal, letters should be granted to the applicant whose interest is the greater. (*Twomey, C. J. and Ormond, JJ.*) **MA SEIN TIN v. MA PWA.** 46 I. C. 878.

—Proceedings for—Nature of—Decision in not *res judicata* in subsequent suit by defeated claimant for recovery of properties as heir. See RES JUDICATA 43 I. C. 723.

**LETTERS PATENT (ALLAHABAD) CL 8**—Pleader, Professional misconduct—Intimidating witness to prevent him from giving evidence. See LEGAL PRACTITIONER'S ACT, S. 19. 46 I. C. 819.

—S. 10—Review of judgment—Decree under S. 10.

No applications for a review of judgment is allowable where the decree was given in an

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appeal under S. 10 of the Letters Patent 1 A. L. 509 toll (*Richards C. J. Banerji, J.*) KALYAN SINGH v. ALLAH DIYA.

18 A. L. J. 964=48 I. C. 476.

—(Bom). Cl. 15—Judgment—Order by a Single Judge refusing to excuse delay for an appeal filed beyond time—Appealability

An order passed by a Single Judge refusing to excuse the delay for an appeal presented beyond the time allowed by law is a judgment within the meaning of clause 15 of the amended Letters Patent; and an appeal lies from the order under the clause. (*Heaton and Shah, JJ.*) RAMACHANDRA v. MAHADEV. 42 Bom. 260=20 Bom. L. R. 172=44 I. C. 313.

—(Cal.) Cl. (15)—Appeal against order refusing to set aside award filed under Arbitration Act—Jurisdiction to hear. See C. P. CODE s. 104 (f) 45 Cal. 502.

—Cal. 15 — Judgment — Difference of opinion between members of a division bench hearing a case under S. 115 C. P. C.—Appeal from decision of Senior Judge which prevails—Maintainability of appeal. (*Sanderson, C. J. Teunon and Walmsley, JJ.*) KUMAR CHANDRA KISHORE v. BASANT ALI. 22 C. W. N. 627=27 C. L. J. 418=41 I. C. 763.

—Cl. 15—"Judgment"—Meaning—Decision that a suit is bad for misjoinder of parties and causes of action—Appealability See (1917) DIG. COL. 741; RAMENDRA NATH HAY v. BRAJENDRA NATH DASS. 45 Cal. 111=

21 C. W. N. 794=27 C. L. J. 168=41 I. C. 944.

—Cl. 15 — Judgment, meaning of — Decree or order—Dismissal of an appeal without investigation on merits—Limitation Act, S. 5—Deduction of time—Review pending.

The term 'judgment', in clause 15 of the Letters Patent means "decrees or order" and consequently an order of dismissal of an appeal without investigation of the merits may be a judgment 22 C. L. J. 525 and 22 C. L. J. 452 ref.

An appellant is not entitled as a matter of right to deduction of the period during which an application for review remained pending in the court below. He has to seek extension of time under S. 5 of the Lim. Act. (*Mookerjee and Beachcroft, JJ.*) PROSARNA KUMAR BAIDYA v. RAM CHANDRA DE. 28 C. L. J. 205=47 I. C. 677.

—Cl. 15—Judgment order allowing amendment—Appeal.

Quere—Whether an order of a judge on the original side allowing or refusing an amendment except on terms, is a judgment within Cl. 15 of the letters patent (*Sanderson, C. J. and Woodroffe, J.*) UPENDRA NARAIN ROY v. RAJANOKI NATH ROY 45 Cal. 365=22 C. W. N. 511=47 I. C. 129.

## LETTERS PATENT (PATNA) CL. 10.

—Cl. 15—Judgment—Order of Single Judge dismissing application for review, in the absence of his colleague on leave—Order without jurisdiction—Appealability. See C. P. CODE, C. 47, R. 5 22 C. W. N. 550.

—Cl. 15—"Judgment"—Refusal of leave to file written statement—Not appealable.

No appeal lies from an order made by a Judge sitting on the Original Side, refusing an application by a deft for leave to file his written statement. Such an order is not a "judgment" within Cl. 15 of the Letters Patent 43 Cal. 857 dist. and (1872) 8 B. L. R. 433 Ref. (*Sanderson, C. J. and Woodroffe, J.*) MURALIDHAR CHAMARIA v. DALMIA. 45 Cal. 818.

—Cl. 44—Indian Legislature—Power of to amend or alter Letters Patent so as to remove a particular Court from the appellate jurisdiction of the High Court. See DEFENCE OF INDIA ACT, SS. 8 AND 11. 46 I. C. 977.

—(Madras) Cls. 15 and 36—Decision of High Court in a land acquisition appeal—Not a judgment—Difference of opinion—Not appealable under. See LAND ACQUISITION ACT, S. 54. 35 M. L. J. 110.

—Cl. 15—Order of Judge of High Court in proceedings awarding compensation under S. 250 Cr. P. Code—Order passed in Criminal trial—No appeal. See (1917) DIG. COL. 742 KANDASWAMI PILLAI v. EMPEROR. 9 Cr. L. R. 234=43 I. C. 624=

19 Cr. L. J. 208.

—Cl. 36—Applicability of to appeals from the mofussil. See LAND ACQUISITION ACT, S. 54. 35 M. L. J. 110.

—(Patna), Cl. 10—Appeal from order of single Judge staying criminal trials—Maintainability—Government of India Act, S. 106—Order staying proceedings not a judgment within the meaning of cl. 10.

An order of a Judge of the High Court sitting alone, staying a criminal trial, is not appealable under clause 10 of the Letters Patent of the Patna High Court.

An order staying proceedings is not a judgment with the meaning of clause 10.

The object of clause 10 was to prohibit appeals, (i) in respect of sentences and orders passed or made in the exercise of criminal jurisdiction, and (ii) in respect of orders, made in the exercise of revisional jurisdiction in other cases, namely civil cases. (*Mullick and Thornhill, JJ.*) BABUJAN MISSER v. SHEO SAHAY CEAUDHURY. 3 Pat. L. J. 309=5 Pat. L. W. 153=43 I. C. 348=19 Cr. L. J. 1008.

—Cl. 39—Privy Council decree on appeal from a decision of Calcutta High Court—Jurisdiction to execute decree—Patna High Court

## LETTERS PATENT (PATNA) CL. 39.

not competent, though suit was tried within its local jurisdiction. See C. P. CODE, O. 45, R. 15 2 Pat. L. J. 533.

———CL. 39 Proviso 1 — Reversal and remand with direction that appeal should be re-heard—Jurisdiction of High Court of Calcutta. See (1917) DIG. COL. 744: RAM GOBIND CHOWDHURI v. THAKUR DAYAL JHA. 2 Pat. L. J. 556=2 Pat. L. W. 41=43 I. C. 501.

———CL. 41—Jurisdiction to issue writ of habeas corpus. See HABEAS CORPUS (1918) Pat. 37.

**LIBEL**—Fair comment—Plea of—Essentials of—Comments to be confined to facts as they exist and not to facts as imagined by writer. See PENAL CODE, S. 500. 43 I. C. 417.

———Fair Comment—Plea of—Journalist Facts forming the basis of comment to be truly stated—Trivial misstatements of fact do not take away plea of fair comment.

A journalist does not transgress the limits of fair comment if all material facts are truly stated in the articles though it may be that there are one or two small deviations from absolute accuracy on minor points which have no influence on the conclusions, and the conclusions are such as ought to be drawn from the premises by a critic bringing to his work the amount of care, reason and judgment which is required of a journalist.

While a journalist is bound to comment on public questions with care, reason and judgment, he is not necessarily deprived of his privilege merely because there are slight unimportant deviations from absolute accuracy of statement where those deviations do not affect the general fairness of the comment. The articles must be considered rather in their entirety than by separate insistence on isolated passages, and the Judge must decide what impression would be produced on the mind of an unprejudiced reader, who, knowing nothing of the matter beforehand read the articles straight through.

Facts upon which the comment is founded must be truly stated though later they may not turn out to be true at all. A fact may be truly stated and may yet be utterly untrue.

Comment to be fair need not take the form of an inevitable inference. Fair comment impliedly permits of a much greater latitude than the drawing of inevitable inferences. All that is required is that the inference from facts truly stated should be fair, that is, one possibly out of many equally or almost equally fair inferences (1908) 2 K B 309; (1908) 2 K B 825 note; (1934) 6 Q B 183; (1868) 18 L. T. 615. ref. (Batchelor, O. C. J., Esqman and Maron, JJ.) SUBRAMAL v. B. G. HORNIMAN. 20 Bom L. R. 135=47 I. C. 449.

## LIMITATION.

———Judicial proceedings—Privilege—Non-liability in action for damages. See DEFAMATION 16 A. L. J. 330 (F. B.)

**LICENSE**—Revocation of—Right of licensee to damages on breach of contract. See GANJAM AND VIZAGAPATAM AGENCY RULES RR. 10 (2) AND 20. (1918) M. W. N. 722.

———Suit for ejectment of—Notice to quit—Necessity. See EJECTMENT. 27 C. L. J. 523.

———Plea raised for first time in appeal—Maintainability—Appeal on ground that whole claim was time-barred—Failure to pay stamp duty on portion—Effect. See PRACTICE. 14 P. W. R. 1918.

**LIMITATION**—Adverse Possession—Mortgagor and Mortgagee. See MORTGAGOR AND MORTGAGEE. 69 P. W. R. 1913.

———Chaukidari Chakran lands—Right of patnidars when such lands are resumed by Government and transferred to Zamindar—Transfer "Subject to contracts" Village Chaukidari Act (VI of 1875) S. 51—Limitation Act Sch. II Arts. 113 and 144.

The word "Contract" primarily means a transaction which creates personal obligations but it may though less exactly, refer to transactions which create real rights. It is in this latter sense that it is used in S. 51 of Bengal Act VI of 1870, and the rights thereby reserved to patnidars and others on the transfer to the Zamindar of chaukidari chakran lands, comprehensively included in the word "Contract" are real rights, the enforcement of which is secured not by a suit for specific performance, but by a suit for possession.

Where therefore a patnidar sued the Zamindar to recover possession of such lands.

Held, that the Article of Sch. II of the Limitation Act, 1877 applicable was not Art. 113 but Art. 144 and that the period of limitation accordingly was not three but twelve years. (Lord Buckmaster) MAHARAJAH RANJIT SINGH BAHADUR v. MAHARAJ BAHADUR SINGH. 25 M. L. J. 723=

25 M. L. T. 8=23 G. W. N. 193=18 A. L. J. 564=48 I. C. 265=45 I. A. 162 (P. C.)

———Execution—Decree directing mesne profits to be ascertained in execution—Limitation—Starting point. See LIM. ACT, ART. 182 (7). 40 All. 211.

———Mode of computation—Date on which appealed against to be excluded—Last day for appealing being dies non should be excluded. See PROV. INSOL. ACT, S. 464.

33 M. L. J. 531.

———Plf. fraudulently made to execute a document different from that agreed upon—Suit to recover property affected—Transaction void, not voidable. Lim. Act Art. 91 applicability. See LIM. ACT, ART. 91. 28 G. W. N. 93.

## LIMITATION.

—Special Law—Proceedings under Madras Land Encroachment Act (III of 1905)—Land in possession of tenant—Eviction—Suit by landlord—General Law of Limitation—Applicability *See* MAD LAND ENCROACHMENT ACT, S. 114. 35 M. L. J. 401.

**LIM. ACT (XIV of 1859)**—Limitation Act (IX of 1871)—Acquisition of title by prescription—Right recognised under, though no express statutory provision. *See* MALABAR LAW, DEVASWOM 34 M. L. J. 344.

—S. 1 Cl. (12)—Suit by Hindu widow to recover possession dismissed, as barred by time—Effect of in regard to the right of reversioners after her—Res judicata—Reversioner if barred fresh cause of action—Alienation by widow—Onus on purchaser to prove necessity *See* (117) DIG. COL. 148 KUNJAM VENKATARAMIAH v. DEJAPPA KONDE. 34 M. L. J. 349=22 M. L. T. 233=(1917) M. W. N. 679=6 L. W. 530=42 I. C. 542.

—S. 1, cl. 15 and S. 18 Act (IX of 1871) S. 29 and Art. 143—Kanom mortgage—Redemption—Limitation—Extinction of mortgagor's title—Acknowledgment of title after expiry of period prescribed for redemption but within period allowed by S. 18 of Act XIV of 1859—Effects of rights barred under repealed Act, not revived by later enactment *See* (1917) DIG. COL. 749; KAMAN KURUP v. CHAPPAN NAIR. 33 M. L. J. 758=(1917) M. W. N. 864=22 M. L. T. 419=43 I. C. 50.

—(IX OF 1908) — Applicability of Act, to suits under U. P. Land Revenue Act.

The Lim. Act has no application to suits contemplated by S. 111 of the U. P. Land Revenue Act. (Stuart A. J. C.) NURUL HASSAN v. SAEJU PRASAD. 43 I. C. 473.

—S. 2, Cl. (8) and Art. 124—Office of trustees of devaswom annexed to a Malabar stanom—Alienation of properties of devaswom by stani—Suit for recovery of possession by successor in stanom—Limitation. *See* (1917) DIG. COL. 750; RAJAH OF PALGHAT v. RAMAN UNNI. 41 Mad. 4=33 M. L. J. 26=(1917) M. W. N. 552=6 L. W. 198=42 I. C. 235.

—S. 3—Limitation—Extension of period by agreement impossible.

The period of limitation cannot be extended by express agreement between the parties nor can it be extended by an agreement which can be implied from circumstances such as those of the present case. (Chamier, C. J. and Chappman, J.) MIDNAPUR ZEMINDARY CO. LTD. v. THE DY. COMMISSIONER OF MAN. PRADA. 3 Pat. L. J. 132=44 I. C. 370.

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—S. 3—Limitation—Plea of, to be taken notice of by appellate court, though not raised in the courts below *See* LIM. ACT, ART. 120 AND 182. 22 C. W. N. 994.

—S. 3—Not pleaded—General plea of—Decision on—Special Limitation not pleaded—Validity—Beng. Tenancy Act, Sch. III Art. 3—C. P. Code, O. S. R. 2.

Under O. S. R. 2 of the C. P. Code limitation should be specially pleaded.

When limitation has not been specially pleaded and the facts are not apparent on the face of the record, a Judge has no jurisdiction to go into the matter and enquire whether on certain facts he found, the suit was barred.

Where a general plea of limitation that the suit was barred by the twelve year's rule was pleaded, a Judge was not competent to decide a case on a special plea, that the suit was barred under art. 3 Schedule III of the B. T. Act when such latter plea was raised for the first time in the Court of appeal, without raising an issue and allowing the plaintiff to adduce evidence on it. (Fletcher and Huda, JJ.) KEDAR NATH MONDAL v. MOHESH CHANDRA KHAN. 28 C. L. J. 218=46 I. C. 767.

—Ss. 4 and 14—Scope of—Computation—Last day of filing a holiday—Suit filed next day in wrong court—Plaint returned for presentation to proper court—Subsequent presentation in proper court—Time between the two presentations—Deduction of—Right to select from—Suit if barred.

Where a plff instituted a suit on the day after the last day of filing, the last day being a holiday in a Court within whose jurisdiction one only of the defts. resided and the Courts declining to grant leave under S. 20 (b) of the C. P. Code returned the plaint for presentation to the proper court which was subsequently done.

Held, that the plaint not having been presented to a proper court on the day after the last day of limitation the suit was barred.

S. 4 of the Lim. Act is a particular statutory provision not for the purpose of computing the period of limitation but for allowing in certain circumstances the filing of suits after the period has expired.

S. 14 is a provision relating to the computation of the period of limitation and the time occupied in conducting bona fide proceedings, in a wrong court after the last day of limitation cannot be deducted in reckoning the number of days to see if the time prescribed by the article has expired.

A man has a perfect right to endeavour to get the payment of his money and there is nothing improper or want of good faith within the meaning of S. 14 of the Act in a creditor suing his debtor where he thought he

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would be more willing to discharge the debt. (*Sadasiva Aiyar and Napper, J.J.*) RAMA LINGAM AIYAR v. SUBBIEER 24 M. L. T. 214  
—8 L. W. 253—47 I. C. 624.

—S. 5.—Admission of appeal presented out of time—Ex-parte admission of appeal—Open to consideration at instance of respondent—Practice of Indian courts, disapproved.

The admission of an appeal after the period of limitation deprives the respondent of a valuable right, for it puts in peril the finality of the decision in his favour. Where therefore an order for such admission is made *ex-parte*, it is open to consideration at the respondents' instance.

The question of limitation should not however be left open till the hearing of the appeal, although this has hitherto been the usage in India. The Courts in that country should adopt a procedure which will secure at the stage of admission the final determination of any question of limitation affecting the competence of an appeal. (*Sir Lawrence Jenkins*) KRISHNABAWMI PANIKONDAR v. RAMASAWMI CHETTY.

41 Mad. 412—34 M. L. J. 63—  
23 W. L. T. 101—16 A. L. J. 57—  
22 C. W. N. 431—20 Bom. L. R. 541—  
27 C. L. J. 253—4 Pat. W. L. 54—  
7 L. W. 156—(1918) M. W. N. 906—  
11 Bur. L. T. 121—43 I. C. 493—  
45 I. A. 25. (P. C.)

—S. 5—Appeal—Delay in filing—Sufficient cause—Pleader's mistake if a.

A legal adviser's mistake in order to justify an extension of period prescribed for presenting an appeal must be a *bona fide* one; and shall be deemed to be done in good faith which is not done with due care and attention. (*Broadway, J.*) AHMAD HASSAN v. SHAMS-UL-NISSA, 10 P. L. R. 1918—69 P. W. R. 1918—  
45 I. C. 542.

—S. 5—Applicability—Appeal—Limitation—Calculation—Deduction of time taken up in review—Review persisted in face of objection to its maintainability. (*Johnstone, J.J.*) H. H. BRIJ INDAR SINGH v. LALA KASHI RAM. 130 P. L. R. 1917.

—S. 5—Applicability of—Application for decree absolute in a mortgage suit whether an application for execution of a decree. See C. P. CODE, O. 34, RR. 4 AND 5.

16 A. L. J. 35.

—S. 5—Applicability—Prosecution in good faith—Review persisted in notwithstanding objection to its maintainability—Appeal after rejection of review—Time taken up in review if must be deducted.

Where a party prosecutes a review in the face of respondents' objection, and protest to its inadmissibility and after the rejection of

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the review presents an appeal, he is not entitled, under S. 5 of the Limitation Act, to a deduction of the time taken up in prosecuting the review because it could not be said to be prosecuted in 'good faith' within the meaning of that section. (*Johnstone, J.*) H. H. BRIJ INDAR SINGH v. LALA KASHI RAM.

130 P. L. R. 1917.

—S. 5—Applicability of provisions of, to execution application

In the absence of any rule or enactment making S. 5 of the Act applicable to an application for execution of a decree, the section does not apply to such an application. (*Chamier, C. J. and Chapman, J.*) MIDNAPUR ZEMINDARY CO., LTD. v. THE DEPUTY COMMISSIONER OF MANBHUM.

3 Pat. L. J. 132—44 I. C. 570.

—S. 5—Applicability to appeal under Provincial Insolvency Act—"Sufficient cause" Meaning—Review if and when a sufficient cause. (*Scott Smith, J.*) WARIYAM SINGH v. WADHAVA.

89 P. R. 1918—  
87 P. L. R. 1918—83 P. W. R. 1918—  
46 I. C. 558.

—S. 5—Delay in filing appeal—Review—Time spent in prosecuting when allowed.

An application for review must not only have reasonable expectation of success but must also be prosecuted with reasonable diligence in order to justify an appellant in the reckoning of days spent in the prosecution of the review from the period allowed for filing the appeal.

(*Rattigan, C. J. and Le Rossignol, J.*) AZIZ-UD-DIN v. BRAG MAL. 197 P. R. 1918—  
46 I. C. 23.

—S. 5—Delay—Mistake in calculating time, if a sufficient ground.

A mistake in calculating the period of limitation allowed for filing an appeal is not a sufficient cause for extending the period under S. 5 of the Lim. Act (*Fletcher and Smither, J.J.*) GURU CHARAN GHOSE v. KASHI CHANDRA GHOSE. 45 I. C. 450.

—S. 5—Delay in presentation of appeal—Presentation to wrong Court—Error of law—Power to excuse.

Delays in presentation of appeals are within S. 5 of the Lim. Act and the Court has power to excuse delays.

Where an appeal is time barred on the date of its presentation and the delay is due to the fact that it was previously presented in a wrong Court and returned for representation to the proper Court the delay can be excused under s. 5 of the Lim. Act. (*Ayling and Seshagiri Iyer, J.J.*) RAYARAPPA NAMBIAR v. KOYOTAN CHABLE VEETIL.

35 M. L. J. 51—  
24 M. L. T. 28—8 L. W. 154—  
45 I. C. 489.

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—S. 5—Extension of time—Grounds for  
—Legal adviser's mistake when a ground *See*  
(1917) DIG. COL. 752; *RESAL SINGH v.*  
*SHADI.* 95 P. R. 1917=13 P. L. R. 1918=  
174 P. W. R. 1917=43 I. C. 317

—S. 5 and Art. 179—Leave to appeal to  
*Privy Council*—Application by ward in his own  
name—Rejection of—Subsequent application  
more than a year by ward after release from  
superintendence—No saving of limitation.

An application for leave to appeal to His Majesty in Council was rejected on the ground that the applicant's estate being under the superintendence of the Court of Wards, he was not competent to make the application. After the release of the estate from the superintendence of the Court of Wards, the applicant made another application for leave to appeal to His Majesty in Council more than two years after the date of the decree sought to be appealed from:

*Held*, that the second application could not operate to revive the first application; that, even if the first application was revived, the revival could not in any way benefit the applicant, inasmuch as the application which was sought to be revived was an application by a person disqualified to make it, and it would remain an application by a disqualified person if revived; that no sufficient cause had been shown to enable the Court to apply the provisions of S. 5 of the Lim. Act to the case; and that the Court would not be justified in utilising the provisions of S. 151 of the C. P. Code so as to revive the previous application and to grant leave to appeal. (*Stuart and Kanhaiya Lal, A.J.C.*) *NARENDRA BHADUR SINGH v. THE OUDH COMMERCIAL BANK.*  
5 O. L. J. 153=46 I. C. 68.

—S. 5—Memorandum of appeal insufficiently stamped—Conditional admission effect of—Whether deficit can be paid after expiry of period of limitation—Negligence of Vakil effect, whenever good reason to exercise discretion under S. 5—Appeal barred.

*Held*, that under S. 4 of the Court Fees Act the court could not receive an appeal which was not properly stamped that the filing of the appeal on a court-fee of Rs. 10, was not done in good faith and that the conduct of the Vakil when the deficit in court fees was brought to the notice was wantonly negligent and that, therefore, the appellants were not entitled to the benefit of the court's clemency under S. 5 of the Act, that the effect was behind time (*Roe and Courts, JJ.*) *JODHAN PRASAD SINGH v. NANKHU PRASAD SINGH.*  
3 Pat. L. J. 434=5 Pat. L. W. 136=  
46 I. C. 509

—Ss. 5 and 14—Review application—Delay—Sufficient cause:

The plaintiff a Mahomedan female filed a suit to establish her right of way which was

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negated by the trial Court on the strength of a certified copy of a map produced by the deft. An appeal was preferred against that decree to the Dt. Judge but it was heard by the first class Subordinate Judge, with appellate powers who dismissed it on the 8th October 1915. The plff. applied to the Revenue authorities on the 16th idem. for another certified copy of the map, and appealed against the decree to the High Court on the 10th November. The certified copy was received by the plff. on the 4th January 1916 and, on the next day he applied for a review of the judgment of the lower appellate Court. Pending the application for review the appeal in the high Court was withdrawn. The review petition was transferred by the Dt. Judge to the first class Subordinate Judge who dismissed it on the 5th May 1916, on the ground that it was not made to the proper Court. The next day, the plff. made a second application to the First-Class Subordinate Judge asking him to review his judgment in view of the correct certified copy of the map produced by her. The review having been allowed the deft. appealed to the High Court contending that the application was barred by limitation and that it was wrongly granted.

*Held*, that, assuming that in strictness the application was out of time, the case was one which called for the concession allowed by Ss. 5 and 14 of the Lim. Act. (*Batchelor A. C. J. and Kemp, J.*) *BAI NEMATBU v. BAI NEMATULLABU.*  
42 Bom. 285=  
20 Bom. L. R. 434=46 I. C. 14.

—Ss. 5 and 14—Sufficient cause—Bona fide prosecution of appeal in wrong court—Ground for extension of time in filing appeal.

An appeal against the decision of a Munsif was filed within time in the Court of the District Judge and a question being raised as to which was the proper Court of Appeal, the District Judge took time to consider it and ultimately determined that under the notification of the High Court the Subordinate Judge's Court was the proper Court and returned the appeal which was on the same day filed in the latter Court.

*Held*, that although S. 14 of the Lim. Act was inapplicable to appeals the principle of that section has been recognised by Courts as applicable to appeals in the sense that the bona fide prosecution of a proceeding in a wrong court has been regarded as a proper ground or as sufficient cause within S. 5 of the Lim. Act for extending the time for filing an appeal. (*Richardson and Beachcroft, J. J.*) *RUPA THAKURANI v. KUMUDNATH KARMAKAR.*  
22 C. W. N. 594=46 I. C. 116.

—S. 5—Sufficient cause—Difficulty in obtaining stamp. *See* (1917) DIG. COL. 753; *RAM SAHAY RAM PANDEY v. KUMAR LACHMI NARAIN SINGH.* 3 Pat. L. J. 74=  
5 Pat. L. W. 18=42 I. C. 675.

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—S. 5.—Sufficient cause—Discretion—High Court, interference by pleader, *bona-fide* mistake of See (1917) DIG. COL. 753; MA MAI GALE v. MAUNG TUN WIN.

16 Bur. L. T. 221=37 I. C. 815.

—S. 5.—Sufficient cause—Mistake of pleader.

Before an extension of time can be granted under S. 5 of the Lim. Act on the ground that the appeal has been filed beyond time owing to a mistake made by the legal adviser of the appellant, there must be proper evidence establishing that a mistake was committed and that it was a *bona fide* one. (*Fletcher and Huda, JJ.*) ISWAR CHANDRA KAPALI v. ARJAN.

45 I. C. 725.

—S. 5—"Sufficient cause" for not presenting an appeal within the period prescribed—Whether time spent in applying for review may be excluded in computing the period—Mistake of law—Whether it may amount to sufficient cause—Limitation Act (IX of 1908) Ss. 5 and 14—Judicial discretion—Duty of Superior Court when it is questioned—Abatement of suits—Should not be pronounced *ex parte*—Procedure in questioning abatement—Whether review or appeal is the proper remedy—Code of Civil Procedure (Act XIII of 1882) Ss. 365, 366, 368 371, 568—Substitution of parties in miscellaneous appeal—Sufficient for all stages of a suit. See (1917) DIG. COL. 746, BRIJ INDAR SINGH v. LALA KANSHI RAM.

45 Cal. 34=22 G. W. N. 169

=26 C. L. J. 672=33 M. L. J. 438=

22 M. L. T. 362=6 L. W. 392=

15 A. L. J. 777=19 Bom

L. R. 866=104 P. R. 1917=

=126 P. W. R. 1917=3 Pat. L. W. 313

=42 I. C. 43=44 I. A. 218. (P. C.)

—S. 6—Applicability—Assignee from minor if entitled to benefit of section.

Assignee of property from a Mahomedan minor cannot avail himself of the benefit of the provisions of S. 6 of the Limitation Act of 1908 (*Leslie Jones, J.*) HUKAM SINGH v. SHAHAB DIN.

14 P. W. R. 1918

=44 I. C. 290.

—Ss. 6 and 29 (1) (b)—Exemption from Limitation—Applicability only to suits described in the schedule and not to a suit under the O. P. Ten. Act.

S. 6 of the Lim. Act *prima facie* applies only to suits prescribed in the schedule to the Act.

It does not, therefore apply to a suit brought under S. 69 sub-section (1) of the C. P. Land Revenue Act, the limitation for which is provided in the sub-section itself. (*Batten, A. J. C.*) BALKRISHNA LAXMAN v. BALA.

46 I. C. 879.

## LIMITATION ACT, S. 7.

—Ss. 6, 7 and 28, Art. 44 and 144—Guardian and Ward—Alienation by guardian—Suit for possession by ward on attaining majority—Limitation—Bar against elder brother, when affects others—Lim. Act, S. 7—Scope of. See (1917) DIG. COL. 755; KANDA-SWAMI v. IRUSAPPA.

41 Mad. 102=

33 M. L. J. 309=40 I. C. 664.

—S. 6—Minor—Purchaser from, whether entitled to exemption from limitation.

The view that the plff. having purchased the property from a minor has got by the assignment the rights of a person under disability under S. 6 of the Lim. Act, cannot be supported after the decision of the Full Bench in the case of 9 Cal. 663. (*Fletcher and Huda, JJ.*) BHAGBAN CHANDRA v. ISHAH CHANDRA KAIBARTA DAS. 22 C. W. N. 831=46 I. C. 802.

—Ss. 6 and 8 and Art. 12—Minority—Extension of period—Minority during confirmation of sale—Suit to set aside after majority.

S. 6 of the Lim. Act gives a minor the same period of limitation after his attaining majority as an ordinary person gets. There is nothing in S. 8 to extend the period.

A suit by a minor to set aside a sale under Art. 12 Sch. I of the Lim. Act must be brought within one year from the date of the plff's. majority. (*Chevis, J.*) PALA SINGH v. HARNAM.

40 P. L. R. 1918=30 P. W. R. 1918=

43 I. C. 712.

—S. 7—Discharge by adult brother on behalf of joint family consisting of minor co-parceners—Suit to recover arrears—Cash allowance.

Where plffs. are jointly interested in a cash allowance, they can sue to recover arrears for three years only even though one of them is a minor at the date of the suit. 6 Bom. L. R. 647 dist. (*Heaton and Shah, JJ.*) HUCHRAO v. BHIMRAO. 42 Bom. 277=20 Bom. L. R. 161

=44 I. C. 851.

—S. 7 and Art. 182 (6)—Minority—Subsequent disability—No saving of limitation.

A decree under O. 31 R. 6 of the C. P. Code, was passed on 4-3-1914 and an application for execution was put in on 3-3-1914, and on the same date the Court passed the order that notices be issued to the judgment-debtors. The notices were actually drawn up and signed on 4-3-1914 and that was the date which the notices bore. The application for execution was struck off on 5-3-1914. The next application was made on 5-3-1917 by one of the original decree-holders, and the legal representatives of two of the other decree-holders, the legal representative being minors. March 4, 1917, was a Sunday. The Court below held that the application was within time. *Held,*

## LIMITATION ACT, S. 9.

reversing the order of the Court below, that the application was time barred, the time running from the date on which the order of the Court issuing notice was passed.

*Held*, also, that the time having already commenced to run from 1914 the decree-holders were not entitled to the benefit of S. 7 of the Lim. Act by reason of the minority of some of the decree-holders. (*Richards, C. J. Knox and Bannerjee, J.J.*) **KALIKA BAKSH SINGH v. RAM CHARAN.** 40 All. 630=  
16 A. L. J. 633=46 I. C. 534.

— **Ss. 9 and 15—Applicability of—**  
**'Disability'—'Inability'—Distinction between—**  
**Alien enemy—Right of suit—Limitation, sus-**  
**pension of.**

S. 9 of the Lim. Act covers the case of an alien enemy who is debarred from suing in consequence of a declaration of war.

The general rule is that once limitation has begun to run, a subsequent 'disability' to sue will not avail to stop it in the absence of express statutory provision.

*Per Sanderson, C. J.*—The Legislature in enacting S. 9 of the Lim. Act did not mean the same thing by the use of two words "disability" and "inability".

An express statutory provision on a particular matter would have the effect of overriding any common law rule regarding the same.

*Per Woodroffe, J.*—S. 15 of the Lim. Act refers to orders of Civil Courts, and not to the condition of things under which an alien enemy is prevented from suing owing to a declaration of war. (*Sanderson, C. J. and Woodroffe J.*) **DEUTSCHE ASIATISCHE BANK v. HIBA LALL BURDHAN AND SONS**  
23 C. W. N. 157=47 I. C. 398.

[On appeal from. 47 I. C. 132.]

— **S. 9—Limitation—Running of—**  
**Intervening disability not effective to stop. See**  
**LIM. ACT, ART. 134.** 27 C. L. J. 201.

— **S. 10 and Art. 89—Administrator—**  
**Accounts, suit for, against—Limitation.**  
**See. (1917) DIG. COL. 756. JANARDHAN**  
**PRASAD v. JANKIBATI THAKURAIN.**  
(1913) Pat. 170=2 Pat. L. J. 645=  
4 Pat. L. W. 337=  
40 I. C. 860.

— **S. 10—Applicability—Land assigned**  
**by mutual agreement—Suit for its recovery—**  
**Limitation.**

The land in dispute was, according to a statement in the record of rights of 1-63, assigned by the then owners three years previously to the predecessors-in-interest of the present defts., who were in possession as assignees according to mutual agreement and would so continue taking profits and bearing

## LIMITATION ACT, S. 10.

loss until the assignment terminated. The assignors were shown in the proprietary column of the records as *tafwiz kunirdagan* and the assignees were shown in the same column as *majwar alatham*. The same entries reappeared in the statement of 1891 and again in that of 1910. In 1914 plffs. as representatives of the original assignors applied for mutation in their own favour and on their application being refused by the Revenue Officer instituted the present suit for possession.

*Held*, that the suit was governed by S. 10 of the Lim. Act and was consequently not barred by limitation (*Leslie Jones, J.*) **SEOTI v. BHAGIRATH.** 66 P. R. 1918=  
12 P. L. R. 1918=70 P. W. R. 1918=  
45 I. C. 325.

— **S. 10 Arts. 60. and 145—Applicability**  
**—Money kept in deposit with another to be**  
**returned on demand—Suit to recover—Limita-**  
**tion.**

A suit to recover money left by plff. with deft. to be repaid on demand and to be kept in deposit till then is governed by Art. 60 and not by S. 10 or art. 145 of the limitation Act. Art. 145 cannot be applied to a deposit of money except in the case of coins which are ear-marked and where it is the intention of the parties that the identical coins should be returned to the depositor. (*Ratingan, C. J.*) **DALIPA v. LABAN RAM.** 65 P. L. R. 1918=  
16 P. W. R. 1918=47 I. C. 592,

— **S. 10—Applicability of—Trust pro-**  
**perty and income lost by default of trustee**  
**—Governed by ordinary law of limitation. See**  
**(1917) DIG. COL. 756. THOLASINGAM CHETTY**  
**v. VEDACHELLA AYYAR.** 41 Mad. 319=  
22 M. L. T. 383=(1917) M. W. N. 651=  
6 L. W. 532=42 I. C. 544

— **S. 10—Scope of—Temple property—**  
**Gift of for valuable consideration—Considera-**  
**tion consisting in performance of religious**  
**service at the temple—Suit to recover the**  
**property—Limitation—S. 10 inapplicable, See**  
**LIM. ACT, ART. 134.**

20 Bom. L. R. 441.

— **S. 10—Trustee Transferee from—Ac-**  
**quisition of title by prescription.**

S. 10 of the Lim. Act applies only where a person setting up adverse possession claims adversely to the beneficial owner. But where a person has been performing the duties of a *shebait* of an idol and applying the trust funds to the proper purposes of the trust and claims the right to hold that office and to perform those duties S. 10 of the Lim. Act has no application and he can acquire that right as against the original *shebait* by such adverse possession. 36 Cal. 1003, 7 Mad. 387; 23 Mad.

## LIMITATION ACT, S. 12.

271; 31 Cal. 311 ref. and foll. (*Dawson, Miller, C. J. Mullick, J.*) *NATHE PUJARI v. RADHA BINODE NAIK.*  
3 Pat L. J. 327=4 Pat L. W. 283=  
(1918) Pat. 247=47 I. C. 290.

—S. 12—*Appeal—Limitation—Computation*—“Time requisite for obtaining copies”—Copies of decree and of judgment applied for separately—Applicant if entitled to separate deductions—Practice—Finding of lower appellate court on point—Binding nature of on second appellate court.

Under S. 12 of the Limitation Act an appellant can only deduct such time as was “requisite” for obtaining copies. What time is requisite for this purpose is a question of fact and where the Divisional Judge has decided that two revisions, viz., one for obtaining the copy of the judgment and another for obtaining copy of the decree of the lower court were not requisite in the particular case and made only one allowance. Whether he was right or wrong is not a question of law. (*Cheris, J.*) *SHER SINGH v. PEM RAJ.* 100 F. R. 1913  
=48 I. C. 31.

—S. 12 (2) and (3)—*Computation of time for the purpose of appeal—Long vacation of the lower court—Notification that copies will be supplied in the long vacation—Whether the period of the vacation can be excluded.*

Where a notification is published that copies will be granted during the long vacation the whole period of the long vacation cannot be excluded as the period for granting a copy of the judgment or decree; on the other hand, the whole period of the vacation must be reckoned in computing the period of limitation. (*Hillips and Kumaraswami Sastri, JJ.*) *KADIR MOIDEEN SAHIB v. SAYYED ABU BAKKAR SAHIB*  
36 M. L. J. 122=1918 M. W. N. 836=  
8 L. W. 8.

—S. 13—*Effect—Suit against partners of firm—One of the debts absent from British India for portion of the period of limitation.*—*Effect—Plff's right to deduction of period (1) as against all debts, at last as against absentee debt—English Law compared.*

A. B. and C were partners with D in a firm known as the Epoh Firm. A, B and C were also partners with E in another firm known as the Singapore Firm. D died in 1903, and during the course of the winding up of the Epoh firm, that is, in Dec. 1903, A, B and C lent to the Singapore Firm a certain sum of money. In a suit instituted in Nov. 1909 by E, the son of D, against A, B, C and E for the recovery of plff's share of the money so lent to the Singapore Firm it appeared that E was not in British India between the end of 1903 and Dec. 1908, though the other debts were in British India all the time and that by a bona fide deed of composition

## LIMITATION ACT, S. 14.

entered into by the Singapore Firm with its outside creditors. E was, on payment of a certain sum of money to pay off those creditors released from liability to his partners for any moneys advanced by them.

*Held*, (1) that the absence of E from British India would under S. 13 of the Lim. Act, entitle plff to claim a reduction of time as against E alone and not as against A, B and C also and the fact that plff. could have sued A, B and C, who were the co-obligors of E and were within British India during the said period, was not a ground for holding that the claim as against E was barred by limitation; and

(2) that the release of E was, in the circumstances of the case, binding on plff. his remedy, if he had been damaged by the conduct of A, B and C, being to sue them for damages.

Effect of S. 13 of the Lim. Act in cases in which one of the debts alone is absent from British India considered and compared with the English Law on the subject. (*Ayling and Seshagari Aiyar, JJ.*) *PALANIAPPA CHETTIAR v. VEERAPPA CHETTIAR.* 41 Mad 446=  
34 M. L. J. 41=44 I. C. 466.

—S. 14—*Applicability of—Appeals—Principle of the section applicable to.* See LIM. ACT, SS. 5 AND 14.

22 C. W. N. 594.

—S. 14—*Applicability—Execution of decree—Limitation—Execution application praying for transfer of decree—Dismissal of, on the ground of absence of proof or want of jurisdiction and limitation—Subsequent application to same court for attachment of properties within jurisdiction—Decree-holder if entitled to deduction of time pendency of prior application.* See 1917 DIG. COL. 758. *RAGHAVENDRA RAO v. VENATARAMA IYER.* 33 M. L. J. 632=45 I. C. 460.

—S. 14—*Exclusion of time—Proceeding before Collector—Bombay Hereditary Offices Act (III of 1874), S. 11 A.*

An application to the Collector to take action under S. 11 A of the Bom. Hereditary Offices Act, 1874, is not a civil proceeding in a court within the meaning of S. 14 of the Lim. Act. Hence the time taken up in prosecuting such an application cannot be excluded under S. 14 from the period of time prescribed by the Lim. Act (*Henton and Haynard, JJ.*) *LAXMAN v. KESHAV.* 20 Bom. L. R. 918.  
=43 I. C. 497.

—S. 14—*Scope of computation of time—Last day holiday—Suit filed in wrong court on next day—Return for presentation to proper court—Presentation in proper court time spent—Deduction—Suit if barred.* See LIM. ACT, SS. 4 AND 14. 8 L. W. 289.

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—S. 14—*Sufficient cause—Due diligence—Decree against joint tenants satisfied by one—Suit for contribution laid in Small Cause Court—Refusal to take back plaint—Revision to the High Court—Dismissal of—Presentation of plaint to proper court.*

A decree for arrears of rent having been passed against the plff. and the defts. who were joint occupancy tenants, was realised from the plff. alone to a large extent on 1908-1910. The plff. thereafter brought a suit against the defts., for contribution on 23-5-1913 in the Court of Small Causes. On Nov. 27, 1913, the Small Cause Court ordered the return of the plaint for presentation to the proper court. The plff. refused to take it back, and in Feb. 19, 1914 filed a revision against the order to the High Court, which was dismissed on March 16, 1915. On June 15, 1915, the plff. having applied for the return of the plaint, it was so returned to her on June 30, 1915, and was filed on the same day in the Munsif's court.

*Held*, that the plff. was not entitled to the interval between May 20, 1913 and June 30 1915, being allowed to her, inasmuch as she could not be deemed to have been prosecuting her case with due diligence in view of the fact that she waited for more than three months after the dismissal of the revision before she applied for the return of the plaint. (*Tudball and Abdul Raouf, JJ.*) HAMIDA BIBI v. FATIMA BIBI. 16 A. L. J. 429= 43 I. C. 591.

—S. 15—*Applicability of—Alien enemy prevented from suing by reason of declaration of war—No right to exemption from limitation. See LIM. ACT, SS. 9 AND 15.* 47 I. C. 398.

—S. 15—*Applicability of—Royal proclamation—Effect of.*

S. 15 of the Lim. Act relates to injunctions or orders of Court, and not to royal proclamations which prevent the institution of suits by alien enemies. (*Chaudhuri, J.*) DEUTSCH ASIATISCHE BANK v. HIRALAL BURDHAN & SONS. 47 I. C. 123

See ON APPEAL.

23 C. W. N. 157.

—S. 15—*Exclusion of time—Execution of decree—Court giving time for payment whether saves limitation. See C. P. CODE, S. 48.* 16 A. L. J. 71.

—S. 15 and art. 162—*Execution application—Suspension of limitation while case is struck off.*

The final decree in a mortgage suit was set aside on appeal as against some of the owners of the equity of redemption and the case was ordered to be retried. The decree-holder's application for execution against the other defendants was struck off till the liability of

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the defendants against whom the decree had been set aside was finally settled.

*Held*, that the execution of the decree was stayed by the Court's order striking off the execution case, so that limitation in respect of execution did not begin to run until the liability of the defts. against whom the decree had been set aside was finally settled. (*Fletcher and Huda, JJ.*) SATISH MOHINI DEBYA v. PATNA BANK, LTD. 47 I. C. 907.

—S. 15—*Execution of decree—Decree given as security for costs of appeal to Privy Council—No bar to execution—Time does not stop during pendency of application to Privy Council.*

Where a plff. whose suit had been dismissed by the High Court appealed to the Privy Council, and offered as security for respondent's costs in that appeal a decree which he had obtained against the latter in another suit, *held* that the acceptance of the decree as security did not amount to an order by the court that execution of the decree should not proceed pending the disposal of the appeal to the Privy Council and that, therefore, the period between the dismissal of the suit by the High Court and the date on which the application for execution of the decree was filed could not be excluded under S. 15 of the Lim. Act. (*Chamier, C. J. and Chapman, J.*) MIDNAPUR ZEMINDARI CO. v. THE DEPUTY COMMISSIONER OF MANBHUM. 3 Pat. L.J. 132= 44 I. C. 570.

—S. 15 and Art 182—*Execution of decree—Insolvency proceedings, pendency of, when a bar to execution—Absence of protection order—Time does not stop.*

The pendency of an insolvency proceeding under the Pres. Towns Ins. Act does not of itself, in the absence of a protection order under S. 15 of the Act, bar the remedy of a decree-holder to execute his decree by the arrest of the judgment debtor. Limitation for the execution of a decree, therefore, continues to run against a decree holder during the pendency of an insolvency proceeding and he is not entitled to exclude the period during which the insolvency proceeding has been pending from the period allowed for execution of the decree. (*Mullick and Thornhill, JJ.*) SHEO SARAN RAM v. BASUDEO PRASAD SAHU. (1918) Pat 357=47 I. C. 798.

—S. 15—*Stay of execution, partial—Exemption from limitation*

A partial stay of execution, e. g. a stay of execution in respect of a particular property against which execution is sought amounts to a stay of execution within the meaning of S. 15 of the Lim Act, so that in computing the period of limitation prescribed for an application for execution of a decree, the time during which the execution of the decree has

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been partially stayed should be excluded. (*Harold, J. C.*) *NACHIAPPA CHETTY v. MAUNG PE.* 3 U. B. R. (1913) 73= 46 I. C. 392.

———S. 15 Subs (2)—*Period prescribed by S. 104 H. of the B T Act, Extension of B. T. Act, Ss 184 and 185.*

S. 15 Sub-sec. 2 of the Lim. Act, does not extend the period of six months mentioned in S. 104 H. sub-sec (2) of the B T. Act.

S. 15 Sub-sec (2) of the Lim. Act, which is made applicable to suits, appeals and applications mentioned in the third schedule annexed to the B. T. Act, by virtue of S. 185 Sub-sec. 2 does not apply to suits instituted under S. 104 H. of the B.T. Act which are not mentioned in the third schedule. 18 C. W. N. 31 and 34 All. 496 dist. (*Mookerjee and Walmesley, JJ.*) SECRETARY OF STATE FOR INDIA v. GANGADHAR NANDA. 45 Cal. 934=27 C. L. J. 374= 45 I. C. 228.

———S. 15 (2)—*Suit against Secretary of State under S. 104 H of the B. T. Act. Notice, Period of, not to be deducted. See LIM. ACT, Ss. 29 (1) (b) AND 15 (2).* 22 C. W. N. 802 also 22 C. W. N. 817.

———S. 18 and Art. 181—*Applicability of—Fraudulent execution sale—Application to set aside—Limitation—Decree-holder's plea based on judgment-debtor's knowledge of fraud—Onus of proof. See C. P. CODE, S. 47 AND O. 21. R. 22.* 27 C. L. J. 528.

———S. 18 and Art. 166—*Execution sale—Application to set aside—Fraud—Extension of time.*

S. 18 of the Lim. Act only applies where a person having any right to make an application has by means of fraud been kept from the knowledge of his right.

Where, therefore, a judgment-debtor was by the fraud of the judgment-creditor and the auction-purchaser induced to omit to make an application under R. 89 of O. 21 of the C. P. Code, on the assurance that they would themselves apply to have the sale set aside.

*Held*, that the fraud was not of the kind which would operate to extend the limitation provided for an application to set aside a sale on the ground of irregularity. The fraud alleged did not keep the judgment-debtor from the knowledge of his rights but merely prevented him from making an application. (*Richards, C. J. and Bannerjee, J.*) HARISH CHANDER v. GANGA BISHUN. 43 I. C. 671.

———S. 19—*Acknowledgment—Deposition to a Court in another case—Not signed by defendant or by his agent.*

A deposition made by the defendant in another case which was not signed by him or

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his duly authorised agent did not fulfil the requirements of S. 19 of the Limitation Act 122 and 145 P. R. 1889 and 16 P. R. 1691, dist 184 P. W. R. 1911 foll. (*Shah Din, J.*) KAPUR CHAND v. NARINJAN LAL. 34 P. R. 1918=45 I. C. 99.

———S. 19—*Acknowledgment of liability—Implied acknowledgment of liability—Implied acknowledgment—Document—Construction.*

An acknowledgment of liability under S. 19 of the Lim. Act may be express as well as implied.

The assignee of a subscriber to a chit fund wrote to the manager of the fund asking for payment of the subscription amount due to his assignor. The manager replied you have not shown me the deed of assignment under which you make the claim. Further I have been issued an injunction order prohibiting me from paying the amount to anybody. A third party named Sundar Row has sent me a notice that the amount was due to him. you are informed that you must send me the amount of subscription and I cannot give you credit for anything."

*Held*, that the letter amounted to an acknowledgment of the liability (*Seshagiri Ayyer, J.*) SUBBA RAO v. PARASURAMA PATTAR. 34 M. L. J. 551=46 I. C. 973.

———S. 19 and Art. 78—*Acknowledgment—Hundi and cheque, payment by—Dishonour—Acknowledgment.*

Art. 78 Sch. I of the Lim. Act has no application to a suit to recover money alleged to be due on accounts taken between the parties, though a payment by the debt. by a cheque and a hundi was dishonoured on presentation. Such payment does not constitute an acknowledgment within the meaning of S. 19 of the Lim. Act. (*Mookerjee and Beauchamp, JJ.*) PADMA v. GIBISH. 27 C. L. J. 392= 45 I. C. 241.

———S. 19—*Acknowledgment by judgment-debtor, after attachment, not binding on auction-purchaser.*

An acknowledgment by the judgment-debtor may save limitation against the auction-purchaser, but such acknowledgment if made after the attachment cannot prevail against the auction-purchaser who is entitled to have the property purchased by him in the condition in which it was at the time of the attachment. (*D. Chatterjee and Walmesley, JJ.*) RAJESHWARI DAS v. BINODA SUNDARI DAS. 22 C. W. N. 278=44 I. C. 533.

———S. 19—*Acknowledgment of right what constitutes—Petition for adjournment in mortgagee's suit after preliminary decree—Incidental acknowledgment of mortgagee's right to decree amount. See C. P. CODE, Ss. 2 (2) 47 ETC.* 35 M. L. J. 582.

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—S. 19—*Acknowledgment—Validity—Condition—Right claimed must be acknowledged*

The acknowledgment referred to in S. 19 of the Lim. Act must be an acknowledgment of liability in respect of the right claimed.

A possessory mortgage was created in 1897. The mortgagee never got possession of the mortgaged property. More than 17 years after the date of the mortgage a suit was brought for possession by the mortgagee; for bringing the suit within limitation reliance was placed on an acknowledgment of liability contained in a sale deed executed by the mortgagor in 1906. By this sale transaction some money was left with the vendor with a direction embodied in the deed to pay the same to the mortgagee. *Held*, that if there was any acknowledgment it was with respect to the liability to pay the money due on the mortgage and it could not be availed of to give a fresh start of limitation for a suit for possession as was brought by the mortgagee (*Lindsay J. C.*) *BENI MADHO v. SIE BAL SINGH*.  
21 O. C. 151=46 I. C. 513.

—Ss. 19 and 20—*Nattukottai Chetties Acknowledgment of debt—Vilasam of the firm written at the top of the letter—No signature—'Acknowledgment' validity of—Signature sufficient according to custom—Part-payment of principal when valid—Secondary evidence, when can be given* See (1917) DIG. COL. 763; *MUTHIA CHETTIAR v. KUTTAYAN CHETTY*.  
(1913) M. W. N. 42=8 L. W. 790=

43 I. C. 20.

—Ss. 19 and 20—*Uncertified adjustment of payment—Not effective to save limitation. See DIG. COL. 765; BIRSWAR MUKERJEE v. AMBIKA CHARAN BHATTA CHARJEE*.  
45 Cal. 630=42 I. C. 472.

—S. 19 Expl. II and S. 21—*Receiver—Acknowledgment by—Whether will save limitation—Firm under dissolution—Appointment of Receiver to do all things necessary for the preservation of the assets of the firm—Whether receiver has authority to make an acknowledgment*.

An acknowledgment of a debt due by a firm under dissolution made by a receiver of that firm is valid to save limitation if it is authorised by the terms of the order appointing the receiver.

A receiver may be an agent authorised to make an acknowledgment within the meaning of S. 19, Expl. II, whose language is general enough to include an agent appointed either by Statute or by court if he is authorised under the law to make acknowledgments.

Where a receiver is appointed to take charge of the property of a firm with power "to do all things necessary for the preservation of the assets of the firm", he is entitled to make acknowledgments if at the time the acknow-

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ledgments are made they are acts necessary for the preservation of the estate.

Case law on the subject reviewed. (*Abdur Rahim and Oldfield, JJ.*) *LAKSAMANAN CHETTY v. SADAYAPPA CHETTY*

35 M. L. J. 571=(1918) M. W. N. 877=  
8 L. W. 594=45 I. C. 179.

—S. 20—*Acknowledgment—Mortgage—Part payment—Payment by mortgagor by means of sale of certain other property to the prior mortgagees*.

A mortgage was made to A on 8-1-1891. A brought a suit on this mortgage on 7-11-1914. He impleaded in this suit as defendants (1) the mortgagors, (2) one set of subsequent mortgagees, and (3) certain purchasers of a portion of the equity of redemption in the mortgaged property under a sale-deed, dated 24-6-1913. The third set of defendants only contested the suit on the ground that it was barred by limitation. Alleged that the suit was within time by reason of three payments made by the mortgagors on account of interest as such, the last of the payments being on 25-11-1902. This payment was made by the mortgagors by means of a sale by the mortgagors to certain prior mortgagees of some property other than that was covered by the mortgage in suit. *Held*, that the payment having been made towards interest as such by the mortgagors, who were liable to pay, took effect against the third set of defendants, purchasers of a part of the property and the suit was within time. (*Piggott and Walsh, JJ.*) *RAUSEAN LAL v. KANHAIYALAL*.  
16 A. L. J. 790=47 I. C. 845.

—S. 20—*'Debtor'—Meaning of—payment by son during life-time of father, effect of*.

The word "debtor" as used in S. 20 of the Lim. Act, means the person who is liable under the contract of debt. Hence, where a father and his son form together a joint Hindu family and a debt is contracted by the father, the son is in the life-time of the father neither a debtor nor, in the absence of any evidence, an agent of the father for the purposes of the said section. (*Lindsay, J. C.*) *LACHEMI NARAIN v. DATA SHANKAR*.  
47 I. C. 655.

—S. 20—*Explanation—Instalment decree—Payment of overdue instalment—Acceptance of saving of limitation*.

Whether the payment and acceptance of an overdue instalment is to be treated as a payment regularly made in satisfaction of the instalments due, so as to extend the period of limitation for execution of the decree, is a question of fact. (*Pratt, J. C and Hayward, A. J. C.*) *THE FIRM OF BHAWANDAS FEROMAL v. MENGRAJ*. 11 S. L. R. 120=  
48 I. C. 325.

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—S. 20—Interest—Payment as such—Payment by debtor without directions as to its appropriation—Usual course of dealing—Effect of.

A debtor paid a certain sum on a certain day to his creditor without declaring whether it should be appropriated towards interest or principal but with knowledge that according to the usual practice the payment would be appropriated to the interest then due.

Held, that a payment made with the knowledge that it would be appropriated to interest was made with the intention that it should be so appropriated, so as to give a fresh starting point to limitation within S. 2 of the Lim. Act. (*Tennon and Richardson, J.J.*) SIVA KUMARI DEBI v. DISHWAMBAR ROY 46 I. C. 532.

—S. 20—Interest payment of—Interest paid as such.

In order to bring a case within S. 20 of the Lim. Act it is not essential that the debtor should, on the occasion of every payment, state explicitly that the payment is made on account of interest as such. It is sufficient if circumstances exist which make the conclusion inevitable that the payment must have been made on account of interest. (*Mockerjee and Becheroff, J.J.*) CHARU CHANDRA BHATTACHARYA v. KARAM BUX SIKDAR 27 C. L. J. 141=43 I. C. 812.

—Ss. 20 and 21—Interest—Payment of by co-mortgagor if binding on the other mortgagors

Where payment of interest as such is made by one of several co-mortgagors, such payment cannot in view of S. 21 of the Lim. Act save limitation under S. 20 of that Act except as against that co-mortgagor, unless it is shown that the other co-mortgagors authorised the payment. (*Kanhaiya Lal, A. J. C.*) MUBARAK ALI v. GOPI NATH. 50 L. J. 73=45 I. C. 613

—S. 20—Mortgage by Hindu widow—Death of widow—Payment for interest by one of the reversioners—Effect on other reversioners. See (1917) DIG. COL. 765; SARAB NARAIN DAS v. TOP OJHA. (1917) Pat. 348=4 Pat. L. W. 85=43 I. C. 351

—S. 20 and Art. 182—Cral application, when a step in aid of execution—Application for execution by decree holder containing admission of part payment of decree—amount—certificate of payment—Effect on limitation C. P. Code, O. 21, R. 2, scope of. See (1917) DIG. COL. 766 MASILAMANI MUDALIAR v. SETHUSWAMI AIYAR. 41 Mad. 251=33 M. L. J. 219=22 M. L. T. 115=(1917) M. W. N. 502=41 I. C. 701

—S. 20—Part-payment—Payment towards decree not bearing interest—Certificate of payment as for interest—Application to

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certify payment under decree—Effect of. See (1916) DIG. COL. 98, HARENDRA CHANDRA BHATTACHARYA v. GAGAN CHANDRA DAS. 22 C. W. N. 325=35 I. C. 177.

—S. 20—Part-payment of principal—Endorsement of, not signed by payee, ineffective to save limitation.

An endorsement of part-payment of the principal written on the back of a bond on behalf of a person making the payment, but signed by the payer or bearing his mark, does not save limitation under S. 20 of the Lim. Act. (*Fletcher and Huda, J.J.*) BALIRAM KOCH v. SABHA SHUKLA. 23 C. L. J. 222=44 I. C. 516

—S. 20 and Art. 182 (5)—Payment of portion of decretal amount—Limitation—Fresh starting point.

A decree-holder gets a fresh starting point for limitation to execute the decree within the meaning of Art. 182, cl. (5) of the Lim. Act, from the date on which a portion of the decretal amount is paid by the judgment-debtor. (*Tennon and Newbould, J.J.*) JOTINDRA KUMAR DASS v. GAGAN CHANDRA PAUL. 45 I. C. 963.

—S. 20 (1)—Mortgage without possession—Sub-mortgage by mortgagee—Payment by mortgagor to sub-mortgagee—Payment sufficient to save limitation as against original mortgagee.

In 1896 one S mortgaged his own land and that of his younger brother to R. C. without possession, the mortgagor agreeing to pay one-fourth produce as interest. In 1898 R. C. sub-mortgaged half his rights to certain relatives now represented by M. R. the present plff. In August 1904 the property of the mortgagor's widow was bought by K. B. and I. B. who admittedly paid off half the debt due to R. C. but contended that they paid off the whole debt.

On the 7th March 1912 M. R. sued for the recovery of the principal due on the sub mortgage and for the value of the produce for 8 years. The real debts were K. B. and I. B. the vendees and R. C. the original mortgagee. The Dt. Judge gave the plff. a decree against R. C. alone; on appeal by R. C. the decree was upheld by the Additional Divisional Judge R. C. then preferred a second appeal to the Chief Court. It had been found as a fact that M. R. had continued to receive the produce from K. B. and I. B. up to November 1906 and the question for decision was whether payment of produce by K. B. and I. B. to M. R. saved limitation as regards R. C. Where a debt is kept alive under the terms of S. 20 (1) by payment by a person liable to pay the debt, the result is to make it enforceable against any one liable for it and that consequently the payments of produce by K. B. and I. B. saved limitation against R. C., also. 28 Bom. 243 dist. (*Scott-Smith and Leslie Jones, J.J.*) RAM CHAND v. MEWA RAM. 3 P. R. 1918=44 I. C. 213.

## LIMITATION ACT, S. 21.

—S. 21—Payment "by agent"—Brother not a guardian of a Hindu minor, while mother is alive. *See* (1917) DIG. COL. 767: BIRESWAR MUKHERJEE v. AMBICA CHARAN BHATTACHARJEA. 45 Cal 630= 42 I. C. 472.

—S. 21 (b)—Part payment of interest by one heir, whether binds other heirs. *See* (1917) DIG. COL. 767; YAGAPPA CHETTY v. MAHOMED. 11 Bur. L. T. 132= 40 I. C. 858.

—S. 22—Suit against dead person—Institution bad—S. 22 not applicable.

A plff. cannot claim the benefit of the institution of a suit against a dead person for the purpose of extending the period of limitation against his heirs. (*Kanhaya Lal, A. J. C.*) NAU NEHAL SINGH v. THE DEPUTY COMMISSIONER, UNAO. 5 O. L. J. 546= 47 I. C. 394.

—S. 23—Fresh cause of action—Appropriation of income by co-sharer—Suit for declaration.

Every fresh appropriation of the income of property by one co-sharer to the exclusion of others gives rise to a fresh cause of action to the other co-sharers for a suit for a declaration of their rights. (*Shevis and Shadi Lal, JJ.*) HARNAM SINGH v. MAKHAN SINGH. 21 P. L. R. 1918=43 P. W. R. 1918= 44 I. C. 31.

—S. 23 and art 146 (a)—Municipality—Platform resting on Municipal Street as part of main building and on its own foundation—50 years enjoyment—Extinction of title.

A platform was in existence for about 50 years and rested upon its own foundation. It was an integral part of the main building of the pliffs. The land upon which the platform stood, belonged to the Municipality as the owner thereof.

*Held*, that the Municipality lost their right under Sch. II Art 146 (a) of the Lim. Act, to that portion of the land upon which the wall stood: that S. 28 of the Lim. Act had no application as the injury was complete on the erection of the wall and the mere fact that the effect continued, could not extend the time of limitation. (*Chatterjee and Shergshanks, JJ.*) ASHUTOSH SADUKHAN v. THE CORPORATION OF CALCUTTA. 28 C. L. J. 484.

—S. 26—Applicability of—Village pathway.

S. 26 of the Lim. Act has nothing to do with an ancient village pathway used by the inhabitants of a particular village from time immemorial. (*Fletcher and Huda, JJ.*) NAGENDRA NATH MAZUMDAR v. BANWARI LAL DAS. 46 I. C. 970.

## LIMITATION ACT, S. 28.

—S. 26—Easement of supply of water from natural stream—Acquisition—Limitation.

An easement of the supply of water from a natural stream may be acquired by twenty years' user under the provisions of S. 26 of the Lim. Act. (*Rattigan, C. J.*) ABDUL RAHMAN v. MUHAMMAD ALAM. 57 P. R. 1918= 46 I. C. 441.

—S. 28—Adverse Possession—Limited right—Samudayi of Malabar davasvom—Acquisition of right by prescription. *See* MALABAR LAW, DEVASWOM.

34 M. L. J. 344.

—S. 28 and Art. 144—Right exercisable occasionally—Adverse possession—Right to take wood from trees when fallen or cut—No uninterrupted or continuous possession—Effect on title.

Plff's ancestor obtained leave in 1867 to plant trees on land belonging to the Government. He was to do so at his own expense and to tend them; the only right he was entitled to was to get the fallen dry wood from the trees. Certain transfers of the village took place, and on two occasions *viz.* once in 1900, and another time in 1910, the deft. who purchased the village got the proceeds of sale of such wood. The pliffs on both the occasions asserted their claim to wood or the piece thereof but remained unsuccessful. Within six years from the date of the last sale they brought the suit for declaration of their right to get the dry wood under the agreement of 1867. The deft. pleaded adverse possession; *held* that the right being one which could only be exercised on occasion that is when the wood might fall or be cut from the trees and not occurring every year or at stated times, and there having been disputes as to the right between the parties on two previous occasions there could be no adverse possession.

*Quere*—Whether S. 28 of the Lim. Act applies at all to a case like this. (*Tutball and Rafiq, JJ.*) DEBI PRASAD v. BADRI PERSHAD. 40 All 461=

16 A. L. J. 345=44 I. C. 980.

—S. 28, Scope of—Applicability only to suit for possession—Debt not extinguished. *See* (1917) DIG. COL. 770; PRIYA SAKHI v. BIRESWAR. 44 Cal 425=

21 C. W. N. 177=27 C. L. J. 212= 37 I. C. 277.

—Ss. 29 and 15 (2)—Suit under S. 104 H. of the B. T. Act—Period of two month's notice to Secretary of State, not to be deducted. *See* B. T. ACT S. 104 H. 46 I. C. 399.

—S. 29 (1) (b)—Local law—Karachi Port Trust Act, S. 87—Suit against Port Trust—Limitation—Exclusion of holidays.

The general provisions of the Lim. Act regarding the exclusion of holidays and Courts

## LIMITATION ACT, S. 29.

vacations in computing the period of limitation, have no application to any special period of limitation prescribed by any special or local law, viz., the Karachi Port Trust Act.

A suit against the Karachi Port Trust filed beyond the period of 6 months allowed by S. 87 of the Karachi Port Trust Act, owing to the intervention of the Easter holidays and vacation of the Court is barred by limitation. The maxim *lex non cogit impossibilia* has no application to such a case as the suit could have been filed earlier. (*Hayward, A. J. C.*) MOOSAJI AHMED AND CO. v THE ASIATIC STEAM NAVIGATION AND CO. 45 I. C. 168.

—Ss. 29 (1) (b) and 15 (2)—*Suit under S. 104 H of the B. T. Act—Notice to Secretary of State under S. 80 of the C. P. Code—No right to deduct time spent in.*

The provisions of S. 15, sub-sec. (2) of the Lim. Act do not apply to a suit instituted under the terms of S. 104 H of the B. T. Act. A suit under S. 104 H must be brought in any event, within six months as specified in that section and the plff. is not entitled to exclude the time during the currency of a notice to the Secretary of State whom he has joined as a deft. 27 C. L. J. 374; 22 C. W. N. 802 foll. 5 Cal. 110 dis. 18 Cal. 368 ref. (*Fletcher and Huda JJ.*) GANGADAR NANDA v. SECRETARY OF STATE FOR INDIA.

22 C. W. N. 817=28 C. L. J. 537=  
47 I. C. 524.

—Ss. 29 (1) (b) and 15 (2)—*Suit under 104 H of the B. T. Act—Notice to Secretary of State under S. 80, C. P. Code—Period of notice, deduction of—No right to.*

The effect of S. 29 (1) (b) of the Lim. Act is to make parts II and III of the Act inapplicable to a special period of limitation prescribed by a special or local law.

In a suit against the Secretary of State under S. 104 H of the B. T. Act in computing the period of six months prescribed by clause (2) of the section, the plff. is not entitled to deduct two months in respect of the notice which he is bound to give to the Secretary of State under S. 80 of the C. P. Code. (*Richardson and Walsley, JJ.*) THE SECRETARY OF STATE FOR INDIA v SAHIB NARAIN HAZRA 22 C. W. N. 802=47 I. C. 602.

—Art. 2—*Sale of plff.'s property in execution of money decree—Tender of decretal amount by plff.—Sale by Amin in spite of tender in collusion with decree-holder—Sale set aside—Suit for damages—Limitation.*

In execution of a simple money decree certain immoveable property belonging to the plff. was advertised for sale. On the date fixed for the sale the Amin came to sell the property. Before the sale, the plff. alleged, he had tendered the decretal amount to the deft., but in spite of it the deft. held the sale in collusion with the decree-holder. The sale was subse-

## LIMITATION ACT, ART. 10.

quently set aside under O. 21, R. 89 of the C. P. Code. The plff. brought this action for damages against the Amin nineteen months after the date of sale. The deft. *inter alia* pleaded limitation in bar of the suit under Art. 2 of Sch. I of the Lim. Act.

Held that the suit was barred under Art. 2 of Sch. I of the Lim. Act inasmuch as the whole foundation of the plff.'s claim was the alleged omission by the deft. to perform a duty imposed by the C. P. Code.

"The policy of the law is quite clear, namely, that suits of this nature should be brought and investigated as promptly as possible."

Cases of this nature are distinguishable from cases where a deft. pleads in defence to an alleged illegal Act that it was done in pursuance of a legislative enactment which requires notice of the action before the institution of the suit. 25 Bom. 387 not foll. (*Richards C. J. and Banerji, J.*) MUKAT LAL v. GOPAL SARUP. 16 A. L. J. 1017=48 I. C. 815

—Art. 10—*Pre-emption suit—Limitation—Starting point.*

The period of limitation commences from the date of registration of the sale-deed and not from the date on which right to redeem the land which included the land in suit was determined in a suit. The article of the Lim. Act applicable to this case is art. 10. (*Shah Din, J.*) NANKU v LACHMAN. 67 P. L. R. 1918.

—Art. 10—*Pre-emption suit—Limitation—Starting point—Possession taken prior to date of deed of sale—Effect.*

Plff. sued on 20th December 1915 for pre-emption in respect of a sale by a registered deed dated 21st December 1914. It was pleaded for defendant that the suit was barred by limitation as the vendee had taken actual possession of the property sold some two months prior to the 21st December 1914.

Held, that the possession referred to in Art. 10 of the Limitation Act must be possession under the sale sought to be impeached, and such possession could only be taken in this case from the 21st December 1914, the date of the deed of sale, and that consequently the suit was not barred by time. (*Shah Din, J.*) RAM PRASA v. RUP LAL. 30 P. R. 1918=48 I. C. 102.

—Art. 10—*Punjab Pre-emption Act (I of 1913)—S. 30—Sale and applicability—Sale including share in the shamilat—Suit for pre-emption in respect of—Limitation.*

A suit for pre-emption in respect of a sale including a share in the shamilat is governed by art. 10 of the Lim. Act and S. 30 of the Punjab Pre-emption Act, is not applicable to such a case 65 P. R. 1889 foll. (*Scott-Smith, J.*) LEHNA SINGH v. BHAGAT SINGH 68 P. R. 1918=153 P. W. R. 1918=  
47 I. C. 359.

## LIMITATION ACT, ART. 11.

———*Art. 11—Applicability of—Claim dismissed for default—Suit for declaration of title—Limitation.*

Art. 11 of Sch. I of the Lim Act applies to a case where a person sues to establish his right to property in respect of which a claim preferred by him under O. 21 R. 58 of the C. P. Code has been dismissed for default and without investigation.

The language of Art. 11 of Sch. I of the Lim. Act is more comprehensive than the language of the preceding Acts and the applicability of the Article cannot be restricted to those cases only in which the claim preferred under O. 21, R. 58 of the C. P. Code has been allowed after an investigation. (*Richardson and Beachcroft, JJ.*) *NOGENDRA LAL CHOWDHURY v. FANI BHUSAN DAS.*

45 Cal. 735=44 I. C. 265.

———*Art. 11—Claim—Dismissal of, for want of evidence—Duty of claimant to sue within one year. See C. P. CODE O. 21, RR. 58 AND 63.*

16 A. L. J. 256

———*Art. 11—Dismissal of claim without investigation—Suit to establish title—Limitation.*

On the date fixed for evidence in a claim petition the scribe of one of the mortgage-deeds was the only witness for the objector who, however did not examine him. An adjournment was refused and the case was closed with the result that the objection was dismissed. In a suit for a declaration instituted more than a year after the dismissal of the objection.

*Held*, that as there was really no investigation of the objection the case did not fall within Art. 11 of the Lim. Act and that the suit was therefore, within time (*Prideaux, A. J. C.*) *NANHU v. MALLOO.*

44 I. C. 523.

———*Art. 11—Order refusing to investigate a claim—Order that a claim be notified to bidders covered by Art. 11 of the Lim. Act. See C. P. CODE O. 21, RR. 58 AND 63.*

35 M. L. J. 335 (F. B.)

———*Arts 11 and 120—Suit for declaration that an alienation is in fraud of creditors and that it is liable to attachment—Suit by defeated claimant—Limitation.*

Where pff. a defeated claimant in execution brought a suit to establish his right to proceed against the property of the 1st deft. in execution, and for a declaration that the alienation to the 2nd deft. was not binding on him.

*Held*, the suit was substantially one under O. 21, R. 63 of the C. P. C. and fell within Art. 11 of the Lim. Act. The fact that the secondary relief for a declaration would not be barred if separately sued for does not take

## LIMITATION ACT, ART. 36.

it out of the article. (*Ayling and Phillips, JJ.*) *VENKATESWARA AYAR v. SOMASUNDRAM CHETTY.* (1918) M. W. N. 244=7 L. W. 256=44 I. C. 551.

———*Art. 11—Suit to establish claim—Claim rejected by executing court without investigation—Limitation—C. P. Code, O. 21 Rr. 58 and 63.*

Where a claim is preferred under O. 21, R. 58 of the C. P. Code and an order is passed allowing or rejecting it without any investigation, still the party adversely affected by it must bring a regular suit to establish the right which he claims to the property comprised in the order, within the year allowed by Art. 11, 15 Cal. 521. 15 C. W. N. 832 and 18 C. W. N. 770 ref. 27 I. C. 944 and 81 M. L. J. 247 appr. (*Richardson and Beachcroft, JJ.*) *NAGENDRA LAL CHOWDHURY v. FANI BHUSAN DAS.*

45 Cal. 735.

———*Arts. 12 and 144—Minor—Sale of his property in execution of decree in suit in which he was not properly represented—Suit by him after attaining majority to recover such property—Limitation See MINOR DECREE AGAINST.*

113 P. R. 1918.

———*Art. 12—Minor—Suit to set aside sale—Limitation—Suit to be brought within one year of majority. See LIM. ACT, SS 3 AND 8 ETC.*

43 I. C. 712.

———*Arts. 12, 44 and 91—Suit to set aside sale in execution of decree obtained against third party—Article applicable. See (1916) DIG. COL. 905. MA NGE v. MA SHWE HNIT.*

10 Bur. L. T. 225=(1916) 1 U. B. R. 113=36 I. C. 3.

———*Art 30—Carrier—suit against for injury to goods delivered for carriage—Limitation.*

A suit for compensation for injury to goods while in the possession of a carrier, e.g., a Railway Company, falls under Art. 30 of the Lim. Act and must be filed within one year from the date when the injury occurs (*Hayward A. J. C.*) *LOUIS DREYFUS & CO v. SECY. OF STATE.*

45 I. C. 173.

———*Art. 31—Applicability of—Not restricted to common carriers.*

Art. 31 of the Lim Act is not restricted in its application to common carriers. It applies to carriers who come within the above definition. (*Wallis, C. J. and Kumarasami Sastry, J.*) *MYLAPPA CHETTIAR v. THE BRITISH INDIA STEAM NAVIGATION CO. LTD.*

34 M. L. J. 553=24 M. L. T. 175=8 L. W. 46=45 I. C. 435.

———*Arts. 36 and 102—Applicability—Hereditary arohaka of temple—Suit against trustee to recover pay and perquisites—Limitation.*

## LIMITATION ACT, ART. 36.

tation—Perquisites payable by temple and by third parties—Distinction, *See* LIMITATION ACT, ART. 102 AND 36.

23 M. L. T. 238.

—Art. 36—Decree in suit for ejectment of tenant in Malabar—Suit by holder of, for compensation for damage done by judgment debtor to property—Decreed subsequent to decree—Limitation—Deduction of time spent in prosecuting execution proceedings to obtain some relief—Lim. Act, S. 14—Application—Malabar Compensation for Tenants Improvements Act, Ss. 5 and 6—Intention of legislature—Court executing decree in suit for ejectment of Malabar tenant—Jurisdiction to award compensation for damage done by judgment-debtor to suit property subsequent to decree—Estoppel—Inconsistent pleadings in successive proceedings—Applicability of doctrine to pleas based on abstract question of procedure law—Scope of *See* (1917) DIG. COL. 772. ABDULLA KOYA v. KALLAMPARATH KANARAN. 33 M. L. J. 463=(1917)

M. W. N. 821=6 L. W. 696. =  
43 I. C. 6.

—Arts. 44 and 126—Applicability Hindu Law—Father's alienation of joint family property—Son's suit to recover said property after setting aside alienation—Limitation—Father executing deed as guardian of son—Effect. *See* HINDU LAW, JOINT FAMILY ALIENATION 23 M. L. T. 245.

—Arts. 44 and 126—Hindu joint family—Alienation by father as guardian—Suit to set aside—Limitation.

The fact that a Hindu father executed a sale-deed as guardian of his son will not take the case out of Art. 126 and bring it under Art. 44 which applies to cases where a minor's property is transferred by his guardian. 38 A. 126; 40 C 966; 30 M L J 9, 3 I. C. 505 Ref. (Wallis, C. J. and Kumaraswamy Sastri, JJ.) GANESA AIVAR v. AMIRTHASAMI ODAYAR. 23 M. L. T. 245=(1918) M. W. N. 862=44 I. C. 605.

—Art. 44—Minor—Alienation by guardian—Suit by minor after attaining majority to recover possession—Alienation to be set aside within time. *See* HINDU LAW, SURRENDER BY WIDOW. 34 M. L. J. 229.

—Art. 44—Minor—Suit to set aside—Alienation by mother—Limitation.

A minor's mother and natural guardian sold his property. To set aside the sale, the present suit was brought more than three years after the minor attained majority.

*Held*, that the suit was barred under Art. 4, of the Lim. Act of 1908. (Beaman and Heaton, JJ.) LAXMAVA v. RACHAPPA.

20 Bom. L. R. 408=46 I. C. 22

—Arts. 44 and 144—Transfer by manager of joint Hindu family not being a guardian—Suit by junior member to set aside—Limitation.

## LIMITATION ACT, ART. 57.

Where the manager of a joint Hindu family, not being the guardian of a minor member thereof, transfers property for no justifiable purpose, a suit by the minor member to set aside the transfer and for his share is governed not by Art. 44, but by Art. 144. (Fletcher and Panton, JJ.) AFTABUDDIN v. PROKASH CRUNDER SOOT. 28 C. L. J. 496.

—Art. 47—Limitation for suit to set aside order of magistrate under S. 145 Cr. P. Code, and for possession—Starting point—Refusal to interfere in revision by High Court—Date of original order of magistrate

Where an order was passed under S. 145 of the Cr. P. Code against certain persons relating to a dispute regarding the land and one of the persons so affected instituted a suit in a civil court more than three years after the date of the order passed by the Magistrate.

*Held*, that the suit was barred under Art. 47 Sch. I of the Lim. Act. The period of limitation under Art. 47 of the Lim. Act runs from the date of the order of the Magistrate and not from the date on which the High Court refuses to exercise its powers of superintendence. 12 C W N. 840 foll. (Roe and Jwala Prasad, JJ.) LACHMAN SINGH v. DILJAN ALI. 4 Pat. L. W. 136=43 I. C. 965.

—Art. 47.—Order of Court under S. 145, Cr. P. Code—Withdrawal of case by one party during pendency of proceedings—No evidence taken on behalf of party in whose favour order was made—Suit for possession—Limitation. *See* (1917) DIG. COL. 774. EAB MAHOMED v. BEJAT MAHOMED SAHA. 22 C. W. N. 342=42 I. C. 768.

—Arts. 57, 115 and 120—Suit for recovery of amount due on grain advances, with interest.

A suit for the recovery of the money-value of peas, gram and wheat due under an oral contract made by debt. to pay in kind certain advances made to him in kind together with interest in kind at the rate of 50 per cent. per annum is governed by the 3 years period under Art. 65 or Art. 115 of the Lim. Act, and not by Art. 57 or Art. 120. 26 P. R. 1897 dist; (Kensington, C. J.) MENGHA RAM v. HASSU. 41 P. R. 1918.

—Arts. 57, 61, 62, 115 and 120—Suit for recovery of moneys advanced by a partner ship consisting of some of the members of a joint Hindu family to the family—Partition suit—Barred debt, if can be claimed.

Plff. and Defts. 1 to 3 who were some of the junior members of a joint Hindu family, carried on a partnership trade for their separate benefit, even during the life-time of their common ancestor P, who died in 1906. For his funeral expenses, the partnership

## LIMITATION ACT, ART. 60.

spent its own moneys. The partnership was dissolved in 1911 and the amount due to the partnership on the above account by the joint family estate fell to the share of the plff. among the partners. In a suit for partition in 1913, plff. claimed to recover from the 1st debt. and debts. 2 and 3 (who formed a single branch) 2/3 of this amount, the remaining 1/3 being the amount which he was liable to pay as a member of the joint family.

*Held*, that the cause of action for the partnership to recover the moneys arose on the date of the loans, that the partnership could have sued the joint family for recovery of this debt notwithstanding that some members of the joint family solely constituted the partnership and that the plff's claim could not be treated as an item of account in the partition suit as it was barred by limitation. (*Sadasiva Iyer and Phillips, JJ*) VELLAYAPPA MOOTHAN v. KRISHNA MOOTHAN.

34 M. L. J. 32=44 I. C. 428.

—Arts 60, 145—Applicability—Money left with another to be repaid on demand—Suit to recover—Limitation. See LIM. ACT, S. 10, ARTS. 60 AND 145. 65 P. L. R. 1918.

—Art. 60—Deposit, *maral* — Deposit in A's name *maral B*—Effect—Deposit repayable on demand after a certain time—Limitation.

Money deposited on the understanding that it was to be paid on demand after a certain period does not cease to be a deposit within the meaning of Art. 60 of the Lim. Act.

Where money is deposited with a Firm in the name of A *maral B*, the *maral man B* is neither the trustee in respect of the money nor has he any right to operate on it. The Firm remains and is liable to A alone. (*Wallis, C. J. and Seshagiri Aiyar J.*) CHELLAPPA CHETTY v. SUBRAMANIAN CHETTY.

24 M. L. T. 264=(1918) M. W. N. 564=8 L. W. 221=47 I. C. 948.

—Arts. 60 and 115—*Thavanai* transaction—Suit for recovery of money—Limitation.

The Article of the Limitation Act applicable to *thavanai* transactions, if they really mean that the deposit amount is to be repaid whenever demanded, is Article 60, while if the money is to be repaid at the end of the *thavanai* period which is current when the demand is made, they are governed by the residuary Art. 115. (*Wallis, C. J. and Kumaraswami Sastri, J.*) MUTHIAH CHETTIAR v. RAMANATHAN CHETTIAR.

(1918) M. W. N. 242=7 L. W. 330=43 I. C. 972.

—Arts. 61 and 120—Suit for Compensation under S. 70 of the Contract Act—Article applicable.

Plffs., the lessees of the Sivaganga Zemindary, executed certain necessary repairs to a tank which irrigated their lands and the debt's

## LIMITATION ACT, ART. 62.

lands and also the lands of other persons. Before commencing the repairs they intimated to the debts, their intention to do so and called upon them to bear their rateable share of the expenses. The plff., however, completed the repairs and filed the present suit for contribution against the debts, relying on S. 70 of the Contract Act. They prayed also that the amount that may be decreed be charged on debts' land. *Held*, that Art. 120 and not Art. 61 of the Lim. Act was applicable to the case.

*Per Oldfield, J.*—Art. 61 of the Lim. Act can be applied to cases under S. 70 of the Contract Act where the payment made by the plff. produced an immediate benefit to the debt, as in cases of payments of Government revenue or of decree amounts, but the Article will not apply when the benefit will only arise at a subsequent stage and plff's cause of action will not be complete until that subsequent stage is reached. To such cases, Art. 120 must be applied.

*Per Abdur Rahim, J.*—The fact that the Collector had levied some portion of the expenses for repairs from debts for co-ercive process under S. 32 of Regulation XXVII of 1802 will not affect their non-liability under S. 70 of the Contract Act. (*Abdur Rahim and Oldfield, JJ*) VISVANADHA VIJIA KUMARA BANGAROO v. R. G. ORR. 45 I. C. 786.

—Art. 61—Suit for recovery of moneys advanced by a partnership-consisting of some of the members of a joint Hindu family to the family—Limitation. See LIM. ACT, ARTS. 57, 61, 62, 115 AND 120. 34 M. L. J. 32.

—Art. 62—Money paid under void agreement—Suit for recovery of — Limitation — Starting point.

A suit to recover money advanced under a void agreement is governed by Art. 62 of the Lim. Act and must be instituted within three years from the date of the execution of the agreement. (*Lindsay, J. C. and Stuart, A J C*) HAR NATH KUAR v. INDRA BHADUR SINGH. 47 I. C. 214.

—Arts. 62 and 97—Suit for refund of purchase money where sale void ab initio—Limitation.

If a contract of sale between two parties is void *ab initio* and is not merely voidable, then the suit brought by the vendee against the vendor for a refund of the purchase money is governed by Art. 62 and not by Art. 97 of the Lim. Act. 19 Cal. 123; 85 Bom. 593; 18 Mad. 178 dist. (*Shah Din, C. J.*) BUTA RAM v. GURDAS. 44 P. R. 1918=46 I. C. 26.

—Arts. 62 and 116—Suit for reimbursement of moneys paid by mortgagor on default of mortgagee—Limitation.

Where a mortgagee bound to pay off a prior incumbrance, fails to do so and the mortgagor being compelled pays it off and sues the

## LIMITATION ACT, ART. 62.

mortgagee for reimbursement the suit is governed by Art. 62 of the Lim. Act and limitation would begin to run from the date on which the plff. paid off the prior encumbrance. (*Stuart and Kanhaiya Lal A. J. C.*) PRAG V. MOHAN LAL. 47 I. C. 161.

———Arts. 62 and 97—Suit to recover purchase money on deprivation of possession—Limitation.

A suit by a vendee who is deprived by his vendor of the land purchased by him, to recover the purchase money paid by him is governed by Art. 97 and not by Art. 62 of Lim. Act. Time begins to run from the date of dispossession. (*Greaves and Huda, JJ.*) PARSURAM MAHAJAN V. BHAL CHANDRA SHAHA. 44 I. C. 719.

———Art. 62, 97 and 116—Vendor and purchaser—Failure of title—Suit for refund of purchase money—Limitation.

It is only where a sale is void *ab initio* that Art. 62 of the Lim. Act can apply to a suit by the vendee for refund of the purchase money. If, however, the vendee has actually obtained and held possession of the property Art. 97 may be applied even if the sale turns out to be void *ab initio*, for otherwise, the claim for refund might be barred although the vendee had been given no occasion to sue. The same article is applicable where there is a subsequent failure of consideration.

Where the vendor has no title to convey, the article applicable to a suit for refund of the purchase money is Art. 116, and time in such a case begins to run from the date of the execution of the conveyance if there is no question of fraud (*Drake Brockman, J. C.*) DHARAMCHAND V. GORELAL. 47 I. C. 886.

———Art. 75—Contract subject to a condition—Breach of condition—Suit on contract—Limitation—Starting point—Limitation Act, Art. 75—Effect.

The general principle that time begins to run from the earliest date, applicable to cases of instalment bonds under Art. 75 of the Lim. Act of 1908, is also applicable to cases of contract which are subject to a condition. (*Mullick and Thornhill, JJ.*) SATISH CHANDRA GHOSH V. KASHI SARU. 3 Pat. L. J. 412=46 I. C. 418.

———Art. 75—Instalment bond—default—waiver of—right to sue for whole amount—Limitation, starting point of.

An instalment bond provided for the money being re-paid by five instalments and that if there was any default in payment of any of the instalments, the creditor would have the power to recover the entire amount in a lump sum. The bond was executed in 1909 and there was default in the first instalment. The plaintiff waited till the term provided in the

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bond had fully expired, and sued for all the instalments except the first two which he alleged, had become barred.

*Held*, that under the terms of the bond, the plaintiff had an option to waive his right to bring the suit at once on the happening of the first default, and that therefore, his suit with regard to the last three instalments was not barred. (*Abdul Raouf, J.*) MOHAN LAL V. TIKA RAM 16 A L. J. 929=47 I. C. 926.

———Art. 75—Instalment bond—Provision for payment of whole on default of payment of one instalment—Waiver—Mere omission to sue.

A mere forbearance to sue for the whole amount of a bond payable by instalments, is not a waiver within Art. 75 of the Lim. Act. (*Chitty and Walmsley, JJ.*) HARA KUMAR SAHA V. RAMCHANDRA LAHA. 47 I. C. 943.

———Art. 78—Applicability of—Suit to recover money alleged to be due on accounts taken between the parties alleging payment by cheque and hundi and dishonour thereof on presentation—Article not applicable. See LIM. ACT, S. 19 AND ART. 78. 27 C. L. J. 392.

———Art. 83—Commission agent—Suit against his principal—Limitation. See PUNJAB COURTS ACT, S. 44. 59 P. L. R. 1918.

———Art. 83—Suit for value of goods supplied by Commission agent—Limitation.

A suit for the recovery of the money due on account of the value of the goods supplied by the plffs. as commission agents to the defts. is governed by Art. 83 of the Lim. Act (*Rattigan, C.J.*) THE FIRM OF SARAB DIAL ISHARDAS V. THE SHOP OF DEVI LITTA MAL. 46 I. C. 541=59 P. L. R. 1918.

———Arts. 89 and 90—Principal and agent—suit for account—Agent lending money to persons to whom agent not authorised to lend—Ordinary money account—Agency—Termination of—Question of fact.

A suit by a principal against an agent for the recovery of money lent to persons to whom the agent was not authorised to lend, is a suit for an ordinary money account and is governed by Art. 89 of the Lim. Act.

The question when an agency terminates is a question of fact. 39 Mad 376 ref. (*Wallis, C. J. and Seshaguri Iyer, J.*) MUTHIA CHETTY V. ALAGAPPA CHETTY. 41 Mad. 1=45 I. C. 430.

———Art. 89—Suit for accounts—Refusal to render accounts, what constitutes—Postponement—Putting off.

The refusal contemplated in Art. 89 of Sch. I of the Lim. Act is a definite refusal and there must be definite evidence that a definite

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demand was made upon a definite date and refused. It is insufficient to say that demands were made from time to time and the plffs. were "put off" by the defts. "Put off" means postponement and the postponement is by no means tantamount to refusal. (*Roe and Imam, JJ*) *NAWAB CHOUDHURY v. LOK NATH SINGA.* 43 I. C. 570.

—Art. 91—*Applicability—Plff fraudulently made to execute a deed of a different nature from that agreed upon—Suit to recover property affected—Transaction void—Limitation.*

Where it is established that the plffs by defts' misrepresentation was got to execute a deed of sale believing the same to have been a deed of a different kind, the transaction is void and not voidable only, and art. 91 of the Lim. Act has no application to his suit to recover the property. 33 Cal. 257, 3 Bom. 242, 26 Bom. 420 and 30 Cal 493 ref. (*Newbould and Panten JJ.*) *SANNI BIBI v. SIDDIK RUSSAIN MUNSHI.* 23 C. W. N. 93.

—Art. 91—*Applicability of—Sale deed executed by a minor—Suit to recover possession of property sold—Limitation.*

Art. 91 of the Lim. Act does not apply to a suit for possession, where the plff. alleges and proves that a sale deed is void because it was executed by him whilst a minor, but does not claim expressly to have it cancelled or set aside. (*Batchelor A. C. J. Shah and Kemp, JJ.*) *NARSAGAUDA v. CHAWAGAUDA.* 20 Bom. L. R. 802=47 I. C. 531 (F. B.)

—Arts. 91 and 95—*Appointment of shebait and executors by will—Compromise in a suit by a shebait against executor—Transfer by shebait of shebaiti right—Suit by executor disputing validity of transfer—Limitation.*

The testator appointed four persons as shebait of the debutter created by him and four other persons as executors who were to be the advisers of the shebait. In a suit brought by one of the shebait against the executors, a compromise decree was passed in 1899 where by the shebait became entitled to appoint succeeding shebait of their respective shebaiti right by means of will or by any other document. Two of the shebait took no part in the sheba. The other two transferred their shebaiti rights by two deeds which contained recitals showing that the transfers were for the benefit of the deity to Defts. Nos. 1 and 2 who were properly qualified persons. The executors brought the present suit for recovery of possession of the debutter properties and for a declaration that the deeds of transfer of the shebaiti right were void and illegal, more than 14 years after the compromise.

*Held*, that the suit so far as it sought to nullify the deed of compromise was barred by Art. 95 of the Lim. Act and Art. 91 governed

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the suit in so far as it attacked the deeds of transfer (*Woodroffe and Smither, JJ.*) *MOHENDRA NATH BAGCHI v. GOUR CHANDER GHOSH.* 22 C. W. N. 860=46 I. C. 867.

—Art. 91—*Cancellation of document—Suit for—Limitation—Starting point.*

The word "entitled" in Art. 91 of the Lim. Act means entitled by law, i. e., under S 39 of the Sp. Rel. Act. In a suit for cancellation of a document time will begin to run from the time when the plff. becomes aware of facts which create in him a reasonable apprehension that he will suffer injury if the document be left outstanding (*Phillips and Krishnan, J. J.*) *BALASUNDARA PANDIAN PILLAI v. AUTHIMULAM CHETTIAR.* 47 I. C. 505.

—Art. 91—*Contract induced by undue influence, suit to set aside—Cause of action—Alienation in violation of—Suit by beneficiary* See (1917) DIG. COL 738; *RAJA RAJESWARA SETHUPATHI v. RAJAGOPALA IYER.*

(1917) M W N 907=7 L W. 28=43 I. C. 164.

—Arts. 93, 95 and 120—*Suit for declaration that a document executed by the last owner is not binding on the reversioner—Limitation.*

Arts 93 and 95 of the Lim. Act do not apply to suit by a reversioner for a declaration that a kot kabala executed by the last owner and a compromise decree passed on it are not binding on the inheritance. Art 120 applies to such a suit and where plff. is in possession limitation starts only when some act is done on the document sought to be declared not binding on inheritance (*Fletcher and Huda, JJ.*) *HARA NARAIN BERA v. SRIDHAR PANDE.* 47 I. C. 2.

—Art 95—*Compromise of suit by shebait against executor—Suit to set aside—Lim. Act art. 95 applicable.* See LIM. ACT, ARTS. 91 and 95. 22 C. W. N 860.

—Arts 97 and 62—*Suit to recover purchase money by vendee on dispossession by vendor—Art. 97 applicable and not art 62.* See LIM. ACT ARTS, 62 AND 97.

44 I. C. 719.

—Art. 102 and 36—*Suit against trustee to recover pay and perquisites—Limitation—Perquisites payable by temple and payable by third parties—Distinction*

An archaka of a temple is a servant of the trustee of the temple even though his office is hereditary and the amount payable to him by the trustee either towards his pay or as perquisites payable by the temple are "wages" with the meaning of Art. 102 of the Limitation Act. A suit to recover such pay or perquisites from the trustee is governed by the

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period of limitation provided for by that Art. Where the perquisites are not payable by the temple and the trustee is sued thereon on the ground of her having wrongfully received and withheld them the suit is governed by Art 36. (*Sadasiva Aiyar and Bakewell, JJ.*) BHARAD-  
WAJA MUDALI v. ARUNACHELA GURUKAL.

41 Mad. 528=23 M. L. T. 288=  
7 L. W. 524=45 I. C. 414.

———Arts. 106 and 120—Applicability—Partnership—Dissolution—Suit for account and share of profits—Amendment—Suit that plff was a partner, it may be amended on basis that he was a servant remunerated by share of profits—Amendment asked for first time in the Appellate Court—Acknowledgment of part of the claim—Effect—Lim. Act, Ss. 19 and 20—Contract Act, Ss. 239 and 258. See (1917) DIG. COL. 785; KALIDAS CHAUDHRI v. SRI DANPADI SUNDARI DASL.

22 C. W. N. 104=27 C. L. J. 403=  
43 I. C. 893.

———Art 107—Suit for recovery of money advanced by a partnership consisting of some members of a joint Hindu family to the family—Limitation. See LIM. ACT, ARTS. 51, 61, 62, ETC. 34 M. L. J. 32.

———Art. 109—Suit for mesne profits of *patni taluk* sold under Reg. VIII of 1819—Sale subsequently set aside.

Art. 109 of the Lim. Act (XV of 1877) is applicable to a suit for mesne profits where the possession of the property in suit, *viz.*, a *patni taluk*, was obtained by the deft. under a sale held under Reg. VIII of 1819, which was subsequently set aside (*Sunderson, C.J., Teunon and Walmsley, JJ.*) SARAJ RANJAN CHOWDHURY v. PREMCHAND CHOWDHURY. 22 C. W. N. 263=27 C. L. J. 257=43 I. C. 781.

———Art. 113—Specific performance, suit for—Time when begins to run

The time for limitation in a suit for specific performance begins to run from the date the cause of action arises, that is from the date fixed for the performance of the contract.

Where a contract was entered into one or two days before the 15th June 1912, but a portion of the consideration money was paid and occupied on the 17th October 1912, and it appeared that the date for performance of the contract was some days later than the 17th October 1912.

*Held*, that the suit for specific performance instituted on the 1st October 1915, was not barred by limitation. (*Imani, J.*) MUSSAMMAT BATULAN v. NIRMAL DAS

3 Pat. L. W. 192=44 I. C. 244.

———Art. 113—Specific performance—Suit for by third party to contract claiming as beneficiary thereunder—Contract to be performed on a contingency—Limitation—Starting

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point—Limitation Act—Beneficial construction<sup>2</sup> See (1917) DIG. COL. 788; BATHULA VEN-  
KANNA v. NAMADURI VENKATAKRISHNAYYA.

41 Mad 13=33 M. L. J. 35=6 L. W. 192=  
41 I. C. 807.

———Arts. 115 and 116—Applicability—Sale deed containing—Covenant—Breach of—Cause of action—Limitation—Starting point—Deed of Sale—Construction—Indemnity clauses—Continuing covenant—Rights of covenants for breach.

Where a clause in a deed of sale was in these terms, "should disputes of any kind arise at any time touching the said land on the part of anybody, we will clear them all with your own funds, and allow the sale to continue to you uninterruptedly without any kind of loss to you."

*Held*: This is an indemnity clause and should be construed as a continuing covenant. Therefore a suit for indemnification will be in time if brought within 6 years of the date on which it was held by a Court of law that neither the purchaser nor his vendor had the rights given to him by the sale deed. (*Ayling and Seshagiri Iyer, JJ.*) VENKATA RAMAYYA v. RAMABRAHMAN.

35 M. L. J. 124=  
24 M. L. T. 104=8 L. W. 142=47 I. C. 924.

———Arts. 115 and 120—Suit for recovery of amount due on grain advances with interest Art. 115 applicable See LIM. ACT, ARTS. 57, 115 AND 120. 41 P. R. 1918.

———Art. 115—Suit for recovery of moneys advanced by a partnership consisting of some of the members of a joint Hindu family to the family—Limitation See LIM. ACT, ARTS. 57, 61, ETC. 34 M. L. J. 32.

———Art. 115—Thavanai transaction—Suit for recovery of money to be repaid at the end of current thavanai period—Lim Act, art. 115 applicable. See LIM. ACT 60 AND 115. (1918) M. W. N. 242=43 I. C. 972.

———Art 116—Sale of property—Covenant to make good loss in case vendor being compelled to pay off money in excess of consideration—Breach of covenant of title—Limitation.

A sale-deed was executed in favour of the plffs. on 4-7-1901, purporting to convey the property free from encumbrances and containing the covenant that should any excess sum be charged against them the other properties of the vendor would be liable for the same together with damages and costs. At the date of the sale there was a prior simple mortgage existing on the property. The mortgagee brought a suit for sale on 18-1902 and it was decreed 20-5-1915 was fixed for sale of the property and on 19-5-1915 the plffs. paid off the decree. On 10-7-1915 the

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plffs. brought the present suit for recovery of the amount which they paid on account of the prior mortgage, together with interest, from the estate of the vendor. *Held*, that the suit was not barred by limitation inasmuch as the plffs. were not suing upon a mere covenant of title, but upon a covenant of indemnity as set forth in the sale-deed, and the cause of action arose on the date on which they suffered actual loss by reason of their being compelled to pay off the prior mortgage charge. (*Piggott and Walsh, J.J.*) *RAM DULARI v. HARDWARI LAL*. 46 All 605=

16 A. L. J. 706=43 I. C. 18.

—Art 116—*Suit by a shareholder against registered company for dividend—Article applicable—General Clauses Act 1897, S. 3, cl. (45)—Registered—Meaning of.*

A suit by a share-holder against a registered Company to recover dividends is governed by art. 116 of the Lim Act and the period of limitation is 6 years.

"Registered" in Art. 116 of the Lim. Act must be read as defined in the General Clauses Act of 1897: S. 3, cl. 45.

The term "registered" within the meaning of the General Clauses Act includes documents registered under any special law such as the Company's Act or the Copyright Act as well as registration under the Indian Registration Act. (*Wallis, C. J. and Seshagiri Iyer, J.*) *RIP. N. PEBBIS AND SUGAR MILL CO., LTD. v. VENKATARAMA CHETTY*. 42 Mad. 33=

35 M. L. J. 256=24 M. L. T. 246=

8 L. W. 354=48 I. C. 903

—Arts. 116, 120 and 132—*Suit on mortgage for loan of paddy—Limitation.*

A suit on a mortgage-bond executed for a loan not of money but of paddy is governed by Art. 116 or Art. 120 and not by Art. 132 of the Lim. Act. (*Richardson and Walmsley, J.J.*) *KANDARPA NABAIN MANDAL v. SRIDHAR ROY*. 44 I. C. 513

—Art. 116—*Zarpeshgi ijara—Registered document—Suit for rent—Limitation.*

A suit to recover the rent payable to the plff. under a registered zarpeshgi lease which in effect is a mortgage will be governed by Art. 116 of the Lim. Act and the period is 6 years from the date on which the cause of action accrued and not 3 years as provided in the schedule attached to the B. T. Act. (*Dawson, Miller, C. J. and Mullick, J.*) *SHEIKH MUHAMMAD HANIF v. MOORAT MAHTON*. 4 Pat L. W. 146=44 I. C. 153.

—Art. 119—*Suit to declare the fact of adoption—Limitation.*

The status of an adopted son was challenged in 1901. The adopted son did nothing till 1913, when he filed a suit for a declaration that a previous decree which was passed on the basis that there was no adoption was not binding on him.

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*Held*, that the suit was barred under Art. 119 of the Lim. Act as it was not brought within six years of 1901. (*Beaman and Heaton, J.J.*) *BHARMA v. BALARAM*.

20 Bom. L. R. 836=47 I. C. 639.

—Art. 120—B. T. Act Ss. 104 (h) & 111 (A)—*Suit for relief falling outside scope of S. 104 B but within proviso to S. 111 A—Art. 120 applicable* See B. T. ACT Ss. 104 H & 111 A. 45 Cal. 645.

—Art. 120—*Cause of action—Successive wrong entries in Record of Rights—Fresh invasion of rights.*

*Held*, on the facts that the scope of the suit being limited to the second record of rights the date of six years' limitation under Art. 120 Sch. I of the Lim. Act ran from the final publication in 1906, the previous publication of 1888-89 did not extinguish the right of the plff. who continued to be in possession in spite of the adverse entry and that the entry of 1906 constituted a fresh invasion of his rights. 81 All. 9 cited. (*Dawson Miller, C. J. and Mullick, J.*) *SHEIKH LATAFAT HUSSAIN v. KUMAR KALIKA NAND SINGH* 3 Pat. L. J. 361= (1918) Pat. 225=4 Pat. L. W. 303=45 I. C. 432.

—Art. 120—*Declaration of title—Cause of action, when arises—Omission of plff's name from settlement records—Limitation—Starting point.*

Plffs' names as co-sharers having been omitted from the Settlement Records, they brought a suit for a declaration of title.

*Held*, that limitation commenced to run against the plffs not from the date of their omission of their names from the Settlement Records but from the date when their title was challenged by the defts. (*Teunon and Richardson, J.J.*) *HUSAN MEA v. NAUN MEA*. 46 I. C. 796.

—Art. 120—*Declaratory suit—Cause of action when arises—Successive denials of title—Fresh cause of action.*

A person in possession is entitled to pass by an invasion of his right to the property, and is not by his forbearance, debarred from a future suit on a fresh assertion on the part of the deft. which amounts to a denial or repudiation of his title and gives him an independent cause of action. (*Walsh, J.*) *MAHABIR RAI v. SARJU PRASAD RAI*. 43 I. C. 175.

—Art. 120—*Declaratory suit—Proprietary title—Adverse entry in Record of Rights—Cause of action—Limitation.*

A declaratory suit brought by a plff. who has long been in enjoyment of the property is not barred simply because an entry adverse to his rights in the record was made or because he came to know of that entry more than six years prior to the institution of the suit.

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Even if the right to demand correction of revenue entries is lost by limitation, the plff. is entitled to a declaration of his proprietary title, the period of limitation running from the date when the deft. attempted to oust the plff. from the property. (*Shadi Lal, J.*) GOKAL CHAND v. HUKAM CHAND 72 P. W. R. 1518 = 73 P. L. R. 1918 = 44 I. C. 912.

— Arts 120 and 125—*Hindu widows—Alienation by—Suit for declaration of liability of alienation beyond widows life time—Single cause of action for the reversion—Omission of existing reversioners to sue within 12 years of the alienations if bars reversioners coming into existence after the alienation—Suit by reversioners, character of.*

The cause of action for a suit for a declaration that an alienation by a Hindu widow is invalid beyond her life time, arises on the date of the alienation, jointly and simultaneously for the entire body of the reversioners. If, therefore, an alienation by a Hindu widow is not impeached in a declaratory suit instituted within the period of 12 years prescribed by Art. 125, by the reversioners then in existence, a presumptive reversioner though born after the lapse of 12 years from the date of the alienation will be debarred from bringing a suit for a declaration that the alienation by the widows is invalid beyond her life-time. 28 Mad. 57, 36 Mad. 540, 38 Mad. 397 over ruled, 88 Mad. 406, 39 Mad. 694. 15 M. L. J. 307 rel.

If a reversioner who is competent to do so challenges an alienation or an adoption by the widow unsuccessfully or fails to challenge it within the period allowed by the law of limitation, the result is binding on his successors in the reversion in the absence of fraud, collusion or other invalidating circumstances. (*Sadasiva Iyer, Ayling, Oldfield, Coutts Trotter and Seshagiri Iyer, JJ.*) CHALLAGUNDLA VARANNA v. MADALA GOPALA DASAYYA. 41 Mad. 659 = 35 M. L. J. 57 = 24 M. L. T. 115 = (1918) M. W. N. 461 = 8 L. W. 62 = 45 I. C. 206.

— Arts. 120 and 144 — *Immoveable property, sale proceeds of, nature of—Suit to recover moveable property substituted for, Limitation Act—General Clauses, Act S. 3 cl. 25—Benefits to arise out of land.*

A claim for the proceeds of what was once immoveable property but has been substituted by moveable property is not a claim for immoveable property or any interest therein or any profit arising out of the land and is governed by Art. 120 of the Limitation Act.

Where, therefore, certain property was compulsorily acquired under the Land Acquisition Act and the plff. sued the vendor for the value of the property so acquired, held, that the period of limitation for the suit was six

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years and not twelve years. (*Miller, C. J. and Imam, J.*) RAI RADHA KISHEN RAI v. NAURATAN LAL. 3 Pat. L. J. 522 = 46 I. C. 627.

— Art. 120 — *Loan on security of moveable property—Suit to enforce payment by sale—Limitation.*

Where a plff. who had lent money on the security of eight black buffaloes sought by his suit to enforce the payment of the money charged upon the buffaloes and did not seek to get a personal decree against the debtor, held, that the suit was barred by limitation being governed by Art. 120 of the Lim. Act. (*Tutball and Abdul Raouf JJ.*) DEOKI NANDAN v. GAPUA. 40 All. 512 = 16 A. L. J. 449 = 46 I. C. 373.

— Art. 120 — *Record of rights—Suit for alteration in second of two records of rights—Limitation See RECORD OF RIGHTS.* 3 Pat. L. J. 361.

— Art. 120 — *Suit for contribution—Case coming under S. 70 of the Contract Act—Limitation See LIM. ACT, ARTS 61 AND 120.* 45 I. C. 786.

— Art. 120 — *Suit for declaration of plffs. right to manage Dharmasala—Limitation See (1917) DIG. COL. 793; BHAG MAL v. BHAGWAN DAS.* 11 P. R. 1918 = 125 P. W. R. 1917 = 41 I. C. 636.

— Arts. 120 and 132 — *Suit on mortgage executed as security for loan of paddy—Art. 132 not applicable. See LIM. ACT, ART. 116, 120 AND 132.* 44 I. C. 818.

— Arts. 120 and 132 — *Suit to enforce mortgage of a Pala—Pala or turn of worship whether immoveable property Lim. Act S. 3, Question of Limitation if may be taken for the first time in appeal.*

A turn of worship is not an interest in immoveable property. Consequently a suit to enforce a mortgage of a turn of worship is not governed by Art. 132 but by Art. 120 of the Lim. Act.

The Court can under S. 2 take notice of the question of limitation although it has not been taken up in the Courts below. (*Chitty and Walmsley JJ.*) NARASINGHA BANA GOSWAMI v. PROLHADMAN TEORAI. 22 C. W. N. 994 = 47 I. C. 25.

— Art. 120 and 125 — *Suit by nearest reversioner for declaration that a widow's alienation is not binding on him—Court sale in a suit to which widow is a party when can be treated as a private sale by the widow.*

A Court sale in a sale to which a Hindu widow is a party may be treated as a private sale by the widow of properties vested in her as for a widow's estate if the court sale is the necessary result of some collusive arrangement

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made by her to use the Court as a medium of transfer or in other words if she intended to transfer the properties by means of a court sale and took steps to bring it about, 19 All. 524; 29 All. 289 ref.

In such a case a suit by the nearest reversionary heir to declare the alienation void as against him would fall under Art. 125 of the Lim. Act. If the court sale in question is not brought about under circumstances set out above it cannot be considered as one "made" by the widow and the Article of the Limitation Act for a suit to declare the validity of the sale will be Art. 120 and not 125. (*Phillips and Krishnan, JJ.*) **RANGA RAO v. RANGANAYAKI AMMAL**, 35 M. L. J. 354 =

8 L. W. 455 = (1918) M. W. N. 739 = 47 I. C. 578.

———Art. 120 — Transfer in fraud of creditors—Suit to avoid—Limitation—Starting point.

A suit by a creditor to avoid an alienation by his debtor as being fraudulent comes within Art. 120 of the Lim. Act.

The cause of action for such a suit does not arise on the date of alienation but on the date the creditor seeking to set aside the alienation knows that he has been defrauded, defeated or delayed. S. 58 of the T. P. Act does not expressly give a right to sue but only an option to sue. 17 Bom. 341 foll. (*Arling and Phillips, JJ.*) **VENKATESWARA AYYAR v. MAYANDI CHETTIAR**.

7 L. W. 280 = (1918) M. W. N. 244 = 44 I. C. 551.

———Art. 120—Trespass to land—Pillar driven into another's land—Suit for mandatory injunction to remove the pillar—License.

The deft. built a house on his land, and projected from it a stair-case which overhung the land in dispute and rested on a pillar driven into that land. At that time the land in question was in deft's possession as a tenant; but subsequently in 1905 it went into plff's possession under a permanent lease. The pillar stood in its position at least some nine years before the suit. The plff. having sued to obtain a mandatory injunction directing the deft. to remove the stair case:—

*Held*, that the suit was barred under Art. 120 of the Lim. Act, even if the stair-case was standing where it had been either by the license of the plff's predecessor-in-title or adversely to him, unless the license were specially conditioned by some such terms as that the deft. on demand would remove the stair-case. (*Begman and Heaton, JJ.*) **BARI RAM v. SHIVBAKAS RAMCHAND**. 42 Bom. 333 = 20 Bom. L.R. 327 = 45 I. C. 582.

———Art. 123—Buddhist Law—Suit by stepmother for share in property of step-father—Limitation. See **BUDDHIST LAW, BURMESE**. 47 I. C. 139.

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———Art. 123—Suit for declaration that document executed by last owner is not binding on the reversion—Limitation—Starting point. See **LIM. ACT, ARTS. 93, 95 AND 120**. 47 I. C. 2.

———Art. 125—Court-sale in execution of decree against Hindu widow—Suit to set aside—Art. 125, if and when applicable. See **LIM. ACT, ARTS. 120 AND 125**. 35 M. L. J. 364.

———Art. 125—Hindu widow—Alienation by—Suit by reversioner to declare invalidity—Omission of existing reversioners to sue within 12 years of alienation—Other reversioners subsequently born, barred. See **LIM. ACT, ARTS. 120 AND 125**. 41 Mad. 659 (F. B.)

———Arts. 126, 144, and 148—Applicability—Hindu Law—Joint family—Usufructuary mortgage of family property by father and son—Subsequent sale of entire property by father and possession obtained by vendee on redemption—Suit by sons against alienee for his share of property on payment of proportionate mortgage amount—Limitation—Starting point.

Family property owned in equal moieties by a Mitakshara father and A, his undivided son, was mortgaged with possession by them both to B in 1892. The entire property was in 1897 sold to C by the father as though it were his self acquisition. In April 1898 C paid up the mortgage amount obtained possession of the property and remained in possession thereof, all along claiming an absolute right to the entire property. On his father's death A, however sold his half share in the property to D. In a suit instituted on 26th August 1912 by D against A, B and C for possession of A's half share in the property on payment of the appropriate proportion of the mortgage amount, *held*, that the suit was governed by Art. 126 of the Lim. Act and having been filed more than 12 years after the possession of C began, was barred.

Per *Sadasiva Iyer, J.*—Even if Art. 126 did not apply to the case and Art. 144 did the suit was barred thereunder.

Observations on the scope and applicability of Art. 126. (*Oldfield and Sadasiva Iyer, JJ.*) **MUNIA GOUNDAN v. RAMASAMI CHETTI**.

41 Mad. 655 = 34 M. L. J. 828 = 24 J. L. T. 22 = 8 L. W. 28 = (1918) M. W. N. 448 = 48 I. C. 867.

———Arts 126 and 44—Hindu joint family—Alienation by father describing himself as guardian of his minor son—Suit by son to set aside—Limitation—Art. 126 applicable and not Art. 44. See **LIM. ACT ART. 44 AND 126**. 23 M. L. T. 245 = 44 I. C. 608.

## LIMITATION ACT, ART. 130.

—Art. 130—Applicability—Suit for assessment of rent on a certain tenure—Tenure must be rent free. See B. T. ACT, S. 105. 28 C. L. J. 287.

—Art. 130—Land entered in record of rights as liable to assessment—Suit to assess rent—Limitation.

Deft's lands having in 1910 been entered in the record of rights as liable to be assessed with rent, the recorded landlord brought the present suit for assessment of rent. The Dt. Judge held that the right to have the rent assessed having accrued to the plff. more than twelve years before the suit it was barred by limitation under Art. 130 of the Lim. Act and dismissed the suit. Held that the entry in the record of rights did not give the starting of limitation as such an entry confers no title; that the suit was not one for resumption or assessment of rent-free land within the meaning of Art. 130, but a suit for the assessment of land presumably liable to be assessed. The fact that rent had not in fact been paid more than twelve years before suit is not *per se* sufficient to support a decree for dismissal of such a suit, for the right to have rent assessed must continue so long as the relationship of landlord and tenant continues. Such a relationship and liability could be presumed from the record of rights and it is for the deft to rebut this presumption by evidence. (*Richardson and Beachcroft, JJ.*) DHANANJOI MANJI v. UPENDRA NATH DEB. 22 C. W. N. 686—46 I. C. 428.

—Art. 132—Hypothecation bond—Provision for payment by instalments with option to creditor to sue for whole with enhanced interest in default—Suit upon bond—Limitation—Creditor's failure to enforce default clause—Effect—Right to enhanced interest on default.

Where a hypothecation bond provided for payment by instalments and also contained a default clause which gave the creditor an option requiring payment of the whole amount of the mortgage money at an enhanced rate of interest upon the failure of the debtor to pay any one of the instalments and the option was not exercised by the creditor.

Held, that the contract for payment by instalments would subsist and that no enhanced rate of interest will be allowed if no demand was made. (*Bakewell and Phillips, JJ.*) LACHAKKAMMAL v. SOKKAYYA NAIK. (1918) M. W. N. 886—48 I. C. 191.

—Art. 132—Instalment bond—Mortgage—Default in payment—Right to sue for whole amount—Waiver—Limitation.

A contract which gives the mortgagee one of two options does not bind him to either of them if he chooses to stick to either; in other words, it is open to him to waive the benefit of

## LIMITATION ACT, ART. 132.

an acceleration, if the contract leaves him such an option; and that option cannot be taken away by Statute unless there is anything to show that the grant of such an option is illegal or forbidden by law.

Where a mortgage deed provided for the repayment of the principal with interest in 12 years and further stipulated that if the mortgagors failed to pay interest regularly every year, the mortgagee would be at liberty to sue for the recovery of the entire money on the said deed before the expiry of the period fixed for redemption.

Held, that the mortgagee was at liberty to waive the default in payment of interest and to wait for the expiry of the period fixed for redemption before bringing the action. (*Kanhaiya Lal, A. J. C.*) MUBARAK ALI v. GOPI NATH. 5 O. L. J. 73—45 I. C. 613.

—Art 132—Instalment bond—Provision for payment of whole amount in default of payment of one instalment—Limitation.

A mortgage deed provided for payment of the mortgage money by certain definite instalments and further stipulated that if the instalments were not paid at the appointed time and if any default were to take place then the contract relating to the payment of future instalments was to be deemed rescinded and the mortgagees were to be entitled to sue for the whole amount and interest.

Held, that a suit brought by the mortgagees on the basis of the above mortgage deed more than 12 years after the date when the first default in payment was made was time barred under Art. 132 of Sch. I of the Lim Act. (*Lindsay, J. C.*) LACHEMI NARAIN v. DAYA SHANKAR. 47 I. C. 655.

—Art 132—Mortgage bond—Rice lent—Covenant to repay—Mortgagees to realise money in case of default by sale of mortgaged properties—Suit on mortgage bond—Limitation.

Where, in a suit to enforce a mortgage, the plff lent a certain amount of rice and there was in the bond the usual covenant of repayment and interest and the bond also provided that, if default was made in the kists, the mortgagees would be competent to realise the money which would be due at the rate of Rs. 6 per "map" by sale of the mortgaged properties belonging to the mortgagors.

Held, that the primary object of the suit was to recover money and what the Court would give the plffs would be money and not rice if they succeeded in the suit and that that money was a charge on the mortgaged property.

Held also, each case must turn on the construction that the Court places on the mortgage deed in that particular case. (*Fletcher and Huda, JJ.*) SRIPATHI LAL DUTT v. SABAT CHANDRA MONDAL 29 C. W. N. 790—48 I. C. 78.

## LIMITATION ACT, ART. 132.

—Art 132—Mortgage — Immoveable property—Pala or turn of, worship—Mortgage of—Suit to enforce—Limitation— Art 120 applicable. See LIM. ACT ART. 130 AND 132 22 C. W. N. 994.

—Art. 132—Mortgage—Interest payable in paddy—Suit to enforce—Limitation

A suit to enforce a mortgage for a certain sum of money on which the interest is payable in paddy is a suit to enforce a charge of money on immoveable property. (*Fletcher and Smither, JJ*) **HRISHIKESH SINGH v. LAKHI NARAIN SINGH.** 46 I. C. 384.

—Arts. 132, 116 and 120—Suit on mortgage executed as security for loan of paddy—Art. 116 or 120 and not Art. 132 applicable. See LIM. ACT, ARTS. 116, 120 and 132 44 I. C. 518.

—Art 134 — Alienation for value by mahant—Suit to set aside successive—Limitation.

Art. 134 of the Lim. Act applies to a suit instituted by a succeeding mahant of an asthal by setting aside an alienation for valuable consideration made by the preceding mahant in respect of that property. If such a suit is brought beyond 12 years from the date of such an alienation it is barred by time to the extent of the interest which the alienation purports to convey, inasmuch as each succeeding mahant does not get a fresh start of limitation on the ground of his not deriving title from the previous mahant (*Stuart and Kanhaiya Lal, A. J. C.*) **BASDEO BAN v. RAM SARAN.** 5 O. L. J. 38=45 I. C. 292.

—Art. 134 — Applicability — Transfer under which possession not taken by transferee—Suit by mortgagor or cestuique trust to recover property from limitation—Starting point, date of transfer or date on which possession is taken by transferee—Object of Article—Interpretation of Articles of Lim. Act based on circumstances of their being printed in separate columns—Permissibility—Periods of suspension when can be allowed under Act—Residuary articles—Function of—Statute—Interpretation—Hardship—Considerations of Property. See (1917) DIG. COL. 798 **MULLA VITTHL SEETE KUTTI v. PATRUMMA.**

40 Mad. 1040=33 M. L. J. 320=  
22 M. L. T. 286=5 L. W. 454=  
(1917) M. W. N. 609=43 I. C. 31.

—Art. 134—Debutter property — Permanent lease of—Suit to recover by succeeding shabait—Limitation — Starting point—Minority of succeeding shabait —No interruption of limitation— Lim Act Ss 6 and 9.

A suit by a shabait in 1913, to recover possession of debutter property held by the debt under a mukurari lease granted by a previous shabait in 1876, is barred by the provisions of

## LIMITATION ACT, ART. 134.

Art 134 of Sch I of the Lim. Act, as brought more than twelve years after the date of the lease

The representation of an idol by shabait is a continuing representation and limitation runs against the idol continuously and not against each shabait individually if and when he succeeds to the office, the shabait not being holders of successive life estates in the management or in the property of the endowment. Consequently the fact that the succeeding shabait was a minor would not stop the running of limitation under S 9 of the Lim. Act. 28 Mad 271 ref (*Richardson and Beachcroft, JJ.*) **MONMOTHA NATH LAHA v. ANNODA PRASAD ROY.** 27 C. L. J. 261=44 I. C. 567.

—Art. 134 — Mortgage of occupancy holding by Zemindari—Suit for redemption—Limitation

An occupancy tenant gave a usufructuary mortgage of his holding to the Zemindar, who sold his rights to the debt. In a suit for redemption by piff

Held, that the suit was not one to recover possession of a holding from which the piff. had been unlawfully dispossessed, but as a suit by a mortgagor to recover possession of the mortgaged property from his mortgagee and certain persons to whom the mortgagee had transferred the property and as the piff. had not been unlawfully dispossessed from the holding, the limitation of 12 years applied from the date of transfer to debt. under Art. 134. (*Tudball J.*) **ABHILAKH DHELPHORIA v. DILADHAR DHELPHORIA.** 45 I. C. 549

—Art. 134—Temple land—gift, of for performance of services at the temple—Valuable consideration—Suit to recover property—Limitation—Lim. Act. S. 10, inapplicable.

The predecessors in-title of the piffs, who were managers of a temple, made a gift of a portion of the temple property to the debts', predecessors in 1868 in consideration of the latter performing certain religious services of the temple. In 1913, the piffs, averring that they were no longer willing to accept the services of the debts, in connection with the temple, sued to recover possession of the land from the debts.

Held, that the suit was governed by Art. 134 of the Lim. Act for the debts, had relied on a transfer for a valuable consideration which was the performance of recurrent religious ceremonies at the temple; and that S. 10 of the Act had no application, inasmuch as the management of the debts had not resulted in any form of trust or in any misapplication of trust funds.

S. 10 and Art. 134 of the Lim. Act must be read together, S. 10 is, in the main, designed to meet a suit brought for the purpose of following misapplied trust funds for the benefit of

## LIMITATION ACT, ART. 134.

the trust. The section does not apply to assignments for valuable consideration from express trustees. (*Bachelor, A. C. J. and Kemp, J.*)  
**RAMACHARYA v. SHRINIVASACHARYA**  
 20 Bom. L. R. 441=45 I. C. 19

—Art 134—Transferee from mortgagee by conditional sale—Whether takes an absolute interest—Intention—Burden of proof.

Where the plf. brought a suit to redeem a mortgage by conditional sale executed by his predecessor-in title to one S. in 1872 and where it was proved that S. sold the property comprised thereunder to V in 1879 with the intention of transferring an absolute interest, and the intention of the parties was that there should be an absolute transfer of title.

*Held*, that the suit was barred by Art 134 of the Lim. Act as more than 12 years had elapsed since the date of the transfer by the original mortgagee.

Per *Seshagiri Iyer and Bakerwell, JJ.* :—Whether a transferee from a mortgagee took an absolute interest or only a mortgage interest, is a question of intention. The fact that his vendor had only a mortgage right would not be conclusive on the question. The real test would be, did he ask for and obtain an absolute right in the property and believe himself that he was having an absolute interest in it? The burden of proving such intention is upon the purchaser. 14 M. L. A. 1; 19 Bom. 140 foll. (1917) M. W. N. 5; 32 M. L. J. 85; 1 L. W. 637; 32 M. L. J. 24 ref.

Per *Bakerwell, J.* :—If the title adduced by the vendor and the deed of transfer to the purchaser is consistent with an intention to transfer an absolute interest, the burden will lie upon the plf. to show that the circumstances of the transfer negative such an intention. (*Seshagiri Iyer and Bakerwell, JJ.*) **MUTHAYYA SHETHI v. KANTHAPPA SHETHI.**

34 M. L. J. 431=23 M. L. T. 291=  
 (1918) M. W. N. 334=7 L. W. 482=  
 45 I. C. 975.

—Arts 135. and 144—Mortgage by conditional sale—Suit for possession as full owner after expiry of year of grace—Limitation.

The mortgage in question in this case was by way of conditional sale and its term expired on the 23th June 1901. The deed stipulated that on default the mortgagee would be at liberty to secure possession by the issue of a notice under the Regulation and that if he elected not to do so the mortgagor would continue to pay him interest until the mortgage was redeemed. The mortgagee did not take action for the issue of notices of foreclosure till the 17th June 1913. The notice was served on the mortgagor on the 7th September 1913 so that the year of grace expired on the 7th September 1914. The mortgagee then, on the 8th February 1915, brought the present suit for possession as full owner and

## LIMITATION ACT, ART. 141.

the question for decision was whether the suit was barred by limitation.

*Held*, that the true rule in these cases is that when under the terms of the mortgage deed the mortgagee is entitled to possession of the mortgaged property without first taking foreclosure proceedings the right to possession of the mortgagor determines on the date of default, but when under the terms of the mortgage deed the mortgagee as such has no right to possession the right to the possession of the mortgagor does not determine and his possession does not become adverse until the foreclosure proceedings have been perfected and the year of grace has expired;

*Held*, applying this rule to the present case, that as the mortgage deed did not give the mortgagee a right of entry as mortgagee and as it contemplated the subsistence of the relation of the mortgagor and the mortgagee and after the date of default the suit was not barred by limitation under Art 135 nor by adverse possession under Art. 144 of the Lim. Act. (*Scott Smith and Le Rossignol, JJ.*) **RATAN DAS v. MUSSAMMAT GURAN**

79 P. R. 1918=25 P. L. R. 1913=  
 52 P. W. R. 1918=45 I. C. 563.

—Arts. 137. and 138—Suit for bare site—Possession. See LIM. ACT, ART 142.

76 P. R. 1918.

—Arts. 137, 138 and 142—Suit for recovery of possession—Auction purchaser—Burden of proof. See (1917) DIG. COL. 802 **DOKARI JOEDAR v. NILMANI KUNDU.**

22 C. W. N. 319=26 C. L. J. 339=  
 42 I. C. 709.

—Arts. 138 and 180—Suit for possession by auction purchaser after confirmation of sale—Limitation.

A suit by a purchaser at a court auction for recovery of possession of the properties, after confirmation of the sale is governed by Art. 183 and not by Art 180 (*Imam, J.*) **JAGESWAR SINGH MAHAPATRA v. SRIDHAR SARDAR.**

47 I. C. 344.

—Art. 141—Applicability—Reversioner—Suit to recover ancestral land after death of alienor's widow—Limitation. See PUNJAB LIMITATION ACT, ART 2. 95 P. R. 1918.

—Art. 141—Hindu widow—Adverse possession against Reversioner not barred.

Possession taken by a trespasser during the life-time of a Hindu widow or Hindu female with a life-interest is not adverse as against the reversioners until after the death of the widow. (*Tudball and A. Rao, JJ.*) **GANGA v. KANHAIYA LAL.**

17 A. L. J. 44=  
 47 I. C. 222.

## LIMITATION ACT, ARTS. 141 AND 144.

—Arts. 141 and 144—Hindu widow—*Attenuation by—Suit by an heir of the reversioner—Limitation.*

Of two Hindu co-widows, one who had two daughters, alienated her husband's property on 10-3-1897 and died on 11-7-1902. The other widow died on 17-1-1908. One of the daughters gave birth to a son (plff.) in 1905 and died in 1907. The other daughter died in 1911. The plff. having filed the suit on 13-1-1915 to set aside the alienation.

*Held*, that the suit was not governed by Art. 141 of the Lim. Act inasmuch as the plff. claimed as the heir of her mother and the suit was not one brought by a Hindu entitled to the possession of immoveable property on the death of a Hindu female.

*Held*, however, that the suit was in time, under Art. 144, for the vendee's possession, however adverse against the widows, could not be regarded as adverse against the plff. (*Bachelor, A. C. J. and Kemp J.*) *MALKARJUN v. AMRITA.* 20 Bom. L. R. 762=47 I. C. 153

—Art 141—*Suit for recovery of possession of property held by a female as full owner.*

Art 141 of the Lim. Act lays down a rule of limitation for suits in which it is sought to recover estates which having once been estates in expectancy have been vested in the heir of the last male owner on the determination of a limited estate held by a Hindu or Mahomedan female. It does not apply to cases in which the Hindu or Mahomedan female had been in possession of the full estate (*Lindsay J. C. and Stuart, A. J. C.*) *BISHESHAR BAKSH SINGH v. RAJARAMESHA BAKSH SINGH.*

21 O. C. 1=44 I. C. 338

—Art. 142—*Chaukidari chakran lands—Resumption—suit by patnidar for possession of resumed lands—Discontinuance of possession—Limitation.*

Where a patnidar is in possession of chaukidari chakran lands through receipt of the services performed by the chaukidars, such possession is discontinued on resumption of the lands, inasmuch as the services ceased to be performed so that a suit by the patnidar to recover possession of the resumed lands brought more than twelve years after the date of the resumption is barred by time under Art. 142 of the Lim Act. (*Fletcher and Huda, JJ.*) *MOHENDRA NATH SOW v. RAJANI KANTA SOW.*

46 I. C. 895.

—Art. 142—*Possession and dispossession—True owner obtaining possession by force—Limitation, interruption of.*

Possession of the true owner, however obtained, counts in his favour for the purposes of Art. 142 of the Lim. Act in a suit brought by him for recovery of possession on establishment of title.

## LIM. ACT, ARTS. 142, 137 AND 138.

The plffs, having been dispossessed by the defts. of certain lands belonging to them, succeeded in ousting the latter therefrom and remained in possession until they were evicted under a decree in a suit brought by the deft. under S. 9 of the Specific Relief Act.

*Held*, that time began to run against the plffs, from the moment they were evicted in execution of the decree under the Specific Relief Act, and not before. (*Richardson and Beachcroft, JJ.*) *HARI DAS v. DEBENDRA RAM BANNERJEA.* 35 I. C. 548.

—Arts. 142 and 144—*Scope of—Suit by lawful heir to recover possession of property from trespasser—Limitation.*

In a suit governed by Art. 142 of the Lim. Act the question to be decided is whether the plff., directly or constructively, has been in possession within twelve years of the suit, and it does not matter if within the period continuous exclusive possession adverse to him has been with one or a hundred successive trespassers. But in a case governed by Art. 144 the question is whether the deft against whom the suit is brought has held adversely, personally or by a person who represented him or whom he represents, for more than twelve years continuously. Under the former Article the plff. has to prove that his title has not been destroyed by lapse of time whereas under the latter the deft. must prove that the plff's title has been so extinguished.

Where an owner of property has died in peaceful possession of the estate which is then seized by a trespasser before the lawful heir has entered upon possession, a suit by the latter to recover the estate is governed by Art. 144 and not by Art. 142 of the Lim. Act.

Though an heir can tack on the possession of his predecessor in title to his own one trespasser cannot be allowed to add to his possession the possession of another previous trespasser whom he dispossessed (*Stanyon, J. C.*) *GANNO v. BENNI.* 14 N. L. R. 82=43 I. C. 943.

—Arts. 142 and 144—*Successive life-estates—Dispossession of holder for the time being—Trespasser gets absolute title to estate at the expiry of 12 years—Successors of life-tenant, barred. See LAND TENURE, PALAYAM.* 41 Mad 749.

—Arts. 142 and 123—*Suit to set aside sale of joint share of plff, and for recovery of possession of land. See (1917; DIG. COL. 806; HLA GYAN v. AUNG PYER.*

11 Bur. L. T. 119=42 I. C. 121.

—Arts. 142, 137 and 138—*Vacant site—Suit for possession by purchaser—Limitation.*

Plff. sued in March 1916 for possession of a bare site on the allegation that he purchased it in July 1902 and took possession in October

## LIMITATION ACT, ART. 143.

1904 and that two years before suit defendants had dispossessed him

*Held*, that as the property was a bare site plifs. symbolical possession was equivalent to actual possession and that therefore the suit was *prima facie* governed by Art 143 of the Lim. Act and not Art. 137 or 138, and that defendants could defeat the claim only by shewing adverse possession of more than 12 years. (*Le Rossignol, J.*) KAMAN v. UMRA. 76 P. R. 1918=156 P. W. R. 1918=47 I. C. 411

———Art. 144—Adverse possession—Intangible right—Right recurring on occasion—Right to take wood from trees when fallen or cut—Right disputed on prior occasions—No uninterrupted or continuous possession—Title not lost. See LIM. ACT, S. 28 and ART. 144. 16 A. L. J. 345.

———Art. 144—Adverse Possession—Limited right—Right to manage *devaswom* (religious endowment)—Acquisition of title by prescription. See MALABAR LAW, DEVASWOM. 34 M. L. J. 344=44 I. C. 530.

———Art. 144—Alienation by Hindu widow—Suit by heir of reversioner to set aside alienation—Limitation Act applicable. See LIM. ACT, ARTS. 141 AND 144 26 Bom. L. R. 762.

———Art. 144—Applicability of—Immoveable property—Sale proceeds of—Suit to recover—Limitation. See LIM ACT ART 130 AND 144 3 Pat. L. J. 522.

———Art. 144—Applicability of—Suit for enhancement of rent.

Art. 144 of the Lim. Act has no application to a landlord's assertion and the tenant's denial of the right to enhance the rent of the holding. (*Sanderson, C. J. Mookerjee and Teunon, JJ.*) BIRENDRA KISHORE MANIKYA BAHADUR v. MAHOMED DOULAT KHAN. 22 C. W. N. 856=43 I. C. 59.

———Arts. 144 and 142—Difference between—Defendant cannot tack on possession of prior trespasser. See LIM. ACT, ART. 142 AND 144. 14 N. L. R. 82.

———Art. 144—Immoveable Property—Interest in *Parjot*, *Charai* and *charsai dues*—Right to Adverse Possession.

*Held*, that the right to *parjot*, *charai* and *charsai dues* should for the purposes of limitation be an interest in immoveable property. (*Lindsay, J. C.*) SHEORAJ SINGH v. DEBI BAKSH SINGH. 21 O. C. 119=46 I. C. 439.

———Art. 144—Successive life-estates—Dispossession of holder for the time being—Trespasser gets absolute title at the expiry of 12 years—Omission of holder for life, to eject

## LIMITATION ACT, ART. 164.

trespasser—Successors barred. See LAND TENURE, PALAYAM. 41 Mad 749

———Art. 143—Applicability—Money kept in deposit with deft. to be returned on demand—Limitation. See LIM. ACT, S. 10 65 P. L. R. 1918.

———Art. 146 (a)—Municipality—Platform resting on Municipal street, as part of the main building and on its own foundation for 50 years—Extinction of title of Municipality. See LIM. ACT S. 43 AND ART. 146 (a). 28 C. L. J. 494.

———Art. 148—Redemption—Persons owning a portion of the equity of redemption paying off the whole mortgage—Suit to redeem by remaining co-sharer—Charge and not a mortgage, acquisition of—Limitation Act, Art. 148, not applicable. See T. P. ACT, S. 95. 22 C. W. N. 637.

———Art. 148—Usufructuary mortgage—Redemption—Purchaser of Equity of redemption in part of mortgaged property—Suit by Limitation.

A purchaser of the equity of redemption in a part of the mortgaged property is entitled to redeem his own portion of the property within sixty years of the date of the mortgage from another person who having purchased another portion of the mortgaged property has redeemed the entire mortgage and is in possession of the entire property. The limitation applicable to a suit of that description is provided by Art 148, Sch. I of the Lim. Act. All persons who have stepped into the shoes of a mortgagor are "co mortgagors" for all purposes and the rule of limitation provided by art. 148 is applicable to a suit by a purchaser of the equity of redemption in a part of the mortgaged property. (*Bannarjee and Ryves JJ.*) WAZIR ALI v. ALI ISLAM. 40 All 883=16 A. L. J. 740=47 I. C. 833.

———Art. 153—Applicability—Award made by two out of three arbitrators—Illegal—Application to set aside—Proceedings under paras 12 and 14 of Sch. II of the C. P. Code—Art. 153 inapplicable. See C. P. CODE, SCH. II PARAS 12 AND 14. (1918) M. W. N. 477.

———Art. 164—Ex parte decree—Application to set aside—Onus of proving want of knowledge of decree before thirty days of the application.

In an application to set aside an *ex parte* decree the burden of proving want of knowledge of the decree within thirty days of the application is on the applicant (*Wilberforce, J.*) SUGHRU MAL HAROHARAN DAS v. SHAM LAL GOKAL CHAND. 146 P. W. R. 1918=46 I. C. 777.

## LIMITATION ACT, ART. 166 and 181.

—Arts. 166 and 181—Application to set aside sale in execution of an *ex parte* decree—Decree subsequently set aside—Retrial ending in plaintiff's favour—Time within which application to be made. *See* C. P. CODE SS 47, 144 AND 151. 23 B. N. L. R. 925.

—Art. 186—Execution Sale—Application to set aside—Fraud—Limitation—Article applicable. *See* LIM. ACT, S. 18 AND ART. 166. 43 I. C. 671.

—Art 166—Execution Sale — Application to set aside—Objections to whole procedure—Limitation. *See* (1917) DIG. COL 813 RAMASWAMI CHETTY v. MAUNG THA. 10 B. N. L. T. 249=37 I. C. 327.

—Art. 169—*Appeal*—*ex parte* decree—Application to set aside—Limitation—Starting point.

Where notice has not been served limitation for an application for re-hearing the appeal, dates from the time when the applicant had knowledge of the decree. (*Chevis. J.*) DAULAT RAI v. JAGAT RAM. 98 P. R. 1918=47 I. C. 932.

—Arts 180 and 181—Applicability—Execution sale—Application by purchaser for possession of property—Limitation—Order—for delivery on such application—Further application to carry out that order—Limitation—Dismissal or striking off of an execution application—Effect—Intention of parties—Conduct of decree-holder, if material.

The sale to a decree holder auction-purchaser was confirmed on 16th January 1911. On 9th November 1912 and the 4th December 1913 he made an application for the delivery of possession but they were both dismissed by an order dated 4th December 1912, on the ground that he was unable to identify the land. A third application was made on 4th July, 1913 but on 30th July, 1913, the Court ordered on the same petition "No one to take delivery Petition dismissed." Finally on 16th April 1915, the purchaser again applied for delivery of possession but was met with the plea of limitation under Art 180 of Act IX of 1908. The first Court overruled the plea. *O. appeal.*

*Held per Abdur Rahim J.*—(*Oldfield. J. contra*) (1) that there being no evidence to show that the order of dismissal on 20th July 1913, was made after hearing the purchaser it must be deemed a dismissal only for statistical purposes; and (2) that the application of 1915 might be treated as one for execution of the general order for delivery made on 4th July 1913 and being in that view merely a continuation of the prior proceedings was not barred by Art 180.

*Held, per Oldfield, J.*—(1) that there was no reason why the Court should not act on the presumption that official acts were properly done and the Court passed the order of 30th

## LIMITATION ACT, ART. 181.

July 1913 on an adjourned date or after notice

(3) that there was nothing to show that there was any obstacle of granting relief beyond the respondent's control

(3) that the prior applications had to be dismissed only on account of the purchaser's default

(4) that the prior proceedings cannot therefore be held to have continued after the orders terminating them,

and (5) that the application of 1915 cannot therefore be regarded as a continuation of or subsidiary or incidental to any of the previous applications. 23 All. 13 and 4 L. W. 112 foll 27 All 334 dist; 36 Mad. 553 and 21 All. 135 ref.

*Also per Oldfield. J.*—An order for delivery made on an application under O XXI R. 95 of of the C. P. Code, cannot be treated as a mere general order to be worked in subsequent execution proceedings and on application for the delivery made in execution proceedings.

*Per Abdur Rahim, J.*—Whether the dismissal or the striking off an execution proceeding, has or has not the effect of putting an end to the attachment is one of intention to be determined upon the circumstances of such case.

*Per Oldfield, J.*—The mere fact that an order on an execution application worded "dismissal" is not decisive and the order will be treated as merely suspensory, if the circumstances of the case justify the presumption that such was the Court's real intention. (*Abdur Rahim, and Oldfield JJ.*) NANDUR SUBBAYYA v. RAJA VENKATRAMAYYA APPA RAO. (1913) M. W. N. 214=7 L. W. 15=43 I. C. 135.

—Art. 181—Applicability—Decrees for possession—Reversal in appeal—Application by successful appellant for mesne profits for period during which adversary in possession under original decree—Limitation—Period for which profits will be allowed. *See* C. P. C. S. 144. 3 Pat. L. J. 367.

—Art. 181—Applicability of to, applications under O 34, R. 3 C. P. Code. *See* C. P. CODE, S. 2 (2) 47 & FC., 35 M. L. J. 552.

—Art 181 and S. 13 Applicability—Execution Sale—Fraudulent suppression of process of execution—Effect of—Application to set aside governed by Art 181. *See* C. P. CODE S. 47 AND O. 21, R. 22. 27 C. L. J. 528.

—Art. 181—Application by judgment-debtor to recover possession of immovable property of which he has been wrongfully dispossessed—Limitation.

An application by a judgment-debtor to recover possession of immovable property of

## LIMITATION ACT, ART. 181.

which he has been dispossessed by the decree-holder in excess of the decree falls under Art. 181 and not under Art. 65 of Lim Act (*Saunders, J. C.*) *MAUNG THA v. MA PYU.*

3 U. B. R. (1915) 79=46 I. C. 323.

— Art. 181 — Application for final decree in mortgage suit—Limitation

The period of limitation for an application for a final decree in a mortgage suit is three years under Art. 181 of the Lim. Act from the expiration of the time allowed by the decree for the payment of the mortgage money. (*Richards, C. J. and Banerjee, J.*) *AHMED KHAN v. GAURA.*

40 All 235=

16 A. L. J. 143=43 I. C. 518

— Art 181. Application to revive suit—Inherent power—Limited.

An application to the Court to restore a suit in the exercise of its inherent power is governed by Art. 181 of the Lim Act (*Lindsay, J. C.*) *RAMESHWAR DAYAL v. GUR SAHAL.*

5 O. L. J. 259=47 I. C. 137

— Art. 181—O. P. C.—O. 34 R. 5 Suit for sale on mortgage—Application for final decree—Limitation—Starting point.

The period of limitation for an application for a final decree for sale under O. 34, R. 5 of the C. P. Code should be computed from the date of the decree of the Court of final appeal (*Kankaiya Lal and Daniels, A. J. C.*) *LALLU RAM v. JOT SINGH.*

21 O. C. 176=

47 I. C. 206.

— Art. 181—C. P. Code O. 34, R. 5 (2)—Application for final decree for sale—Limitation—Confirmation of preliminary decree on appeal—Starting point.

An application for a final decree for sale under O. 34, R. 5 (2), C. P. Code, is governed by Art. 181 of the Limitation Act and time runs from the expiry of the period fixed for redemption by the preliminary decree.

Where however there has been an appeal from the preliminary decree time begins to run from the date of the decree on appeal, even though appellate decree merely confirms the decree of the first Court 32 M. L. J. 455 rel. (*Abdur Rahim and Oldfield, JJ.*) *SUBBA RAYALU NAYUDU v. SUNDARARAJU NAYUDU*

35 M. L. J. 507=48 I. C. 185.

— Art 181 and 182—Execution application—Decree satisfied by attachment and execution of another decree set aside eventually—Fresh application for execution—Limitation.

Appellant obtained a decree for costs against respondent. In execution of that decree appellant attached and executed a decree obtained by the respondent against a third person. The latter decree was however, set aside on appeal, and the appellant had to refund the money realised by him in execution

## LIMITATION ACT, ART. 181.

of that decree. The appellant then made a fresh application for execution of his own decree more than three years of his last application

*Held*, (1) that the application being in form and in substance one for execution of a decree, Art. 181 of Sch. 1 of the Lim Act had no application to it and that the application was governed by Art. 182 of Sch. I of the Lim. Act and, having been made more than three years after the date of the last application, was barred by limitation. (*Tudball, J.*) *SUNDER LAL v. BANARSI DAS.*

45 I. C. 531.

— Art. 181—Execution application—Revival of former application for execution—Lim. Act, Art 181 applicable and not S. 48, C. P. C. See C. P. Code, S. 48 3 Pat L. J. 103.

— Art. 181—Execution sale—*Ex parte* decree, subsequently set aside—Retrial ending in plff's. favour—Application to set aside previous sale—Limitation—Art. 181 applicable—Starting point—Date of setting aside of *ex parte* decree See C. P. CODE, SS. 47, 144 AND 151.

20 Bom. L. R 925.

— Arts 181 and 182—Mortgage—Preliminary decree for sale under T. P. Act—Expiry of the time fixed for payment after the new Code came into force—Application for order absolute under O. 34 R. 1 C. P. Code—Limitation.

In a mortgagee's suit for sale a preliminary decree was passed under the T. P. Act. Before the expiry of the time fixed by the decree for the payment of the mortgage money, the new C. P. Code came into force. The mortgagee applied under O. 34 R. 5 of the C. P. Code to have a final decree passed.

*Held* that a final executable decree was passed under the T. P. Act notwithstanding that the direction in the decree of the property was made conditional on default of payment of the amount due by a certain date; that the remedy of the mortgagee was to apply for an order absolute; that the enactment of the C. P. Code did not give the mortgagee a right to apply for a final decree; and that the period of the limitation for the mortgagee's application was that fixed by art. 183 and not by art. 181 of the Lim. Act. 32 M. L. J. 455 not foll. (*Sadosiva Iyer and Spencer, JJ.*) *RAMASWAMI REDDI v. SOKKAPPA REDDI.*

35 M. L. J. 194=48 I. C. 732.

— Art. 181—Mortgage decree—C. P. Code O 34 R. 6—Application for decree under—Not an application in execution—Limitation—Starting point.

An application under O. 34 R. 6 of the C. P. Code is an application in the original suit for a new decree and it cannot be regarded as an application is governed by Art 181 of the Lim. Act and must be made within three years from the date when the right apply accrued. Wherefore the entire mortgage property

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was sold in 1911 in execution of a decree for sale on a mortgage, and the mortgagee made a fresh application under O. 34 R. 6 of the C. P. Code in 1915 (an application for a similar decree having been made in 1913) held that the application was time-barred; and the application not being an application in execution of a original mortgage-decree, the intermediate application did not save limitation. (*Richards, C. J. and Banerji, J.*) MAHOMED ILTIQAT HUSAIN v. ALIM-UN-NISSA.  
40 All. 551=16 A. L. J. 437=47 I. C. 561.

—Arts. 181 and 182—Mortgage decree before new C. P. Code—Application for order absolute under new C. P. Code—Right to apply when accrues.

Where preliminary decree for sale was passed before the C. P. Code of 1908 and applications for order absolute were made in time till 1909 when the C. P. Code of 1908 came into force. Held. On an application under O. 34, R. 4, made on 2-12-1909 that though O. XXXIV, R. 4, of the C. P. Code rendered an application necessary to make the decree absolute for sale, Art. 181 of the Lim Act did not govern the case the right so to apply not having accrued to plff. till the new C. P. Code conferred it upon him in 1909 (*Batchelor, A. C. J. and Kemp, J.*) NARASING RAO v. BANDU.  
42 Bom. 309=20 Bom L. R. 431=46 I. C. 107.

—Art. 181—Mortgage suit—Preliminary decree—Application for final decree governed by Art 181. See C. P. CODE, O. 34 Rr. 4 and 5.  
40. All. 203

—Art. 181—Mortgage, suit for sale—Decree passed by High Court on appeal—Application for decree absolute—Limitation. See C. P. CODE, O. 34, Rr 84 AND, 5.  
16 A. L. J. 85

—Arts 181 and 182—Preliminary decree after new Code of Civil Procedure—Application for final decree—Limitation—Limitation Act, Arts. 181, and 182—Applicability.

Art. 181, and not art 182 of the limitation Act applies to an application under O. 34, R. 6 (3) of the Code of Civil Procedure for a final decree in which the preliminary decree was passed after the passing of the present Code of Civil Procedure. (*Oldfield and Krishnan, JJ.*) PATTABIRAMA NAIDU v. SUBABAMANIA CHETTI.  
7 L. W. 438=45 I. C. 76

—Art 181—Restitution application for—Limitation—Starting point.

Time begins to run against the party claiming restitution from the date when the final pronouncement is made in the proceedings instituted to test the propriety of the decree or order of the lower Court. (*Mockerjee and Beackcroft, JJ.*) ATUL CHANDRA SINGH v. KUNJA BEHARI SINGHA.  
27 C. L. J. 351=43 I. C. 775.

## LIMITATION ACT, ART. 182.

—Art. 181 Expl. 1—Joint decree against several persons—Appl. by two out of such—Appeal dismissed with costs—Execution of decree—Limitation—No further application within three years—

S. obtained a decree for possession and costs against K. D. and certain other persons jointly. Out of these debts. K. and D. appealed to the High Court and their appeal was dismissed with costs. D. held a decree against S. and in execution thereof he attached the decree in favour of S. against himself and his co-judgment debtors. D. executed the decree from time to time and realised various sums, and eventually it was held that the first Court's decree had been satisfied. S. had applied for the execution of the decrees for the costs obtained in the High Court in 1907. In the interval S. had been adjudicated an insolvent and the Official Assignee transferred the decree in favour of S. to M. M. applied for execution on foot of the High Court's decree. Held, that the application was time barred having been made more than three years from 1907. (*Richards, C. J. and Banerjee, J.*) GHULAM MUHI-UD-DIN v. DABBAR SINGH.  
40 All. 206=16 A. L. J. 109=46 I. C. 699.

—Art. 182—Application in accordance with the law—Decree against a talukdar—Application to execute the decree—Application not accompanied by certificate of managing officer as required by S. 29 (E) (3) of Gujarat Talukdars Act (Bom. Act VI of 1883)—Exclusion of time from date of decree to date of application for certificate.

A decree for instalments was passed against a Talukdar on the 16th Sept. 1910 with the proviso that on failure to pay any one instalment in time, the whole amount of the decree became payable at once. The first instalment which was payable on 1st April 1911 was not paid. An application to execute the decree was made on the 1st April 1914 but as it was not accompanied by a certificate from the managing officer under S. 29 (E) of the Gujarat Talukdars Act it was rejected on the 15th June 1914. The certificate was applied for in August 1914. A second application to execute the decree was made on the 23rd February 1916. Both lower Courts rejected the application as being time-barred. On appeal:—

Held, allowing the appeal, that the application of 1916 was in time, as by virtue of sub. S. 3 of S. 29 E of the Gujarat Talukdar's Act the applicant was entitled to exclude the time from 16th September 1910 (the date of the decree) to August 1914, the date of the due submission of the decretal claim to the managing officer, which was the date for the application of the certificate.

But the Court differed as to whether the appeal ought to be allowed apart from S. 29 (E) (3) of the Gujarat Talukdars Act. *Shah, J.*, holding that it ought as the application of 1914 was "in accordance with law" within the meaning

## LIMITATION ACT, ART. 182.

of Art. 182 of the Lim. Act that no certificate of the managing officer under S. 29 E (1) of the Gujarat Talukdars, Act was produced and Marten, J. being of a contrary opinion.

*Sembie, Per Marten, J.* That the application of 1914 was not made to the "proper Court" as defined in Explanation II to Art. 182 of the Lim. Act as at its date it was the duty of no Court to execute the decree or order there having been no certificate from the managing officer. (*Shah and Marten JJ.*) HARGOVIND v. NAJA SUBA. 20 Bom. L. R. 872=47 I. C. 726.

—Art 182—Execution Application—Fresh—Filing of supplemental list of properties to be attached not mentioned in prior application—Continuation of the old application.

Where on an application for execution of a decree made in accordance with law, execution cannot be successfully taken against the property specified in the application by reason of causes for which the decree-holder is in no way responsible he should not be confined to the properties first specified, but it is open to him to ask the Court to proceed against other properties specified in his further supplementary list. (*Teunson and Cuming JJ.*) MOHINI MOHAN SARKAR v. NAVADWIP CHANDRA BISWAS. 47 I. C. 911.

—Art. 182—Execution—Step-in-aid—Application for transfer of decree to another court—Certified copy of decree not filed—Application if a step-in-aid See (1917) DIG. COL. 816; GURPEN CHETTY v. ANA MAHALINGAM. 11 Bur. L. T. 116=42 I. C. 100.

—Art. 182—Restitution—Application for—Limitation.

An application for restitution under S. 144 of the C. P. Code, is an application for execution of a decree within the meaning of Art. 182, Sch. I of the Lim. Act 28 Cal. 118, 11 All. 372, 30 I. C. 680, 8 Bur. L. T. 165 dist. (*Rattigan, C. J. and Le Rossignol, J.*) RAM SINGH v. SHAM PERSHAD.

67 P. R. 1918=15 P. L. R. 1918=36 P. W. R. 1918=44 I. C. 301.

—Art 182 (1) (7)—Instalment decree—Whole amount becoming due on failure to pay instalment when second one became due—No payment of instalment—Execution after five years of due date.

A decree was passed in 1909, which made the decretal amount Rs 860 payable by annual instalments and provided that in case of failure to pay any one instalment within the period fixed or until the period of next instalment, the plff. should recover in one sum the whole amount due at that time. The first instalment became due on 6-6-1910. It was not paid at all; nor was any other instalment paid. The decree-holder having applied on 6-6-1915 to execute the whole decree.

## LIMITATION ACT, ART. 182 (5).

*Held*, that the execution was barred by limitation, the decree holder not having applied to execute the decree within three years of the first default (*Beaman and Heaton, JJ.*) RAICHAND MOTICHAND GUJAR v. DHONDO LAXUMAN BAURE.

20 Bom. L. R. 773=47 I. C. 313.

—Art. 182 (2)—Decree—Modification by High Court in revision—Limitation for execution—Starting point. See (1917) DIG. COL. 817; GURUPADA HALDAR v. TARICK BRUSAN RAY.

22 C. W. N. 158=44 I. C. 141.

—Art. 182 (2) — Execution—Where there has been an appeal meaning of—Appeal against order on an application to set aside the decree, effect of.

The words "where there has been an appeal" in clause 2 of the last column of Art. 182 of the First Schedule to the Lim. Act, mean where there has been an appeal against a decree in the suit and cannot be held to include an appeal against an order made on an application to set aside that decree. (*Chamier, C. J. and Sharfuddin, J.*) RAI BRIJRAJ v. NAURATANLAL. 3 Pat. L. J. 119=44 I. C. 575.

—Art 182 (3)—Review of judgment—Meaning of—Application for rehearing of suit—Dismissal for default.

Cl. (3) of Art. 182 of the Lim. Act does not apply where an application for the re-hearing or review has been dismissed. The intention of the Legislature was to allow further time to a holder of a decree or order for costs where there has been an application for review which has been heard and a fresh decision has been pronounced not to allow further time where an application for re hearing or review has been put forward on untenable grounds, and has consequently been rejected or dismissed.

*Quaers*:—Whether the words "review of judgment" in clause 3 of Art 182 of the Lim. Act cover an application for rehearing of a suit dismissed for default. (*Chamier, C. J. and Sharfuddin, J.*) RAI BRIJRAJ v. NAURATAN LAL. 3 Pat. L. J. 119=44 I. C. 575.

—Art 182 (5)—Application in accordance with law—Non compliance with the requirements of O 21, Ex. 11 and 17 (2), C. P. Code—Formal defects.

An application for execution rejected under O 21, R. 17 (2) of the C. P. Code on the ground that it did not specify correctly the particulars required to be specified therein by R. 11 of that order, is not an application in accordance with law or a step-in-aid of execution taken in accordance with law within the meaning of Art 182 of Sch. I of the Lim. Act. (*Richardson and Benchcroft, JJ.*) ISHAN CHANDBA v. JIULAL CHANDRA.

44 I. C. 320.

## LIMITATION ACT, ART. 182 5.

— Art. 182, cl. 5—*Application in accordance with law—Step in aid of execution—Application in execution for payment out of money deposited in court by one of the judgment debtors if one in execution or in aid of execution—Application in execution praying for some relief—Grant of—judgment debtors right to question right of decree holder to that relief so long as order granting it subsists—Estoppel—Res judicata.*

An application for payment out of money in court in execution is an application for a step in aid of execution within the meaning of Cl. 5 of Art. 182 of the Limitation Act.

Where in execution of a revised decree in a suit for sale on a mortgage against the members of a family plaintiff applied for and obtained an order after notice directing the payment to her towards the partial satisfaction of the decree amount or a sum of Rs. 500 deposited in court by 6th defendant in the suit in pursuance of an order directing him to do so as a condition of the original *ex parte* decree against him being set aside: and the said sum of Rs. 500 was paid out to plaintiff in her said application, *held*.

(1) That, as an order of the court was necessary to make the sum of Rs. 500 available for payment towards the decree amount, the application was one in execution of the decree itself and gave plaintiff a fresh starting point under Cl. 5 of Art. 182 of the Limitation Act.

(2) That in the face of the order granting plaintiff's application it was not open to defendants to contend that the decree did not direct payment of money towards the decree amount decreed in general and that the application for such relief was therefore one not in accordance with law within the meaning of Art. 182. (*Spencer and Krishnan, JJ.*) **THANGI SHETTITHI v. DUJA SHETTITHI.**

35 M. L. J. 575=24 M. L. T. 483=  
8 L. W. 519=(1918) M. W. N. 748=43 I. C. 226.

— Art. 182 5)—*Application in accordance with law—Prior application complying with provisions of the Code—Time given for filing decree—Non-compliance—Subsequent application—Limitation.*

An application for execution of a decree was made on 1st March 1916, but copy of the decree was not filed along with it. It however fulfilled all the requirements of O. XXI, R. 11 of the C. P. Code. Time was given by the Court for filing the copy of the decree but it was not filed whereupon the application was struck off. Another application was filed within three years of the previous application. *Held*, that the application when filed having complied with all the requirements of O. XXI, R. 11, was an application in accordance with law and saved limitation. (*Richards, C. J. and Bannerjee, J.*) **RAGHUNANDAN LAL v. RADAM SINGH.** 40 All. 209=16 A. L. J. 87=  
43 I. C. 914.

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— Art. 182 (5)—*Application in accordance with law—Execution—Application without describing judgment-debtor as guardian of minor.*

A mortgage-decree was obtained against a number of persons, one of whom was a minor his guardian being one of the adult debtors. In an application for execution of the decree in which all the debtors were named, the minor and his guardian were not described as such:

*Held*, that the application was one in accordance with law within the meaning of Art. 182 of the Lim. Act (*Richards C. J. and Bannerjee, J.*) **RAM LAKHAN DAS v. SHANKER SINGH.** 43 I. C. 519.

— Art. 182 (5)—*Decree—Application for execution—Application in accordance with law—Properties not specified in list furnished under O. 21 R. 13 not liable to be proceeded against in execution—Filing of a fresh list of properties—Continuation of original application. See C. P. CODE O. 21 R. 17 (2) AND 18.* 22 C. W. N. 540.

— Art. 182 (5)—*Execution application—Amount of costs stated under heading (g) but not under heading (h) of sub-rule (2) of O. 21, R. 11—Applicant required to file certified copy under sub rule 8—Failure to comply—Whether failure renders application not in accordance with law and not sufficient to save limitation.*

Where a suit was decreed by the Munsif on 30.4.1911 the appeal disposed of by the High Court on 15.5.1914, and the application for execution was filed on 11.5.1917, the only defects in the application when filed were that the amount of costs was stated under the heading (g) of sub-rule (2) of R. 11, O. 21 C. P. Code, and not under heading (h) as it ought to have been. Under sub rule (3) of R. 11, the Court required the applicant to produce a certified copy of the High Court decree within 15 days, and on his failure to comply, the application was rejected.

*Held*, that the failure to state the amount of costs under sub-heading (h) was not a serious defect, and that the application was in accordance with law at the time it was made and therefore sufficient to save limitation. Failure to produce the certified copy did not render the application not in accordance with law.

The question whether an application for execution is in accordance with law or not must be determined with regard to what the law requires to be done at the time when the application is made, and in order to ascertain whether the application is in accordance with law, it is not impossible to consider what the law requires to be done after the application has been made. The intention of sub-rule (2)

## LIMITATION ACT, ART. 182.

rule 17 is to relax the law in favour of the decree holder (*Chapman and R. v. JJ*) ARJUN NAIK v. LAKHAN. 5 Pat. L. W. 205.

———Art. 182 (5)—*Execution of decree—Step in aid—Application to reject objections to the execution of decree.*

An application to the Court executing a decree asking that certain objections to the execution of the decree be dismissed is a step-in aid of execution and saves the bar of limitation. (*Tudball and A Raoof, JJ.*) TAZIM-UN-NISSA BIBI v. NAJJU.

40 All 668=16 A. L. J. 704.  
=48 I. C. 35.

———Art. 182 (5)—*Payment of portion of decretal amount—Limitation—Fresh starting point. See LIM. ACT, S. 20 AND ART. 182 (5).*

45 I. C. 905.

———Art. 182 (5)—*Step in aid—Application to transfer decree for execution to the Court of a Native State—Existence of reciprocity—Effect of.*

An application made to a British Indian Court to transfer its decree for execution to the Court of a Native State between whom and the British Government there exists an agreement to execute each other's decrees, is a step-in aid of execution within Art. 182 of the Lim. Act. (*Beaman and Heaton, JJ.*) JANARDAN v. NARAYAN. 42 Bom 420=20 Bom. L. R. 421.

=46 I. C. 56.

———Art. 182 (5)—*Step-in aid of execution—Process-fee, payment of, whether step-in aid of execution. See (1917) DIG. COL. 816;*

MANNA LAL v. SARDAR SINGH.

20 O. C. 332=43 I. C. 342

———Art. 182 (5) and (6)—*Step-in aid of execution—Relief not granted by the decree—Application for—Not an application in accordance with law.*

An application for execution of a decree which prays for a relief not granted by the decree, is not an application in accordance with law and cannot be treated as a "Step-in aid of execution" so as to save the bar of limitation.

Where no personal decree is passed in a mortgage suit an application in execution praying for the attachment of non-mortgaged properties is not covered by clauses (5) and (6) of the Lim. Act (*Seshagiri Iyer and Bakewell, JJ.*) RAMAKRISHNA KADIRVELUSAMI v. EASTERN DEVELOPMENT CORPORATION, LTD

43 I. C. 537

———Art. 182 (5)—*Step-in aid—Filing list of witnesses by decree-holders*

On the application of a decree holder for execution of his decree the judgment-debtor put in an objection and the Court directed both parties to adduce evidence in support of their re-

## LOWER BURMA COURTS ACT.

spective cases on a certain date. On that date the decree holder filed a list of his witnesses who were present in Court, and intimated to the Court that he was ready to proceed with his case.

*Held.* that the conduct of the decree-holder implied an application to the Court to take the evidence which he was prepared to adduce to repel the objection of the judgment-debtor and should be taken to be an application to the Court to take some step-in aid of execution (*Teunon and Newbould JJ.*) BROJENDRA KISHORE ROY COUDHURY v. DIL MUHAMMUD SARKAR.

22 C. W. N. 1027=44 I. C. 604.

———Art. 182 (6)—*Date of issue of notice meaning of.*

The date of the issue of the notice in Art. 182 cl. 6 of the Lim. Act means the date on which the notice actually issued from the office of the Court, that is to say, the date on which it is signed by the Sheristadar in the name of the Court. (1917) Pat. 53 ref. (*Roe and Imam, JJ.*) SHAIKH KHODA BUKSH v. BAHADUR ALI.

(1918) Pat 130=  
3 Pat. L. J. 285=4 Pat L. W. 324=  
45 I. C. 203.

———Art. 182 (6)—*Execution—Date of issue of notice—Time runs from date of order by Court to issue notice. See LIM. ACT, SS. 7 AND 182 (6)*

16 A. L. J. 633.

———Art. 182 (6)—*Limitation—Starting point.*

Under Art. 182 clause 6 of the Lim. Act, time runs from the date on which the notice was issued, and not from the date on which the order issuing the notice was passed. (*Beaman and Heaton, JJ.*) NILKANTH LAXMAN JOSHI v. RAGHO NAHAU PAVALE

42 Bom. 553=20 Bom. L. R. 361=  
45 I. C. 559.

———Art. 182 (7)—*Mesne profits, ascertainment of—Decree directing execution—Time when begins to run.*

In a suit for redemption of a mortgage where the decree directs the mesne profits due to the mortgagor to be ascertained in the execution department, time begins to run when the profits are so ascertained. 25 All 385 foll (*Richards C. J and Banerjee, J.*) NAR-SINGH DAS v. DEBI PRASAD. 40 All. 211=

16 A. L. J. 68=43 I. C. 932.

LIQUIDATOR—Official Liquidator—Position of—Officer of Court and not agent of the bank; See OFFICIAL LIQUIDATOR.

47 I. C. 122.

## LOWER BURMA COURTS ACT. (VI OF 1900)

S. 12—Criminal trial by single Judge of Chief Court—Misdirection to jury—New trial if

## LUNACY ACT, S. 3.

can be ordered by chief court—Cr. P. Code Ss. 423 and 439—Power to go into evidence See (1917) DIG. COL. 825; THEIN MYIN " EMPEROR. 10 Bur. L. T. 123= 42 I. C. 161=9 Cr. L. R. 516.

**LUNACY ACT, (IV OF 1912) Ss. 3 (11), 62 and 63—Relative', meaning of—Wife's brother, if competent to make application for inquisition under S. 62.**

The brother of the wife is related by marriage to the husband of his sister and is, therefore, a "relative" within the meaning of S. 3 (11) of the Lunacy Act and is competent to make an application for inquisition under S. 62 of the Act. A narrow construction should not be placed upon the term "relative" as defined in S. 3 (11) of the Lunacy Act. (*Mookerjee and Beachcroft, J.J.*) **MONI LAL SEAL v. NEPAL CHANDRA PAL.**

22 C. W. N. 547=27 C. L. J. 205= 43 I. C. 511

—S. 61—Applicability of, to cases outside Presidency Towns.

S. 61 of the Lunacy Act, and the rules framed thereunder are applicable only to cases in Presidency Towns, and in the absence of rules applicable to cases outside the Presidency Towns those rules can be made applicable to such cases also (*Mookerjee and Beachcroft, J.J.*) **MONI LAL SEAL v. NEPAL CHANDRA PAL.**

22 C. W. N. 547=27 C. L. J. 205= 43 I. C. 511.

—S. 62—Proceedings under—C. P. Code—Applicability of the provisions of. See C. P. CODE, S. 141.

27 C. L. J. 205= 43 I. C. 511.

**MADRAS CITY MUNICIPAL ACT (III of 1904) Ss. 129, 145 and 148—Covenant by lessee to pay taxes on buildings and by lessor to pay quit rent—Separate tax on buildings and 'lands'—Liability of lessee to pay. See LESSOR AND LESSEE**

43 I. C. 634

—Ss. 282 and 420—Pandal with inflammable materials—Construction of—Offence.

It is unlawful under the Madras City Municipal Act (1904) for any one to construct or allow to exist an inflammable pandal, without the written permission of the President of the Municipality. (*Sadasiva Aiyar and Napier, J.J.*) **EMPEROR v. S. VARADACHARIAR.**

32 Mad. 7=24 M. L. J. 180= 8 L. W. 581=47 I. C. 672=19 Cr. L. J. 948.

**MADRAS COURT OF WARDS ACT (I of 1902) S. 41—Construction of—Unnotified claim—Cessation of interest—Prohibition of payment—Secured creditor, right of.**

Persons having pecuniary claims against a ward under the superintendence of the Court of Wards, who fail to notify their claims to

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the Collector under S. 38 of the Madras Court of Wards Act (I of 1902) are subject to two penalties mentioned in S. 41 of the Act. The first penalty *viz.*, the cessation of interest, is final and the claimant can only prosecute his legal remedies for the amount already accrued due to him. The second penalty, *viz.*, that the unnotified claim shall not be paid until after the discharge or satisfaction of the notified claims, must be construed in a restrictive sense. In the case of secured creditors who have not notified it only prohibits payments to them by the Court of Wards out of the unincumbered funds at its disposal and does not prohibit the realization of the security and the satisfaction of the secured creditor's claim out of the proceeds. The prohibition of payment is directed only to the Court of Wards and does not extend to Courts and Collectors executing decrees even during the continuance of the superintendence of the Court of Wards. (1911) 1 M. W. N. 75 dist. (*Wallis, C.J. Kumaraswami Sastri and Bakewell, J.J.*) **SRINIVASA RANGA RAO v. SUNDARABAJA RAO.**

41 Mad. 503=34 M. L. J. 454= 23 M. L. T. 127=7 L. W. 206= 44 I. C. 15.

**MAD. DT. MUNICIPALITIES ACT (IV OF 1884), Ss. 21 and 27—Powers of Municipalities—Bona fide exercise of powers—Discretion exercised by Municipal Council—Rules for the interference of courts.**

A Municipal Council under the Dt. Municipalities Act is a Corporation with power to contract and to do all things necessary for the purposes of its constitution, the Municipal fund being held by it for the purposes of the Act.

The Court will not interfere with the operations of a Municipal Council if they are within its authorisation and the Council acts *bona fide*. It is the best Judge not only of what is most conducive to its own interest but also of what is proper and fitting as regards third parties and it will be left unchecked to take or not to take lands. (*Oldfield J.*) **N. N. KRISHNASWAMI IYER In re.**

35 M. L. J. 251=48 I. C. 128.

—S. 53—Professional tax, levy of—Carrying on business within the Municipality, what constitutes—Question of fact.

The p/ffs the Clan Line Steamers, Ltd., were an incorporated Company having their registered office and head place of business in Glasgow. They owned a line of steamers which plied between English ports and the East calling among other places at Madras and at Cocanada in the Godavari District. The agents for the 'Clan Line' in Madras were Messrs. Gordon Woodroffe & Co. Under an arrangement with Gordon Woodroffe & Co. Messrs. Ripley & Co., of Cocanada, acted for the Clan Line Steamers, Ltd., and received payment of

## MAD. DT. MUNICIPALITIES ACT, S. 53.

commission. The defendants were the Municipal Council of Cocanada, a District Municipality constituted under the Madras District Municipalities Act of 1844. Under S. 53 of the Act the defts. levied a profession tax on the pliffs. on the ground that the latter carried on business as a company and as shipowners within the Municipality. The pliffs paid the tax under protest and sued to recover the same. The facts found at the trial were these: Cocanada was mostly an exporting sea-port and hardly any cargo was discharged there. If by chance any cargo did go to Cocanada it was discharged from the Clan ships into lighters provided by the holders of the bills of lading. Ripley & Co., did not handle the cargo though they might occasionally collect freight and transmit it to Gordon Woodroffe & Co. In the matter of booking space in the out-going ships for cargo to be embarked at Cocanada, Messrs Ripley & Co., had no controlling voice but could act only with the previous authorisation of Gordon Woodroffe & Co. Most of the arrangements for shipment from Cocanada were made by the Cocanada merchants with Gordon Woodroffe & Co., either directly or through shipping brokers at Madras. Sometimes the Cocanada shippers applied to Ripley & Co., to get them space on the clan ships and their applications were forwarded to Gordon Woodroffe & Co., who generally sent what was called an engagement form through Ripley & Co., to the intending shippers. That form contained the acceptance and completed the contract. If time was short, Gordon Woodroffe & Co. telegraphed to Ripley & Co., instructions, as to what amount of room was available for the proposed shipper. On receiving the authorisation, Ripley & Co., issued a shipping order to the shipper who thereupon took the goods to the ship and obtained the mate's receipt and in due course a bill of lading signed by Ripley & Co., for the master. If the goods put on board were in a slightly damaged condition the shippers obtained clean bills of lading on signing indemnity forms addressed to Ripley & Co. Ripley and Co. collected freight and disbursed the Clan ships, a large portion of the disbursements consisting in payments for stores supplied to the ship under contracts made by Gordon Woodroffe & Co. with the suppliers at Cocanada. *Held*, that the business of making shipping contracts for the Clan Line Steamers Ltd., with Cocanada merchants was substantially carried on at Madras, that the activities of the pliffs. at Cocanada did not amount to a carrying on of business in the said place within the meaning of the authorities and that the levy of profession tax by the defendants being illegal, the pliffs. were entitled to a decree for the amount of the tax they had paid to the defendants. Cases on the subject reviewed. (*Coutts v. Potter, J.*) CLAN LINE STEAMERS, LTD., v. MUNICIPAL COUNCIL OF COCANADA.

33 M. L. J. 146=

45 I. C. 500.

## MAD. DT. MUNICIPALITIES ACT, S. 172

—Ss. 172 and 173 — *Municipality—Misfeasance, liability for—Gravel negligently thrown on public road, injury caused by—Damage caused by—Negligence of Contractor—Effect of.*

Municipal Corporations in India are liable for acts of misfeasance.

It is the duty of Municipalities to lay and maintain roads so that the public may pass over them safely and they are not liable for the injuries resulting to the public through the negligent or improper performance of that duty.

The liability of statutory bodies for negligence is not based on whether a profit is derived by the levy of a cess or toll from the public. The question whether it gives them an income over expenditure is not a criterion for enforcing liability.

Municipalities in India do not act in the exercise of sovereign power or as agents of the State in paying or maintaining roads (1915) M. W. N. 89 dist.

In the case of statutory bodies entrusted with the performance of public trusts, their liability cannot be shifted on to a contractor employed by them for a particular purpose. They may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him if it is not performed. But they are not thereby themselves relieved from liability to those injured by the failure to perform it.

Per *Seshagiri Iyer, J.*—Municipal Councils in Madras are statutory bodies with very circumscribed powers and are not self-governing in the sense that Municipal Corporations in England are. Though they are not departments of a Government their powers are derived from the Government and they are controlled by the provisions of the District Municipalities Act.

The public have a right to use the full breadth of a public road and any obstruction to such use amounts to misfeasance.

Per *Napier, J.*—S. 173 of the Madras District Municipalities Act does not apply to the case of a contractor executing repairs to the road under the orders of a Municipal Council. The section has reference to temporary obstructions to the thoroughfare by erecting of pandals or arches by a private person and has nothing to do with the execution of repairs by the employers of the Municipality.

*Quære.*—Whether a public body can be liable for mere non-feasance.

Whether the making of roads by the Government is an act of sovereign power? (*Seshagiri Iyer and Napier, JJ.*) THE MUNICIPAL COUNCIL OF VIZAGAPATAM v. WILLIAM FOSTER.

41 Mad. 538=

44 I. C. 308.

## MAD. DT. MUNICIPALITIES ACT, S. 207.

—Ss. 207, 217, and 264 A—*Prosecution under S. 264 A—Whether council bound to call on the accused to provide moveable receptacles under S. 217—Whether construction of latrine by them a condition precedent.*

A Municipal Council is not bound to call upon the accused to provide moveable receptacles under S. 217 of the Dt. Municipalities Act before proceeding to take action under S. 264 A.

There is no duty imposed by the Act on the Municipal Council as a necessary condition precedent to the institution of the prosecution under S. 264 A to have constructed the latrine themselves under S. 264 (1) (*Sadasiva Iyer and Spencer, JJ.*) THE PUBLIC PROSECUTOR v. SETTIGIRI NARAYANA REDDI.

35 M. L. J. 442=48 I. C. 161=  
19 Cr. L. J. 931.

MAD ESTATES LAND ACT (I of 1908) S. 3 (2) (d)—*Estate finding that village is not—No jurisdiction to Revenue Court to order detention of crops*

Where a Court finds that a village is not an estate within the meaning of S. 3 of the Mad. Est. Land Act, it has no jurisdiction to pass any order under the Est. Land Act, e. g., with regard to the detention of the crops by a particular party (*Mr. Azizuddin*) SRIRAM SRIRAL NAYUDU v. SRI RAMULU NAIDU

43 I. C. 20.

—S. 3—(1) (2) (d)—*Grant in inam of an agraaharam by an ancient, Native Ruler—Presumption as to rights conveyed—Agraaharam whether an estate—Right of agraaharamdar to sue in Civil Courts.*

There is no presumption in law that in the absence of the inam grant, the grant of an inam by a Native Ruler prior to British rule conveyed only the melwaram (Royal share of the Revenue).

Held, accordingly that a grant of an Agraaharam in Inam made by a Reddi King of Nellore more than 400 years ago and recognised and confirmed by the British Government under S. 15 of Madras Regulation XXXI of 1802 conveyed both the melwaram and kudivaram rights.

Held further, that the agraaharam was not an 'estate' within S. 3 (2) (d) of the Mad. Est. land Act and the Agraaharamdar was entitled to sue the tenants in ejectment in a Civil Court. (*Sir John Edge*) SURYANARAYANA v. PAT-ANNA.

41 Mad. 1012=25 M. L. T. 30=  
9 L. W. 126=23 C. W. N. 273=  
29 C. L. J. 153=(1918) M. W. N. 859=  
48 I. C. 689=45 I. A. 269. (P. C.)

—S. 3 Sub-Sec. 2 (a) S. 8 (1) and (3) *Exception—Acquisition by one of the inamdars of the entire Kudivaram interest by gift—Lease of some of the lands—Suit for rent—*

## MADRAS ESTATES LAND ACT, S. 4.

*Civil Court—Jurisdiction of—Whether exception to S. 8 applies to Sub-Sec 1 and 2 of S. 8 "Inamdar," meaning of.*

Where the plff., one of the fractional shareholders of the Melwaram right in an inam village acquired by gift the Kudivaram right in the whole village and he leased to the deft. certain lands in the village on lease, a suit for rent by the plff. against the deft. would lie in the Revenue Court and not in the Civil Court.

The expression "the inamdar in the exception to S. 8 must be read in its strict sense as equivalent only to the owner of the entire interest in the inam and the exception should be treated as applicable only to Sub S. 1 of S. 8 (*Oldfield and Sadasiva Iyer, JJ.*) RAJACHARI v. MANAGER TIRUMUGOOR DEVASTHANAM.

41 Mad. 724=34 M. L. J. 419=  
(1918) M. W. N. 566=  
7 L. W. 568=45 I. C. 71

—Ss. 3 (1) and 40 (3)—*Commutation of rent—Basis for fixing rent, what is—rent for 10 years, when to be, computed from Swamibogam—Pattah—rent agreed upon between parties—If parties can go behind same—Market price. See (1917) DIG. COL. 829: SIVANUPANDIA THEVAR v. MEENAK SHISUNDARA VINAYAGA* 41 Mad. 109=  
34 M. L. J. 139=6 L. W. 412=  
43 I. C. 498.

—S. 3, (11) (a) — *Rent — 'Mathiri Kasavu'—'Sadalarwar'—Not illegal cess.*

'Mathiri Kasavu' and 'Sadalarwar' are charges incidental to the tenure of the land and payable with the rent. (*Sadasiva Iyer and Bakerwell, JJ.*) PRAYAG DOSS JEE VARU v. VENKAMA NAIDU. (1918) M. W. N. 346=23 M. L. T. 137=34 I. C. 641.

—Ss 3 (16) and 20—*Tankbeds meaning—Tankbeds capable of cultivation—Right of landlord over.*

In using the expression tank-beds in S. 3 (16) of the Madras Est. Land Act the Legislature was alluding to such class of tank beds as are cultivable, i. e., as are capable of being cultivated when the tank has become dry or when there is no water in the tank for certain years.

Where tank-beds are capable of being cultivated or used in any such manner, the rights of the landholders over them are not affected by the enactment of S. 20 of the Act. (*Aldur Rahim and Bakerwell, JJ.*) BOLUSWAMY v. VENKATADRIAPPA RAO.

47 I. C. 594.

—S. 4—*Land left waste by tenant—No waram system—Liability for rent—Exemption by reason of contract or custom—Legality—Test of reasonableness of custom.*

## MAD. ESTATES LAND ACT, S. 5.

*Held*, that in a case where the varam system of payment of rent was in vogue and the landlord claimed rent for lands left uncultivated by the tenant, the landlord was entitled to claim rent for land left uncultivated unless the tenants established (1) a contract or custom exempting them from payment of rent for lands allowed by them to be waste or (2) that the lands were so left waste without their fault. *Per Sadasivaiyer, J.*:—A custom to let lands lie waste (without regard to reasonable land without regard to good or bad seasons and existence or absence of facilities for irrigation) for indefinite periods at the tenant's or servants will and pleasure with absolute freedom from liability to payment of any rent is not a reasonable custom which can be recognised by any court. (*Sadasivaiyer and Spencer, JJ*) RAMASWAMI SERVAIGARAM. v. ATHIVARAHACHARIAR 23 M. L. T. 183=

(1918) M. W. N. 340=7 L. W. 471=  
44 I. C. 663.

—Ss. 5, 125 and 132—Sale in execution of decree for rent—Encumbrances, extinguishment of.

A sale in execution of a decree for rent in a Revenue Court passes the property to the purchaser free of all encumbrances except those specified in S. 125 of the Mad. Est. Land Act. (*Phillips and Kmraraswami Sastri, JJ.*) PANANGIPALLI SURANNA v. VENKATASURYANARAYANA. 35 M. L. J. 443=

(1919) M. W. N. 25=48 I. C. 794.

—Ss. 6 (2) Expl. 45, and 163—Revenue Court—Jurisdiction of—Suit to recover rent—Ryot's land—Person in possession under legal right or as trespasser.

Under Ss. 45 and 163 of the Estates Land Act read with explanation to S. 6 cl. (3) the Revenue Court has jurisdiction to entertain a suit to recover rent against persons within an estate who occupy raiyati land whether as regular tenants or as trespassers. (*Seshagiri Aiyar and Napier, JJ.*) KAMULU AMMAL v. ATHIKARI SANGLI SUBBA PILLI. 35 M. L. J. 11=45 I. C. 615.

—S. 8 cl. (1) — Applicability—Merger Inamdar—Union of Kudivaram and melvaram interest — Effect—Inamdar under liability to pay Kattubadi to Zamindar—Occupancy right—Inamdar's right when tenant has none.

Where an inamdar of a portion of melvaram of an estate after the permanent settlement was found to own also the Kudivaram interest in the land; held assuming the finding to be correct that S. 8 cl. (1), applied and the effect of such union was that occupancy right ceased to exist and there was only the Melvaram left in the land-holder. Thus to whosoever the land-holder thereafter lets the land to, he comes in not as tenant of occupancy right but as a ryot of ryoti land within S. 6 (1). The mere fact that the inamdar has to pay some-

## MAD. ESTATES LAND ACT, S. 13.

thing by way of rent to Zamindar cannot make his interest as land-holder anything less than "entire interest" within the meaning of S. 8 cl. (1) since the ryot has to pay rent to the inamdar alone as land-holder.

The words "entire interests" were intended to exclude such interests as those of a mortgagor.

The 3rd defendant who was admitted as a lessee and was in possession at the date of the passing of the Act acquired the occupancy right therein under S. 6 of the Act.

*Napier, J.*—The Inamdars did never acquire the occupancy right in the land in the sense that they had a permanent right of occupancy. There is no presumption that the occupancy right is in the inamdar where it is shown that the tenant had not acquired occupancy right. The true test is cultivation and where that is not shown the inamdar could not acquire the occupancy rights under the Act.

The view of Miller, J. in 38 Mad. 843 diss. (*Abdur Rahim and Napier, JJ.*) DUDDAMPUDI VENKATARAYUDU v. BIKKINA SUBBARAYUDU. 24 M. L. T. 376=

(1918) M. W. N. 643=8 L. W. 599.

—S. 8 (1) and (2) and exception—Applicability of exception to cl. 1 and 2—"Inamdar" in exception, meaning of. See MAD. EST. LAND ACT, S. 3 (2) (d).

34 M. L. J. 419.

—Ss. 9, 163 and 153—Old waste—Suit by landlord to eject a non-occupancy ryot—Forum. See (1917) DIG. COL. 833; YELIKAPALLE VENKAYYA v. VENKATARAMAYYA 33 M. L. J. 757=43 I. C. 711.

—S. 13 (3)—Improvement by tenants before the Act—Enhanced rents—Continued payments for many years—Implied agreement to pay.

Lands in the occupation of ryots in the Karvetnagar estate had from time immemorial been irrigated from wells sunk at their own expense on other land of the landholder. The landholder was not charging rent for the sites of the wells though he might legally have done so and the ryots had been paying increased garden rates from time immemorial. On the question being raised that by virtue of S. 13 (3) of the Madras Estates Land Act the ryots were not in spite of any usage or contract to the contrary bound to continue to pay the increased garden rates as the wells were improvements made at their sole expense.

*Held*, S. 13 (3) of the Estate Land Act would not affect the liability to pay enhanced rents if the improvements were made before the Act, and if there had been a contract between the landlord and the tenant, entered into before the passing of the Act, to pay at such rates.

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An implied contract of this nature may be presumed from a continued payment for a number of years at such rates. 39 M. 84: 28 M. L. J. 186 toll (*Sadasiva Iyer and Bakewell, JJ.*) PRAYAGA DOSS JEE VARU v. VENKAMA NAIDU. 23 M. L. T. 137= (1918) M. W. N. 346=44 I. C. 641.

—S. 20—Tank-beds cultivable—Right of landlord over. See MAD. EST. LAND ACT, SS. 3 (16) and 20.

47 I. C. 594.

—S. 26—Contract not covered by—Objections to—Validity of—Jurisdiction of Revenue Court to hear and adjudicate. See (1917) DIG. COL. 834: SETHURAMA AIYAN-GAR v. SUPPIAH PILLY.

41 Mad. 121= 33 M. L. J. 599=42 I. C. 951.

—S. 26—Proper rate—Presumption of—Lower rate paid under contract with Land holder if binding on successor—Decision between previous holder and tenant as to rate of rent, not res judicata in suit against successor.

In a muchilisa, a faisal rate was specially mentioned but it appeared that the ryot had been paying over a long period a lower rate called jamabandi rate. Held, that although there was no presumption raised by the Estates Land Act as in S. 11 of Act VIII of 1865 yet the faisal rate should ordinarily be taken as the proper rate that could be levied on the land. In the absence of proof of the existence of the grounds specified in S. 26 (1) of the Madras Est. Land Act at the date of suit, any contract as to the lower rate with the previous holder cannot be binding on the successor. In respect of the right of enhancement the claim of a mittadar is peculiar to himself and prior mittadars are not persons under whom the successor claims litigating under the same title. Hence a decision as between the previous holder and the plf. as to the rate of rent is not res judicata as to the rate of rent in a suit against the successor. (*Bakewell and Phillips, JJ.*) KARUPPA KAVUNDAN v. NARAYANA CHETTIAR.

(1918) M. W. N. 188=24 M. L. T. 35= 7 L. W. 376=45 I. C. 406.

—Ss. 26 Cl. (1) 46, 163 and 6 (2)—Grant by Zemindar for cultivation—Indefiniteness as to area and identity of land—Validity of grant as against successors of grantor, conditions—Onus of proof.

A grant to a person of the right for all time to come of cultivating whatever extent of land he likes and whatever he likes does not convey a heritable right on the grantees. And were such a grant is made by a Zemindar, it is not available against his successors, unless the grant is one made for the purpose mentioned in S. 26 cl. (1) of the Estates Land Act, the burden of proving that the grant was made

## MAD. ESTATES LAND ACT, S. 46.

for such a purpose being on the tenants. (*Seshagiri Iyer and Napier, JJ.*) KAMULAM-MAL v. ATHIKARI SANGALI SUBBA PILLAI. 35 M. L. J. 11=45 I. C. 615.

—S. 40—Commutation of rent—Duty of Collector—Appeal forum.

S. 40 of the Mad. Est. Land Act is distinct and imperative and where once the Collector finds that commutation should take place, he is bound to proceed to determine the money rent and the time for which the commutation should have effect. The Collector is not entitled to dismiss the suit on the ground that it is not possible to determine the rate on the evidence available. An appeal lies to the Dt. Court against a decree of the Collector under S. 40 of the Mad. Est. Land Act only where the decree determines the sum to be paid as money rent or the time from which the commutation shall take effect and not otherwise. (*Mr Butterworth.*) PETRO KOIBOLYA PRASAD GOSWAMI v. ARJUNA GOWDA. 43 I. C. 63.

—S. 40 (2) and (3)—Commutation of rent—Considerations to be taken into account in making the determination—Tenant's plea that rents actually levied during decennial period were in excess of what was legally due—Duty of Court to consider—Maramut charges if within the section.

S. 40 of the Estates Land Act was intended to prove for something more than a mere arithmetical calculation of averages or application of a market price to commute grain rent into money. The Collector in determining the rent to be paid is bound to consider and adjudicate on the ryots' plea that the rents actually levied during the decennial period were in excess of what was legally due to the landlord.

Maramut charges are not rent in kind or otherwise with in the purview of S. 40 (2) of the Madras Estates Land Act. (*Ayling and Phillips, JJ.*) PAYDI APPALA SURYANARAYANA v. INUGANTI RAJAGOPALA RAO. 35 M. L. J. 547.

—Ss. 45 and 163—Suit to recover rent against persons occupying ryoti land in an estate, whether as tenants or as trespassers—Suit maintainable in Revenue Court. See MADRAS ESTATES LAND ACT, SS. 6 (2) EXPN. ETC. 35 M. L. J. 11.

—Ss. 46 (1), (3) and 189—Jurisdiction of Collector where no dispute as to rate of rent—Jurisdiction of Collector to confer occupancy rights on one who is a non occupancy ryot—Jurisdiction of Civil Court.

If there is no dispute about the rate of rent under the proviso to S. 46 (1) of the Est. Land Act, there is nothing in S. 189 or in the schedule to the Act to confer jurisdiction on the Collector as a Revenue Court to dispose of

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applications for settlement of rent or, must the jurisdiction of the Civil Court

Under S 46 (3) of the said Act, the right to apply for a permanent right of occupancy is conferred only on a non-occupancy ryot and the power conferred on the Collector to execute an instrument conferring it is subject to the same limitation. If he purports to confer occupancy right, he acts *ultra vires* and the jurisdiction of the Civil Court is not ousted. (Wallis, C.J. and Sadasiva Aiyar, J.) MADURA DEVASTHANAM v KONDAMA NAICKEN

23 M. L. T. 352=47 I. C. 858.

—Ss. 125 and 132—Execution of decree for arrears of rent—Annulment of incumbrances, except those specified in S. 125 of the Act. See MAD. EST. LAND ACT. SS. 5, 125 AND 132.

35 M. L. J. 443.

—Ss. 132 and 125 — Execution of decree for arrears of rent Sale—Encumbrances extinguishment of except those specified in S. 125. See MAD. EST. LAND ACT SS. 5 125 AND 132.

35 M. L. J. 443

—S. 185—Evidence of letting as private land after July 1890—Admissibility of—Presumption—Rebuttal.

In a suit for ejectment of a tenant the question was whether S. 185 of the Act permitted only specific kinds of evidence to be adduced in proof of the allegation that certain land was the private land of the land holder.

Held, S. 185 of the Estates Land Act does not exclude any evidence of letting as private land after July 1890. It is open to the land lord to produce any other evidence which may be relevant to his purpose (1914) M. W. N 756 foll. 86 Mad 168 diss.

S. 185 clearly raised a presumption in favour of the debt but the question that has to be considered is whether the evidence which has been adduced by the plff. is sufficient to rebut the presumption. (Abdur Rahim and Oldfield JJ.) APPA RAO v. KAVERI.

23 M. L. T. 154=(1918) M. W. N. 171=7 L. W. 271=44 I. C. 519.

—S. 189—Jurisdiction of Collector in cases where there is no dispute as to rate of rent or to confer occupancy right on a non-occupancy raiyat, none. See MAD. EST. LAND ACT, SS. 46 (1) AND (3) AND 189.

23 M. L. T. 352.

—Ss. 189 and 77 — Jurisdiction of Revenue Court—Allegations in the plaint alone to be considered.

When the allegations in the plaint bring the case with S. 77 of the Estates Land Act the suit must be filed in the Revenue Court and the jurisdiction of the Court will not depend upon any pleas the defendant might raise. The fact that the Court may have to

## MAD. ESTATES LAND ACT, S. 192.

go into complicated questions will not affect the jurisdiction of the Revenue Court. (1910) M. W. N. 431 foll. (Spencer and Kumaraswami Sastri JJ.) VENKATA RAMAYYA v. CHAKKLI VEERASWAMI GADU

23 M. L. T. 251=(1913) M. W. N. 327=

7 L. W. 508=34 M. L. J. 309=

45 I. C. 471.

—Ss. 192 and 205—Interlocutory order of Revenue Court in a suit for rent—Jurisdiction of the High Court to revise such order—Board of revenue powers of C. P. Code S. 115, O 22 R 3—Dispute as to who is the proper legal representative—Duty of Court to inquire and decide.

It is the High Court and not the Board of Revenue that has jurisdiction to interfere in revision with interlocutory orders of Revenue Courts in suits the final decree in which is appealable. C. K. P. 945 of 1918 diss.

Per Ayling, J. —S. 205 of the Mad. Est. Land Act has application not to incidental orders in suits from the final decree in which the appeal lies, but to such proceedings as are specified as non-appealable in part B of Sch. I to the Act, Nos. 12 to 20.

When there is a contest between rival claimants as to who is the proper legal representative of a deceased plff. it is the duty of the Court under O 22, R 5 of the C. P. Code to enquire into the dispute and decide it on the evidence which might be adduced by the parties. An order summarily rejecting the claim of one of the parties on the ground that the investigation of the claim would involve a prolonged enquiry is sustainable and will be set aside in revision by the High Court. (Ayling and Krishnan, JJ.) PARAMASWAMI ALYANGAR v ALAMU NACHIAR AMMAL.

42 Mad. 76=35 M. L. J. 632=9 L. W. 26=(1919) M. W. N. 107.

—S. 192—Suit in Revenue Court — Appeal to District Court—Order of that Court directing return of plaint for presentation to proper court—Appeal to High Court—C.P.C. O 43, R. 1 — Applicability to suits under Estates Land Act—Practice—Appeal under O. 43, R. 1, C. P. C., converted into revision under S. 115.

O. 43, R. 1 of the Code of Civil Procedure. 1908 which gives a right of appeal against an order passed under O. 7, R. 10 thereof is inapplicable to suits filed in Revenue Courts under the Estates Land Act.

Where in an appeal in a suit under the Estates Land Act the District Court held that the suit was not cognisable by the Revenue Court and directed the plaint to be presented to the proper court, held, that no appeal lay to the High Court against the order of the District Judge.

Their lordships however treated the appeal as a Revision Petition under S. 115 of the Code. (Spencer and Kumaraswami Sastri, JJ.)

## MAD. ESTATES LAND ACT. S. 205.

VENKATARAMAYYAR v. CHAKALI VIRASWAMI GADU.  
41 Mad 554=  
34 M. L. J. 309=23 M. L. T. 251=  
(1918) M. W. N. 327=7 L. W. 5.8=  
45 I. C. 471.

—S. 205—Scope of Section not applicable to interlocutory orders in suits the final decree in which is appealable but to such proceeding as are specified as non-appealable in part B of Sch I to the Act Nos. 12 to 20  
See MAD EST, LAND ACT SS. 192 AND 205  
35 M. L. J. 632

MADRAS FOREST ACT, (V OF 1882) S. 26—  
Scope of—Saving of existing rights—Conviction without enquiry into rights alleged—Illegality of.

S. 26 of the Mad. Forest Act does not empower the Government to regulate the use of the land which is dealt with in Chap. III to the detriment of any rights existing in any individuals and communities. 42 I. C. 724, 22 M. L. T. 211 and 18 Cr. L. J. 996 foll.

Where the residents of a village claim the right of pasturage and the right to cut fuel, a conviction under S. 26 without any enquiry into these allegations is illegal. *Abdur Rahim and Napier, JJ.* THATHA PILLAI v. EMPEROR. 45 I. C. 564=19 Cr. L. J. 600.

## MADRAS HEREDITARY VILLAGE OFFICES ACT, (III OF 1895) Ss. 21 and 13—Village headman—Creation of office of—Preferential claim to office—Suit to establish—Claim for emoluments wrongfully received—Jurisdiction of Civil Court—Madras Proprietary Village Services Act, S. 15 Sub Ss. 1 and 3—Appointment by Revenue Officer—Appeal to Collector or Board of Revenue if competent

The prohibition contained in S. 21 of the Hereditary Village Office's Act against Civil Courts considering or deciding any claim to succeed to hereditary village offices does not apply to a claim to be appointed to any of those offices on its creation, as for instances for new offices are created in pursuance to S. 15 of the Proprietary Estates Village Services Act on the regrouping or amalgamation of proprietary villages the Courts have jurisdiction to try such claims. But claim for emoluments of the office is barred from the cognizance of a civil court.

The office of Headman (Nattamaigar) though formerly held by one man has been in several cases in recent times held by two persons of whom one exercises the police and magisterial functions. In such a case both the officials can be called headman and when a person has to be selected for a new office created under S. 15 of Act II of 1894 from the families of the last holders of the abolished offices the selection may be made from the family of the Old Revenue officer or from that of the police and magisterial officer.

If a proprietor fails to make an appointment as required by S. 15 (1) of Act II of 1894, the

## MAD. IRRIGATION CESS ACT, S. 1.

power of appointment vests by S. 15 (9) in the Revenue officer in charge of the division; the Dt. Collector and Board of Revenue have no power to hear appeals from the action taken by the Revenue Officer or to set it aside.

*Per Napier, J.*—It is not open to a man on the ground of his being eligible for the office to ask for a declaration that the person appointed is not a person qualified to hold the office 33 M. 208 Commented on. *Sadasiva Aiyar and Napier JJ.* KRISHNASWAMI NAIDU v. AKKULAMMAL.

24 M. L. T. 489=9 L. W. 90=1919)  
M W N 29.

## MADRAS IRRIGATION CESS ACT (VII OF 1865), S. 1—Levy of water cess—Exercise of riparian rights—Riparian lands—Right of Government to levy cess—Exemption—Engagement for use of water.

Lands which are not on the banks of a natural stream, e.g., which are half a mile distant from it, are not riparian lands. A person who is not a riparian owner is liable to pay water cess to the Government for irrigating his lands with water of a stream or river.

*Per Sadasiva Iyer, J.*—Having regard to the customs and the necessities of a tropical agricultural country like India, Indian Courts should be liberal in recognising irrigation rights as natural rights of as strong a character as any other, provided the lower riparian owners are not injured and the equality and the wide participation of the benefits of the natural stream are not interfered with to an unreasonable extent. In India riparian land must be confined to the land which is on the bank of the stream or which extends from that bank to a reasonable depth inland. A depth of more than half a furlong would usually be unreasonable. The right of a riparian owner is not restricted to lifting up of water from a natural stream and carrying it at once to the land, but extends to the temporary storage of the water in wells before carrying it on to the irrigated lands.

Government have no right to levy assessment under the Cess Act from a person exercising riparian rights, whether the bed of the stream whose water is used by an inamdar or a Zemindar to irrigate his riparian lands bordering on a natural stream belongs wholly to the Government or partly to the Government and partly to the inamdar or Zemindar or wholly to the inamdar and the Zemindar.

*Per Phillips, J.*—Certain lands were, at the time of the inam settlement, irrigated by a tank and wells unconnected with a river which was half a mile distant from the lands. These irrigation sources were taken into account for the purposes of enfranchisement and there was no agreement between the owner of the land and the Inam Commissioner for freedom from

**MAD. LAND ENCROACHMENT ACT, S. 3.**

water-tax *Held*, that the owner cannot claim the use of the river water by virtue of an implied agreement and is liable for water cess for its use. 33 M.L.J. 144; 21 C.W.N. 10-9; 40 Mad. 885 cons. (*Sadasiva Iyer and Phillips, JJ.*) **EMANI LAKSHMINARASU v. SECRETARY OF STATE FOR INDIA.** 34 M. L. J. 223=23 M. L. T. 235=7 L. W. 1=43 I. C. 113.

**MADRAS LAND ENCROACHMENT ACT (III OF 1905) S. 3**—Levy of penal assessment—Public having a right of way over a person's private land—Pathway obstructed by owner—Right of Govt. to levy penal assessment. See (1917) DIG. COL. 841; **ALAUDIN SAHEB v. SECY. OF STATE.**

6 L. W. 436=45 I. C. 30.

—S. 14—*Eviction proceedings under the Act*—"Persons deeming themselves aggrieved by"—Meaning of—Land in possession of tenant—*Eviction proceedings under Act in respect of*—Suit by landlord for recovery of land from Secretary of State—Limitation—Starting point—General Law of Limitation—Application—Scope of S. 14.

In a suit to recover from the Secy. of State for India in Council a plot of land with damages for the demolition of a cattle-shed thereon a plff. claimed to be the owner of the suit plot and of the cattle-shed on it and alleged that while the plot was in the possession of a person to whom he had leased it out he (tenant) was wrongfully evicted therefrom and the cattle-shed on it demolished by deft. and his subordinates in pursuance of proceedings under the Mad. Land Encroachment Act. It also appeared that though plff. was not served with notice under the Act, he himself applied to the Sub-Collector against the notice served on his tenant and subsequently sent a lawyer's notice to the Collector against it, all before eviction. *Held*, that plff. was a person deeming himself aggrieved by proceedings under the Act within the meaning of S. 14 of Madras Act III of 1905; and that the suit fell within the scope of S. 14 and was governed by the 6 months' rule of limitation provided for by it and not by the general law of limitation.

Per *Krishnan, J.*—S. 14 is wide enough to include a claim for the recovery of possession.

Though a person may not be a party to the proceedings resulting in the order for eviction and therefore not affected by it, if his rights are subsequently invaded by the actual eviction itself he will be a person aggrieved by the eviction proceedings within the meaning of S. 14 (*Spencer and Krishnan, JJ.*) **THE SECRETARY OF STATE FOR INDIA v. SAMI CHETTIAR.** 35 M. L. J. 410=8 L. W. 432=

(1918) M. W. N. 678.

**MADRAS PERMANENT SETTLEMENT REGULATION (XXV of 1802)**—Effect of—Land

**MAD. RENT RECOVERY ACT, S. 11.**

held on military tenure—*Pauliem*—Issue of sanad—Conversion into Zemindari tenure—Removal of restriction on alienation—Military service, abolition of. See **HINDU LAW, IMPARTIBLE ESTATE.** 7 L. W. 36.  
—Omission to issue sanad under—Effect. See **LAND TENURE, PALAYAM.**

41 Mad. 749.

**MADRAS PROPRIETARY ESTATES VILLAGE SERVICE ACT (II OF 1894) S. 15**—Office of head-man—Appointment of the Revenue officer in charge of the division—No appeal to the Board or the Collector of Revenue See **MADRAS HEREDITARY VILLAGE OFFICER'S ACT, SS. 21 AND 23.**

24 M. L. T. 489.

**MADRAS REGULATION (X of 1831) S. 2**—Scope of—Sale of minor's ryotwari property for arrears of revenue—Estate not under Court of Wards—Revenue Recovery Act. S. 59, inapplicability of. See **MADRAS REVENUE RECOVERY ACT, SS. 59 AND 63.**

45 I. C. 596.

**MADRAS RENT RECOVERY ACT (VIII OF 1895) S. 11**—Rates of rent—Contracts paramount to status and usage—Contracts implied from bare payment and acceptance of rent—Consideration for promise to pay necessary.

Under S. 11 of the Madras Rent Recovery Act the rent payable by a tenant to his landlord is determined primarily by contract which may be either express or implied. Failing such contract resort is had, when no settlement has taken place to local usage but if such usage establishes a proper rent, either party may require resort to the warum customary in the village for the division of the crop. Failing proof of such customary warum it is the Collector's duty to fix the rent. All these latter methods however are only applicable in cases where no contract is proved.

The expression 'implied contract, in the section is an English term of art, and must be so construed: it involves the legal incident of some consideration moving from the landlord, as that incident is understood in the English law.

A number of tenants had for years paid rent at the rate of four fanams, which was the prevalent rate for dry lands. At various dates, having dug wells at their own expense, they took up gardens cultivation and were thereafter charged, and for years paid rent at the rate of 8 fanams prevailing for wet lands. For fasli 1912 however they refused to accept pattahs at that rate. It was found, in view of the long continuance of payments at 8 fanams rate, that there was an implied contract to go on paying that rate but that there was no consideration for the new promise, the

## MAD. REVENUE RECOVERY ACT, S. 25.

land being already held on a contract to pay 4 fanams.

*Held* that the implied contract was not legally enforceable and that the ryots were entitled to pattas at the old (4 fanams) rate. (Lord Sumner.) **RAJA JAGAVEERA v. ALA WARASA ASARI.** 36 M. L. J. 49=

23 C. W. N. 225=(1918) M. W. N. 732.  
45 I. A. 195=48 I. C. 907 (P. C.)

**MADRAS REVENUE RECOVERY ACT (II OF 1864) S. 25—Sale for arrears of revenue—Setting aside—Fund—Combination among bidders—Service on registered pattadar and not on real owner.**

An agreement between certain bidders before the sale that they would not bid against each other or that they would divide the property among themselves after the sale would not be a ground for setting aside the sale. 28 Mad. 327 foll.

*Quære*:—If fraud would be sufficient reason to set aside a sale under Act II of 1864.

Per *Oldfield, J.*—If the real owner suffer the registry to stand in the name of another, he puts him forward as the ostensible owner and as between him and the Government the service upon the pattadar must be taken in law to be sufficient service upon the real owner 7 Mad. 405 foll. (*Abdur Rahim and Oldfield, JJ.*, *MANAKARI VENKAPPA CHARI v. HOLLAGUNDI POMPANA GOWD.*)

23 M. L. T. 297=(1918) M. W. N. 191=  
7 L. W. 372=45 I. C. 474

—Ss 37 A 38 (1) Proviso and 59—*Madras Regulation I and II of 1803—Revenue sale—Confirmation of by Deputy Collector—Approval by Collector under S. 3 of Mad. Regulation 7 of 1828—Cancellation of sale by Collector on the direction of the Board of Revenue—Suit to set aside order and for possession—Limitation.*

Under the provisions of Madras Act II of 1864, the debt's land was sold for arrears of revenue and purchased by the plf. A petition under S. 37 A of that Act to set aside the sale was dismissed, as also petition under S. 38 (1). These two orders were passed by the Deputy Collector and his order of confirmation of sale was approved by the District Collector under S. 3 of the Madras Regn VII of 1828. By this confirmation the order of confirmation under S. 38 (2) of Act II of 1864 became final. Later on, however, the Board of Revenue directed the Collector to cancel the sale and he cancelled it accordingly. In a suit by the plf. to set aside the order cancelling the sale and for possession, instituted more than six months after the date of the order, *held* that the suit should be decreed.

The order cancelling the sale though purporting to be passed by the Collector was really the order of the Board of Revenue who had no power to pass such an order under Act

## MAD. REVENUE RECOVERY ACT, S. 29.

II of 1864. The power of general superintendence over Collectors given to the Board of Revenue by Regulations I and II of 1803, did not authorise the latter to direct the Collector to pass a special order contrary to what already he had done.

The order under S. 38 (3) of the Revenue Recovery Act, having been passed by the Deputy Collector and confirmed by the Collector became a final order passed by the Collector within the meaning of S. 38 (3) and neither he nor the Collector had power under the Act to pass any further order. The proviso to S. 38 does not give power to set aside a sale after it had been confirmed under the first part of the section.

The order setting aside the sale was, in effect, a view of the previous order confirming the sale and was passed wholly without jurisdiction and not under any power confirmed by the Act. Consequently a suit to set aside the order need not be brought within the period prescribed by S. 59 of Act II of 1864. (*Phillips and Krishnan, JJ.*) **SUNDARAM IYENGAR v. RAMASWAMI IYENGAR.**

41 Mad. 955=35 M. L. J. 177=  
24 M. L. T. 207=3 L. W. 289=47 I. C. 692.

—S. 42—Applicability of, to sales under the Land Improvements Act S. 7 (1) (c). See LAND IMPROVEMENTS LOANS ACT.  
34 M. L. J. 446.

—Ss 59 and 63—*Madras Regulation X of 1831, S. 2—Sale of minor's property for arrears of revenue—Suit to set aside sale—Omission to bring, effect of—Regulation X of 1831, applicability of, to ryotwari estates of minors—Patta in mother's name.*

A sale of a minor's property under the Madras Revenue Recovery Act is not a proceeding to which S. 59 of the Act is applicable so as to compel the aggrieved parties to sue within six months of the sale: S. 59 is inapplicable to cases protected by Regulation X of 1831.

Regulation X of 1831 does not only apply to such estates of minors as are ordinarily taken charge of by the Court of Wards. Ryotwari lands owned by minors also come within the protection of the Regulations.

Where the patta erroneously stands in the name of the minor's mother, that fact does not preclude the minor from invoking the aid of Regulation X of 1831.

Per *Spencer, J.*—S. 2 of Regulation X of 1831 includes the estates of minor-sale proprietors not under the charge of the Court of Wards. This section and the pre-ambles to the Regulation and the foot-note to S. 20 of Regulation V of 1804 make it clear that the prohibition extends to minors' estate of every description not subject to the jurisdiction of the Court of Wards. The section does not apply to minor members of a joint Hindu family governed by the Mitakshara Law, who have by

## MAD. REVENUE RECOVERY ACT, S. 59.

birth merely an undivided interest in the estate (*Wallis, C. J., Sadashiva Iyer and Spencer, J.J.*) *SAMINATHA AIYAR v. GOVINDASWAMI PADAYACHI*.

41 Mad. 733=34 M. L. J. 536=  
(1918) M. W. N. 409=8 L. W. 37=  
24 M. L. T. 72=45 I. C. 595 (F. B.)

—S. 59—Revenue Sale—Confirmation and approval by Dy. Collector and Collector respectively—Final—Subsequent cancellation of sale by Collector under orders of the Board of Revenue—Suit to set aside order and for possession whether governed by S. 59.

35 M. L. J. 177.

—S. 59—Revenue sale—Sale without notice to defaulter and purchase from him—Suit to set aside—Limitation.

Plff. was a private purchaser of the property in suit. His vendor had obtained a loan from the Government under the Agricultural Improvements Act. Some instalments were unpaid and the property was brought to sale in 1910 under the Revenue Recovery Act but without notice to the plff. or his vendor. The plff. came to know of the revenue sale in 1912, when the purchaser tried to get possession under the Act. The plff. brought the suit in June 1913 more than six months after the order for possession and three years after the sale.

Held, that failure to give notice of the sale did not deprive the Collector of jurisdiction to effect the sale but was a mere irregularity and the sale was one that ought to have been set aside within six months.

Held, also, that in any case as the plff. had knowledge of the sale more than six months before suit, the suit was barred under S. 59 of the Revenue Recovery Act. (*Seshagiri Iyer and Napier, J.J.*) *VADLUR CHINNA NAGI REDDY v. DEVINENI VENKATARAMIAH*.

23 M. L. T. 231=(1918) M. W. N. 224=7 L. W. 468=  
45 I. C. 653.

MADRAS TOWNS NUISANCES ACT (III OF 1899), Ss. 6 and 7—Conviction under—Sovereigns found in accused's pocket and waist cloth—No proof of stake—Confiscation—Legality of. See CR. P. CODE, S. 517.

34 M. L. J. 253.

MAHOMEDAN LAW — Acknowledgment — Effect of—Strong presumption of legitimacy. See MAHOMEDAN LAW, LEGITIMACY.

43 I. C. 883.

—Acknowledgment — Legitimacy presumption of, when—Family repute—Evidence of. See (1917) DIG. COL. 848; *SADIK HUSSAIN KHAN v. HASIM ALI KHAN*.

38 All. 625=14 A. L. J. 1248=  
18 Bom. L. R. 1037=21 C. W. N. 130=  
25 C. L. J. 363=31 M. L. J. 605=  
21 M. L. T. 40=(1916) 2 M. W. N. 657=  
6 L. W. 558=10 Bur. L. T. 140=  
36 I. C. 104=1 Pat. L. W. 186=  
43 I. A. 212 (P. C.)

## MAHOMEDAN LAW.

—Applicability of—Halai memons—Succession and inheritance—Mahomedan Law applicable. See CUTCHI MEMONS

20 Bom. L. R. 289.

—Divorce—Post-nuptial agreement by husband not to take another wife and delegation to wife of power of divorce on breach—Validity—Breach of agreement followed by husband's suit for restitution of conjugal rights—Divorce given by wife after suit—Validity.

A post-nuptial delegation of the power of divorce is valid under the Mahomedan Law.

Where by a Kabinamah executed after the marriage, the husband undertook not to take a second wife without the first wife's permission and delegated to her the power "giving three talaks" in case of violation of the said amongst other conditions "whenever she chose" and afterwards having taken a second wife without the first wife's permission sued the latter for restitution of conjugal rights, whereupon she gave herself the three divorces according to the Mahomedan Law:

Held, that the authority to divorce was validly given and the suit must fail. (*Fletcher and Huda, J.J.*) *SAINUDDIN v. SM. LATIFUNNESSA*.

22 C. W. N. 924=48 I. C. 609.

—Dower—Claim for—Nature of obligation—Rights of wife.

Dower is a sum of money or other property to which the wife becomes entitled by marriage. It is not a consideration proceeding from the husband for the contract of marriage, but is an obligation imposed by the law as a mark of respect for the wife. The character of the obligation to pay the dower is a debt. The moment dower is settled, it becomes a recoverable debt and the wife has a lien over the property of her husband in her possession for unpaid dower. 11 W. R. 212, 2 N. W. P. H. C. R. 327 Ref. (*Seshagiri Iyer and Napier, J.J.*) *ABIDHUNISSA BIBI v. FATHI UDNI SAHIB*.

41 Mad. 1026=35 M. L. J. 468=  
23 M. L. T. 73=(1918) M. W. N. 246=  
44 I. C. 293.

—Dower—Divorce by wife in pursuance of terms of Kabinamah—Right to dower.

Where in pursuance of a Kabinamah executed before the marriage, the wife is given the power to divorce herself if the husband fails to fulfil any of the terms contained in the Kabinamah, and the wife exercises that power on the husband's failure to observe those terms, the divorce is valid and entitles the wife to sue for her dower. (*N. R. Chatterjee and Richardson, J.J.*) *SULTAN AHMED v. SAFRA KHATUN*.

43 I. C. 17.

—Dower—Prompt dower—Right to—Decree conditional on restitution of conjugal rights, if proper—Absence of consummation, effect of.

## MAHOMEDAN LAW.

The fact that a Court can make a decree for restitution of conjugal rights conditional on payment of dower does not show that a wife's decree for prompt dower can be made conditional upon her living with her husband.

Prompt dower can be demanded by a wife at any time after the right thereto has vested in her whether before or after consummation and she can refuse all conjugal rights on the part of the husband until it is paid.

The right to prompt dower vests at marriage and it can be claimed by the wife at any time thereafter. It is a debt due by the husband to the wife and its payment cannot be made conditional on the wife living with her husband. (*Scott Smith, J.*) NAWAB BIBI v. MUHAMMAD DIN. 23 P. L. R. 1918=160 P. W. R. 1918=45 I. C. 893.

———Dower—Relinquishment of, right to, by lady of 15 years of age, not valid—Age of majority. See MAJORITY ACT (IX OF 1875), S. 2. 23 M. L. T. 78.

———Gift—Essentials of—Necessity of delivery of possession to donee—Gift by grandfather to grandson in his protection, father as of being alive—Whether transfer of possession to grandson necessary—Burden of Proof.

The ordinary rule of Mahomedan Law is that a gift is not valid till it is completed by the delivery of the property so given, so far as it is capable of such delivery.

No transfer of possession is necessary in the case of a gift by a father to his infant son, the declaration of the gift being considered to change the possession of the father on his own account into possession as guardian on his son's account; and the Law is the same in every other case where the donee is a minor in the lawful custody of the donor.

In the case of a gift by a grandfather to his minor grandson, when the latter's father is alive and at the time of the gift, the minor is living with the grandfather under his care and in his custody, no express acceptance or transfer of possession is needed to complete the gift.

In such a case there is a presumption that the donor subsequently holds possession and collects the income on the minor's behalf.

The burden of proof in this case is not in the first instance on the minor or on any one who seeks to support the gift to show that the income of the property was spent for the minor's benefit. On the other hand the person who seeks to invalidate the gift must show that in spite of the gift the donor continued to deal with the property as if it was his own. (*Spencer and Krishnan, JJ.*) SUBRAMANIA IYER v. MULLA VEETIL ASSAN KOYA. 35 M. L. J. 841=8 L. W. 559= (1918) M. W. N. 742.

———Gift—Gift of corpus with reservation of usufruct, validity of.

## MAHOMEDAN LAW.

Under a deed of gift executed by a Mahomedan lady subject to the Hanafi law, the donor excepted some of the property, retaining possession over it free of rent and revenue, and stated that after her death the donee would be its proprietor and that the donor would have no power to transfer it either by mortgage, sale, or gift.

Held that even in respect of the excepted property the deed operated as one of gift, inasmuch as the donor transferred the corpus of the property to the donee, reserving for herself the usufruct for life, which was not prohibited under the Hanafi law.

Held, further, that under the circumstances the stipulation not to transfer her interests in the property during her life-time satisfied the conditions of the Hanafi law with regard to the delivery of possession.

Per *Stuart, A. J. C.*—There are three essentials of a gift under the Hanafi law declaration, acceptance and seisin. With regard to seisin, however, the rule is that where everything reasonable has been done to perfect a contemplated gift, nothing more is required. There is nothing in Hanafi law to prohibit a gift of the corpus combined with the retention of usufruct inasmuch as such a transfer does not create a limited estate. (*Stuart and Kanhaiya Lal, A. J. C.*) FAKHR JAHAN BEGAM v. MD. ABDUL GHANI KHAN. 5 O. L. J. 49=45 I. C. 307.

———Gift—Hiba-bil ewaz—Invalid condition, imposition of—Validity of gift unaffected—T. P. Act, S. 11.

The ordinary rules applicable to gifts apply to the Mahomedan Law like any other system of Law and a gift under hiba-bil ewaz is not invalidated by an invalid condition being attached to it. (*Fletcher and Shamsul Huda, JJ.*) NIAMATANNESSA v. HOSSENUDE NAZEB.

22 C. W. N. 512=27 C. L. J. 502= 45 I. C. 601.

———Gift—Hiba-bil ewaz—Inadequacy of consideration, effect of.

A release obtained by a Mahomedan husband in respect of the payment of dower due to his wife, as a sufficient consideration for a deed of conveyance executed by the husband in favour of the wife by which certain properties are handed over to her. Inadequacy of the consideration does not affect such a deed. (*Fletcher and Huda, JJ.*) ABDUL MAJID v. KHALIL. 46 I. C. 355.

———Gift—Marz-ul-maut—Hiba bil ewaz whether affected by. See (1917) DIG. COL. 846; FAZLUR RAHMAN v. MAHOMED UMAR. 3 Pat. L. W. 232=43 I. C. 196.

———Gift—Musha—Gift to two brothers one of whom is an adult and the other a minor—

## MAHOMEDAN LAW.

*Possession taken only by adult brother—Gift to minor, if valid.*

*Mookerjee, J.* In a case of gift by a Mahomedan when it is alleged that the transaction was fictitious, the Court has to rely upon the surrounding circumstances contemporaneous with the gift and the subsequent conduct of the parties concerned.

*Mookerjee, J. (Sanderson, C.J. dissenting).—* A gift of a house by a Mahomedan donor to two of his sons, one of whom is adult and the other is a minor and the adult son takes possession of it, is absolutely void.

*Mookerjee, J. (Woodroffe, J. expressing no opinion).* Under the Mahomedan Law as administered by British Indian Courts where the subject of the gift is incorporeal property not susceptible of physical possession a gift thereof may be completed by such transfer of control as may be appropriated and possible in the circumstances.

The doctrine relating to the invalidity of gifts of musha though not favoured, cannot altogether be ignored or repudiated.

*Sanderson, C.J.*—A gift to two donees one of whom is an adult and the other a minor, but not in the guardianship of the donor at the time of the gift, is valid. Where the adult son accepts the gift for himself and his minor brother at one and the same time and thereby places himself in the position of trustee or guardian for his brother, and consequently the donor will not take seizin of the property for his minor son, no 'confusion' will arise.

According to Mahomedan Law, seizin or actual possession is not necessary to complete the heba and the donor must evince his intention of making a complete transfer of the ownership in the property from himself to the donee by placing the latter in a position to enjoy it beneficially, or to make use of it consistently with its purpose, and in considering this question the relationship of the parties must be kept in view. In other words to be in a position to take possession is tantamount to taking possession: and to place the donee in a position to take possession, is equivalent to delivery of possession similarly investing with authority for that purpose is equally sufficient. (*Sanderson, C.J., Woodroffe and Mookerjee, J.J.*) *MARIAM BIBEE v. SHAIKH MAHOMED IBRAHIM.* 23 C. L. J. 306=48 I. C. 561.

———Gift—Musha doctrine of, applicability of.—Possession—Mahomedans living in Burma. See (1917) DIG. COL. 847, *ESOOF MAHOMED BHAROOCHA v. HAYA TOONNISA* 11 Bur. L. T. 6=38 I. C. 203.

———Gift—Share of property—Musha. See (1917) DIG. COL. 849 *BASIRUL HUQ v. MAHAMMAD AJIMUDDIN.* 3 Pat. L. W. 213=48 I. C. 857.

## MAHOMEDAN LAW.

———Guardian, de facto—Alienation by mother—Immoveable property—Alienation void—Powers of guardian.

Under the Mahomedan Law a mother has no power as *de facto* guardian of her infant children to alienate or charge their immoveable property.

During a father's life he is the legal guardian of his minor children, though the mother has rights as to their custody; after his death, his executor in (sunni law) is their legal guardian, or if there is no executor, their grandfather, or if he be dead his executor. In the absence of any legal guardian the duty of appointing one devolves upon the Judge as representing the Sovereign. If the mother is the father's executor, or has been appointed, she has the powers of a legal guardian, but those powers are subject to strict conditions as to immoveable property. If there is no legal guardian the person in charge of a minor (such as the mother) has power as *de facto* guardian to incur debts, or to pledge the minor's goods and chattels, for the minors imperative necessities (such as food, clothing or nursing) but has no power to deal with the immoveable property. 37 Mad. 514 disapp. (*Mr. Ameer Ali*) *IMAMBANDI v. MUTSADDI.* 45 Cal. 878=23 C. W. N. 50=28 C. L. J. 409=20 Bom. L. R. 1022=16 A. L. J. 800=35 M. L. J. 422=(1919) M. W. N. 91=24 M. L. T. 330=5 Pat. L. W. 276=47 I. C. 513=45 I. A. 73 (P. C.)

———Guardianship—Minor—Rights of mother.

Under the Mahomedan Law during a father's life he is the legal guardian of his minor children, though the mother has rights as to their custody; after his death, his executor in (Sunni law) is then legal guardian, or, if there is no executor, their grandfather, or if he be dead, his executor. In the absence of any legal guardian the duty of appointing one devolves upon the Judge as representing the Sovereign. (*Mr. Ameer Ali*) *IMAMBANDI v. MUTSADDI* 45 Cal. 878=23 C. W. N. 50=20 Bom. L. R. 1022=16 A. L. J. 800=28 C. L. J. 409=35 M. L. J. 422=(1919) M. W. N. 91=24 M. L. T. 330=5 Pat. L. W. 276=47 I. C. 513=45 I. A. 73 (P. C.)

———Guardianship—Mother appointment of, as certificated guardian of person and property of minor daughter—Mother not entitled to any legal character—Suit for declaration of invalidity of marriage of minor daughter.

Under the Mahomedan Law the mother, even when appointed certificated guardian of the person and property of her minor daughter, has no legal character within the meaning of S. 42 of the Specific Relief Act entitling her to a declaration that the marriage of her daughter with a certain person effected by her

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uncle, is not valid. (*Richardson and Beechcroft, JJ.*) SONAULLA SARKAR v. TULA BIBI.  
27 C. L. J. 603=45 I. C. 203.

———Guardianship — Paternal uncle and mother—Virgin niece—Property of.

The paternal uncle has no legal right under the Mahomedan Law to the guardianship of the property of his virgin niece, who has not attained the age of puberty, superior to that of her mother. 29 A. 10: 32 C. 444 foll. (*Battan, A. J. C.*) MAHMADKHAH v. SULTAN BEGAM.  
43 I. C. 849.

———Kazi, Office of, non-hereditary—Grant to kazi "for maintenance" meaning of.

The office of kazi is a public office of high repute but it is not hereditary, though its devolution often follows the line of inheritance.

Where a grant is made to a person as a kazi of a place the presumption is that the primary purpose of the grant is to furnish emoluments for the office of the kazi, and the mere addition of the words "for maintenance" cannot be held to divert the grant from its main purpose so as to make it heritable and divisible. (*Stanyon, A. J. C.*) MAHOMED JAFAR ALI v. MAHOMED TURAD ALI.  
46 I. C. 883.

———Legitimacy—Acknowledgment by father—Evidence of to be clear.

Clear and reliable evidence that a Mahomedan has acknowledged his children as his legitimate issue raises a presumption of a valid marriage between him and the children's mother. 10 C. L. R. 293 applied. (*Mr. Ameer Ali.*) IMAMBANDI v. MUTSADDI.  
45 Cal. 878=23 C. W. N. 50=

20 Bom. L. R. 1022=16 A. L. J. 800=

28 C. L. J. 409=35 M. L. J. 422=

(1919) M. W. N. 91=24 M. L. T. 330=

5 Pat. L. W. 276=47 I. C. 513=

45 I. A. 73 (P. C.).

———Legitimacy—Presumption of—Long co-habitation—Acknowledgment by father, effect of—Rebuttal of presumption arising from—Evidence necessary for—Child born of non-Muslim wife, if legitimate—Adoption if works legitimacy—Child begotten by Zena, if legitimate—Evidence Act, S. 113.

In all cases where marriage may be presumed from co-habitation combined with other circumstances for the purpose of conferring upon a woman the status of a wife, it may also be presumed for the purpose of establishing paternity and legitimacy. Paternity is established in the person said to be the father by proof or legal presumption that the child was begotten by him on a woman who was at the time of conception his lawful wife or was in good faith or reasonably believed by him to be such or whose marriage though irregular (*fasiq*) was not at that time been terminated by actual separation. Paternity and legitimacy

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may also be presumed by acknowledgment by the putative father, in every case where it is humanly and legally possible that he might have been the father in fact and there might have been a valid marriage between him and the mother of the acknowledged child. Where a child has been acknowledged by a Muhammadan father, the burden of disproving the paternity and legitimacy of such child lies heavily on the person who denies them. The evidence necessary to disprove the paternity and the legitimacy must be extremely cogent to displace the presumption of legitimacy, which is not an ordinary presumption of evidence but a strong rule of the Muhammadan Law.

Neither paternity nor legitimacy can be obtained by adoption and a child begotten by Zena cannot be made legitimate by the subsequent marriage of its parents before its birth, S. 112 of the evidence Act being inapplicable to Mahomedans.

The marriage of a Mahomedan with a Non-Muslim woman who is not the lawful wife of another man, is merely irregular (*fasiq*) and not altogether void (*batil*) and the children of such a union are legitimate. (*Stanyon, A. J. C.*) ZAKIRALI v. SOGRABI.  
15 N. L. R. 1=

43 I. C. 883.

———Legitimacy—Things necessary to establish—Marriage and semblance of marriage if to be disproved. See MAHOMEDAN LAW, MARRIAGE.  
23 C. W. N. 1.

———Maintenance—Shafi school—Arrears of maintenance, if in the nature of gratuity or debt—Hanafi law, if different. See (1917) DIG. COL. 851; MAHOMED HAJI v. KALIMA BAI.  
41 Mad. 211=6 L. W. 288=

42 I. C. 517.

———Marriage—Dissolution of—Apostasy, effect of.

The apostasy of a Mahomedan wife *ipso facto* dissolves the marriage, and the wife is not therefore entitled to recover maintenance from her husband. (*Prait, J. C.*) SONA ULLA v. MA KIN.  
46 I. C. 719=19 Cr. L. J. 799.

———Marriage—Legitimacy—Acknowledgment with intent to confer legitimacy—If effective when illegitimacy is established—Things necessary to establish legitimacy—Marriage and semblance of marriage if to be disproved—Concubinage, semblance of marriage—Acknowledgment for collateral object if sufficient—Onus of proof—Repudiation of acknowledgment if possible.

Under Mahomedan Law, acknowledgment cannot establish the legitimacy of a child proved to be illegitimate. It is only when it is uncertain whether there was a marriage or not or legitimacy or not that acknowledgments are effectual to establish legitimacy. 11 M. I. A. 94 at 113, 8 M. I. A. 136 at 159, 8 Cal. 410: 22,

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ALL. 289 ; 27 Cal. 801 ; 9 C. W. N. 352 and 21 C. W. N. 130 cons.

In a suit by H for recovery of the estate of a deceased Mahomedan A as the latter's son and sole heir, H's legitimacy being challenged.

*Held*, on the evidence (Per *Sanderson, C. J.*, and *Chitty, J.*) that the alleged marriage between H's mother and A had been disproved and H, proved to have been the illegitimate son of A, and no acknowledgment by A of H's legitimacy could in such circumstances confer legitimacy on H.

Per *Woodroffe, J.*—Disproof of both a marriage and a semblance of marriage is necessary to invalidate an acknowledgment valid in other respects.

That though plff had failed to prove marriage, the defts. had not disproved both the reality and semblance of marriage so as to establish that the plff. was the issue of Zina.

Per *Chitty, J.*—Concubinage is not "a semblance of marriage" in the contemplation of Mahomedan Law.

Per *Woodroffe, J.*—If mere concubinage is established there is *ex hypothesi* neither marriage nor semblance of marriage which, a proved concubinage excludes.

The evidence showing that A had acknowledged H as his "son" for the purpose of getting him admitted into certain educational institutions and had made similar acknowledgments to others for the purpose of procuring H's marriage with a ward of the Court of Wards.

*Held (per Curiam)* that there were not acknowledgments with the intention of conferring legitimacy.

Per *Woodroffe, and Chitty, JJ.*—An acknowledgment, once made and proved cannot be rebutted. It cannot even be repudiated by the man who made it.

*Woodroffe, J.*—The plff. had not established an acknowledgment in the sense of a clear intention to confer legitimacy on the plff. If he had, it might have been held that the deff. had not disproved marriage or semblance of marriage to rebut such valid acknowledgment. (*Sanderson, C. J.*, *Woodroffe and Chitty, JJ.*) *HABIBUR RAHAMAN CHAUDHURY v. ALTAF ALI CHAUDHURI.* 23 C. W. N. 1= 29 C. L. J. 60.

——— Marriage—Legitimacy—Presumption.—Co-habitation—Treatment.

Provided that the conduct of the parties be shown to be compatible with the existence of the relation of husband and wife, every presumption ought to be made in favour of marriage where there has been a lengthened co-habitation, especially in a case where the alleged marriage took place so long ago that it must be difficult, if not impossible to obtain a trustworthy account of what really occurred

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Not co-habitation simply and birth of a child, but co-habitation and birth with treatment tantamount to acknowledgment of the fact of the marriage and the legitimacy of the child, suffice to establish the marriage of the parents. (*Drake Brockman, J. C.*) *MAHOMED ALIKHAN v. SHUJAT ALI KHAN* 46 I. C. 913.

——— Marriage—Presumption of from co-habitation—Marriage with non Muslim woman irregular not invalid. See MAHOMEDAN LAW, LEGITIMACY. 43 I. C. 883.

——— Marriage presumption of—Evidence of whether long continued and exclusive co-habitation sufficient to infer a marriage.

A Mahomedan lady brought a suit for dower as the widow of a deceased Mahomedan nobleman against his heirs. The lady was the daughter of a woman of questionable antecedents and she herself led a disreputable life before she was admitted by the said nobleman into his harem. The nobleman himself had illicit connection with her. The lady alleged that she had been married to the Raja. The evidence in support of the marriage consisted of the depositions of two witnesses who were disbelieved and of long continued and exclusive co-habitation :—*Held*, that the connection between the parties being in its inception an illegitimate one it is difficult to infer a subsequent marriage from evidence of long continued and exclusive co-habitation. (*Piggot and Tudball, JJ.*) *SHABBAN BIBI v. KHALIQ SHAH.* 16 A. L. J. 754.

——— *Mars-ul-Maut*—Doctrine of, when applicable.

In the case of a gift or other voluntary disposition of property under the Mahomedan Law the doctrine of *mars-ul-maut* only applies when the gift is made during such illness. (*Richardson and Walmsley, JJ.*) *SULTAN AHAMED v. ABDUL GANI.* 45 I. C. 581.

——— *Mars-ul maut*—Effect of, on sale, gift and wakf. See MUHAMMADAN LAW, WAKF. 16 A. L. J. 158.

——— Minor—Alienation of property of, by de facto guardian—Validity—Suit by minor to set aside alienation—Restoration of benefit—Necessity.

An alienee of the property of a Mahomedan minor from his *de facto* guardian cannot enforce the alienation against the minor. But if the minor comes into court to challenge the alienation he must before re entry restore to the alienee all the benefits he derived from the alienation. (*Le Rossignol, J.*) *SARDARA v. KAUBA RAM.* 36 P. R. 1918= 7 P. W. R. 1918=44 I. C. 219.

——— Minor—De facto guardian of—Powers of alienation of.

If the acts of a mother in dealing with her minor son's estate as *de facto* guardian are

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either to the manifest advantage of the minor or for urgent and imperative necessity the court should uphold them (*Le Rossignol and Walderforce, JJ.*) **KAPURA v. SHANKAR DAS MULCHAND.** 168 P. R. 1918=48 I. C. 366.

— *Mutwalli, mortgage of the rights of, if valid and enforceable—Office if alienable at all—Public policy.*

One Ahadali, a priest of a Mahomedan shrine mortgaged his right to the office to three persons and subsequently one of the mortgagees brought a suit against Ahadali's minor son to enforce the mortgage by sale of the mortgaged turn of worship. The latter too brought a suit for getting the mortgage set aside.

*Held*, that alienation was opposed not only to the Mahomedan religion but also to public policy and therefore the mortgage cannot be enforced (*Fletcher and Huda, JJ.*) **MUNSHI SAHED BUKSH v. GOLAM NABI KHANDKAR** 22 C. W. N. 996=47 I. C. 117.

— *Pre-emption—Shiah School—No right of pre-emption when there are more than two co-sharers in the property. See PRE-EMPTION.* 16 A. L. J. 507.

— *Pre-emption—Talabs—Sale—Transaction in the form of a lease—Issues to be decided.*

Where a custom of pre-emption prevails upon sale the vendor and vendee cannot defeat the pre-emptor by dressing up the transaction in the garb of a lease. The same principle applies to the Mahomedan law.

Where a small piece of land was transferred, in the form of a perpetual lease the premium being Rs. 250 and the annual rent being two annas, and pre-emption was claimed in respect of the land under the Mahomedan Law, on the ground that the transaction was really a sale in the garb of a lease made to defeat pre-emption:—*Held*, that on the issue as to the nature of the transaction being raised by the plff. the court was bound to determine its real nature and if after considering all the circumstances, namely, the sum which was paid down, the smallness of the rent and the value of the property, it came to the conclusion that it was a sale, it must hold that the right of pre-emption arose and determine whether the demands were performed or not (*Richards, C. J. and Tudball, J.*) **MAHOMED NIAZ KHAN v. MUHAMMAD IDREES KHAN.** 40 All. 322=16 A. L. J. 233=44 I. C. 227.

— *Religious Office—Females, competency of, to hold. See RELIGIOUS OFFICE.* 41 Mad. 1033.

— *Restitution of conjugal rights—Suit for—Defence of legal cruelty.*

In a suit for restitution of conjugal rights by the husband the court found that the husband and the wife (both Mahomedans) were

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on the worst possible terms that the husband though not actually ill-treating her physically yet ill-treated her in other ways that is to say, mentally, and that by her return to his custody her health and safety would be endangered, *held*, that the wife could not be delivered over to the husband, 1 A. L. J. 318 foll. (*Piggott and Walsh, JJ.*) **HAMID HUSSAIN v. KUBRA BEGAN.** 40 All. 332=

16 A. L. J. 132=44 I. C. 728.

— *Succession—Religious office—Females, competency of, to hold—Astan—Mujavar. See RELIGIOUS OFFICE.* 41 Mad. 1033.

— *Unlawful alienation of endowed property by Mutwalli and the right of a daily worshipper to sue for declaration that alienation is void without proof of special damage—C. P. Code O. 1 R—8 Representative suit by, if lies to set aside alienation by mutwalli—C. P. Code S. 92—Scope of suit under Religious Endowments Act S. 14.*

A suit brought by two worshippers of a mosque for themselves and as representing other worshippers in the locality for a declaration that a permanent lease granted by the mutawalli is void and inoperative is maintainable, the requirements of O. 1, R. 8 of the C. P. Code having been complied with by the plffs.

No special damage need be alleged or proved for the maintainability of such a suit, since worshippers living in the vicinity of a mosque have rights to it as daily worshippers over and above those possessed by the Mahomedan public and have a more direct interest in its maintenance and in the proper administration of the properties endowed for its benefit.

S. 14 of the Rel. Endowments Act contemplates a suit instituted primarily against the Trustee, Manager or Superintendent of a mosque, temple or religious establishment or the members of any committee appointed under that Act, and the only relief that can be asked for in such a suit is a decree directing the specific performance of any act by such trustee, manager, etc., a decree for damages and costs against them and a decree directing their removal.

A suit under S. 92 of the C. P. Code is primarily a suit against a trustee and can only be instituted either on the ground that there has been a breach of trust or that direction of the Court is necessary for the administration of the trust. In the present case the mere fact that the trustee was a defendant in the suit did not attract the application of S. 92 of the C. P. Code, since no relief was claimed against him, nor the Court asked to give any direction for the administration of the trust. (*N. R. Chatterjee and Huda, J. J.*) **ASERAF ALI v. MUHAMMAD NURUJUMA.** 23 C. W. N. 115.

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—Wakf—*Marzul maut*—Applicability of doctrine to wakfs and gifts.

Where a transaction purports to be a sale, the doctrine of *Marzul maut* does not apply to it; while if it is a wakf created when the wakf was suffering from death illness it is valid to the extent of a third and that if it is a gift, it cannot take effect at all. (*Richards, C. J. and Banerjee, J.*) **FAZAL AHMAD v. RAHIM BIBI.** 40 All. 238=16 A. L. J. 158.

—Wakf by trust deed—Ownership in property not divested from date of execution of deed—Validity of wakf.

Where a Mahomedan and his wife, Shias by pursuasion purported to create a wakf by means of a trust deed, but the deed did not divest the ownership of the executants from the date of execution, held that the wakf was invalid. (*Piggott and Walsh, J.J.*) **SYED ALI RAZA v. SANWAL DAS.** 16 A. L. J. 375=43 I. C. 212.

—Wakf—Construction—Deed providing for support of grantors family and descendants—Nominal dedication for charitable purpose—Wakf illusory—Mussalmans wakf validating Act (VI of 1913) Ss. 3 and 4 whether retrospective.

Neither S. 3 nor S. 4 of the Mussalmans Wakf Validating Act is retrospective in its operation; consequently if a wakf created before the passing of the Act was illusory, and therefore invalid in the eye of the Mahomedan Law it would not be validated by reason of any retrospective operation of that Act.

A Mahomedan executed three documents purporting to make a wakf. By the first of these he made no substantial and effective dedication of the property nor did he specify the objects of the endowment; there was no effective alienation of the rights of ownership; by the second of these instruments he provided that on his death the debt, a minor who was a son of a son of his, would be mutwalli under the guardianship of the pliff, it referred to his will as laying down the manner in which the income of the property was to be spent or invested. The third document was the "will" and under it provision was made for religious and charitable purposes; but regarding it as a whole the manifest intention of the testator was to dedicate the income of the property estimated at Rs. 20,000 per annum to the advancement of the members of his family, to tie up the property against the possibility of waste, to make such investments after defraying all expenses that the estate would go on augmenting steadily; while the provision in regard to the charitable and religious purposes was ten per cent. of the total income:—

Held, that having regard to the course of the rulings of the Privy Council and of High Courts prior to the passing of Act No. VI of

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1913, no valid wakf was created. (*Piggott and Walsh J.J.*) **NAIMUL HAQ v. MUHAMMAD SUBHAN-UL-LAH.**

16 A. L. J. 841=43 I. C. 94.

—Will—Request in excess of two-thirds of property—Consent of heirs ratification.

The consent of acquiescence express or implied of the heirs to a will in excess of two-thirds of property is treated as a ratification by them of the conduct of a Mahomedan testator. Such consent may be express or may be implied from unequivocal conduct. (*Stuart and Kanhaiya Lal, A. J. C.*) **FAKHR JAHAN BEGUM v. MAHOMED ABDUL GHANI KHAN.**

5 O. L. J. 49=45 I. C. 307.

—Will—Devise in favour of non-heirs or for pious and charitable purposes. See (1917) DIG. COL. 857 **FAZLUR RAHMAN v. MAHOMED UMAR.** 3 Pat. L. W. 232=43 I. C. 196.

**MAINTENANCE**—Father, liability of, for medical expenses of child. See (1917) DIG. COL. 858: **PHAUNG THA RHI v. MI ME BOW** 11 Bur. L. T. 128=41 I. C. 689.

**MAJORITY ACT (IX OF 1875) S. 2—Breach of Promise of marriage—Section if applicable.**

A breach of promise of a marriage is a matter of marriage within the meaning of S. 2 of the Majority Act so that the Act has no application to such a matter. (*Herald, A. J. C.*) **MAUNG NYIN v. MA MYIN.** 3 U. B. R. (1918) 75=46 I. C. 421.

—S. 2—Relinquishment of claim to dower by a Mahomedan lady of 15 years of age—Age of majority according to Mahomedan Law—Transaction, if valid.

Where a Mahomedan lady of 15 years of age relinquished her right to dower when her husband was dying and subsequently sued to recover it, held, that she was not acting "in the matter of dower" when she said that she gave up her right to it, that the ordinary law of the land regarding age of majority applies to renunciation of dower, that the exception mentioned in S. 2 of the Indian Majority Act does not apply in such a case, and that the relinquishment by her before she attained the age of majority according to the Indian Majority Act does not bind her. (*Seshagiri Iyer and Napier, J.J.*) **ABIDHUNESSA BIBI AMMAL v. MUHAMMAD FATHI UDINI SAHIB,**

41 Mad. 1026=35 M. L. J. 468=23 M. L. T. 78=(1913) M. W. N. 246=44 I. C. 293.

**MAL COMPENSATION FOR TENANTS IMPROVEMENTS ACT (I OF 1900) Ss. 3 (3), 5, 6 (3), 9 (1) and 19—Improvements, onus of**

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*proof-Increased net income—Right to compensation—S. 7 contract settling amount of compensation due at the time of renewal of a kanom—Re-valuation—Appointment of a second Commissioner—Reclamation of land with water supplied by jenmi—Right to compensation to—Admissions of parties—Weight due to—Commissioner's report evidentiary value of.*

Under S. 5 of the Mal. Comp. for Tenants Improvements Act, the burden is on the tenant to prove before he claims compensation, that he or his predecessors-in-interest has made improvements. He must show that some work has been done which has added to the value of the holding and that the said work is suitable and that it is also consistent with the object with which the kanom was obtained. It is not the law, that if there were improvements on the land the tenant in possession is entitled to their value at the time of ejectment, if any person other than the landlord had made the improvements. He is entitled to the benefit of the improvements made by himself or by his predecessors-in-interest. The proposition laid down in 23 I. C. 389 that an increase in the income raises a presumption that the tenant has improved the land is too broadly stated. 17 I. C. 433 ref.

Where the kanomdar was asked to pay Rs. 8,000 (the amount fixed for improvements by the decree for redemption against the tenant in occupation) and tack on the amount to the mortgage money, held that the kanomdar was not entitled to more than that sum in respect of the improvements then existing except in so far as he has done anything since to guard, maintain or improve them. S. 7, of the Act of 1887 deals only with contracts which limit the rights of the tenant to make improvements after the date of the contract. There is nothing in the section which takes away the effect of the settlement as to compensation for improvements effected before the date of the contract. 20 Mad. 435 diss.

An order for appointing a second commissioner to assess the compensation is not a direction for re-valuation within the meaning of S. 5 (2) of the Malabar Compensation Act. Consequently the second commissioner could only take into account the value prevalent when the first commissioner made his report.

Where a tenant, relying on a contract by the jenmi to supply water at a fixed rate, reclaims the land in such a way as to make it capable of receiving the water and raises a second crop of the land, his improvement causes an increase in the value of the net produce of the holdings within the meaning of S. 9 (1) of the Act. However, in estimating the net income, the charge for water must be deducted as a part of the cost of cultivation.

Admissions of the parties to a litigation should not be lightly ignored by the Courts. 29 All. 184 ref.

\*here a commissioner is appointed in a suit, his report should ordinarily be supplied

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mented by the evidence which he gives in the case and without it, the report is of no use (Seshagiri Aiyar and Bakewell, J.J.) KUNNATH MADAMPIL KUNJUNNI v. MANNARGHAT RAMANUNNI.

35 M. L. J. 219.  
(1913) M. W. N. 666=  
43 I. C. 925.

—S. 5—"Tenant to whom compensation is due," meaning—Tender of mortgage amount into court—Amount found to sufficiently cover compensation for improvements—Liability of mortgagee tenant for mesne profits from date of tender—Statute—Interpretation—Principle reasonable or otherwise of construction—Object and preamble of Act—Proceedings in Legislative Council—Reference to—Legitimacy—Conditions. See (1917) DIG. COL. 859. PARAMESWARA AYYAN v. KITTUNNI VALIA MANNADIAR.

33 M. L. J. 591=  
43 I. C. 173.

—S. 6 (2)—Re-valuation—Appointment of a Commissioner to assess the compensation is not a direction for, within the meaning of S. 6. See MAL. COMP. FOR TEN IMP. ACT. SS. 3 (3) ETC.

35 M. L. J. 219.

—Ss. 6 (3) and 4—Malabar law—Mortgage—Redemption suit—Nature of—Preliminary and final decree if necessary.

The Malabar Comp. Act by S. 6, cl. 1, treats a suit in redemption as one in ejectment and provides only for one decree viz., a decree in ejectment, and has made some special departures from the T. P. Act and the Old C. P. Code.

The new C. P. Code, O. 34, Rr. 7 and 8 do not affect the Malabar Comp. Act and there could only be one decree passed in suits against the mortgagees in Malabar under S. 6, cl. (1) of the Act (Oldfield and Sadasiva Aiyar, J.J.) K. NANI NAIR v. KANDAN ASHTAMOORTHY NAMBU DRIPAD.

(1918) M. W. N. 551=  
8 L. W. 275=47 I. C. 914.

—S. 7.—Scope of—Contract settling the amount of compensation due at the time of renewal of a kanom—Applicability See MAL. COMP. FOR TENANTS IMPROV. ACT, S. 3.

35 M. L. J. 219.

—S. 9—Contract by jenmi to supply water at a fixed rate, reclamation of land by tenant and raising of second crop with water supplied—Increase within the meaning of S. 9.

35 M. L. J. 219.

—Ss. 9 and 11—Scope and applicability—Applicability of S. 9 to lands having no value at date of demise—Part of compensation fixed by contract—Claim for further compensation under Act—Sustainability—Contract outside Act—Validity—Tenant's right to compensation for construction of tanks and wells—Their right to value of trees of spontaneous growth.

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In a question between a Malabar landlord and the tenant as to the proper compensation for the reclamation of forest lands into "nilams" the parties would be governed by the contract between them, in all matters provided for by the contract. 40 Mad. 594 foll.

Per *Seshagiri Iyer, J.*—(1) S. 9 of the Malabar Compensation for Tenants' Improvements Act, 1900, deals only with cases where at the time of the demise, the land was of some value and an additional value is imparted to it by the tenant's labour and where at the time of the demise the land was of no value to the landlord as paddy fields but were mere forest lands subsequently converted into fields solely by the tenant's labour, S. 9 has no application.

(2) In order to attract the application of S. 9 the case must be one in which the entire valuation has to be fixed under the Act and there should be no contract between the parties providing for any portion of such valuation.

Per *Napier, J.*—(1) a Malabar tenant who has under the contract been given a certain compensation for reclamation cannot for the purpose of valuing the improvements made by construction of tanks and channels import increase in the value of the annual net produce, as a factor in ascertaining the value

(2) The improvements paid for under the contract cannot be used for the purpose of comparison under S. 9 (2) and

(3) The compensation for construction of letting, certain portion of the demised land was reserved for the landlord's use with the right to cut the trees thereon and the tenant was given right of entry on that portion only after it was denuded of trees by the landlords cutting.

*Held*, (in a suit for eviction that the tenant would not be entitled to any compensation for the value of trees of spontaneous growth standing on such portion.

*Quære*.—Whether a tenant is entitled to the value of spontaneously grown trees even on demised land. 32 M. L. J. 110 ref. (*Seshagiri Iyer and Napier, J.J.*) SAMU MENON v. RAJA VASUDEVA RAVI VARMA.

(1918) M. W. N. 141=7 L. W. 287=  
44 I. C. 242.

**MALABAR LAW**—Anubhavam tenure—Anubhavam, meaning of—Kanom held on anubhavam tenure—Redeemability of. See MALABAR LAW, LAND TENURE. 43 I. C. 379

—Devaswam—Village temple—Management of—Scheme framed by award on Submission by all villagers—Award made into decrees—Alteration of scheme—Remedy by suit under S. 92 C. P. C.—Alteration by consent illegal. See C. P. CODE, S. 92.

(1918) M. W. N. 595.

**MALABAR LAW.**

—Devaswam uralan and samudayi—Mortgage of devaswam lands—Redemption—Right to sue for—Hereditary samudayi and Hereditary Uralan—Rights of and relationship between—Limitation—Prescription—Acquisition of right of Uralan—Limitation Act of 1859—Effect.

In a redemption suit, the question arose as to who has the right to sue on behalf of the devaswam to whom the suit lands belonged. It was found that the 19th debt, who claimed to be the Uralan by purchase had been in active management of the temple till 1860 and thereafter had never instituted any suit or granted any demise on behalf of the temples, but that the plff. who was a hereditary Samudayee had been managing the temple since 1893 in open repudiation of the rights of the Uralan and had granted the demise sued on.

*Held*, that even under the Lim. Act prior to 1871, the rights of Uralan could be acquired by prescription and the 19th debt's Kovilagam must be deemed to have acquired the Uralan's right before 1860. 31 Cal. 314 foll.

*Held*, further that the relation between a hereditary Uralan and a hereditary Samudayee was not governed by the ordinary principles of agency and the latter could by open and notorious repudiation of the Uralan's right, acquire a prescriptive right of management, including the right to sue in his own name even against the Uralan. (*Seshagiri Aiyar and Napier, J.J.*) RAMAN SOMAYAJI PAD v. KUNHU KUTTI KOVILAMMA, 34 M. L. J. 344=  
23 M. L. T. 187=(1918) M. W. N. 179=  
7 L. W. 490=44 I. C. 630.

—Kanom—Arrears of rent—Melcharchdar—Duty of to collect and pay Jenmis arrears of rent—Melcharch—Assignment of, to Kanomdar—Jenmi suit by, for arrears of money had and received—Third party to contract—Right of suit. See (1917) DIG. COL. 861. PANKU MENON v. DHARMAN ACHAN.

41 Mad. 438=  
34 M. L. J. 193=22 M. L. T. 543=  
(1918) M. W. N. 98=8 L. W. 118=  
43 I. C. 625

—Kanom—Assignee of Kanom acknowledging title of the mortgagor by accepting fresh Kanom—Estoppel.

An assignee of a Kanom who acknowledges the title of the mortgagor (Jenmi) by accepting a fresh Kanom deed is estopped from denying the latter's title, although he was not let into possession by the mortgagor 40 Mad. 561 foll. 36 Bom 185 Ref. (*Seshagiri Aiyar and Napier, J.J.*) GOVINDA MENON v. KUPPAN NAMBU DRIPAD. 24 M. L. T. 472=(1918) M. W. N. 20.

—Kanom—Demesne in perpetuity with covenant—For renewal every 12 years—Validity of covenant—Olog on equity of redemption.

Per *Bakerwell, J.*—Where a Kanom deed demises the land in perpetuity and contains a

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covenant for renewal every 12 years, it amounts to a mortgage with a covenant by the mortgagor to postpone redemption for a further period of 12 years on default of redemption on the expiry of the first (or previous) period, and on payment to him of a certain sum. Such a covenant is sanctioned by usage and is valid.

Per *Phillips, J.*—A *kanom* is an anomalous mortgage within the meaning of S. 98 of the T. P. Act. as to which conditions even though they constitute a clog on redemption can be enforced. A provision for the perpetual renewal is therefore not invalid. 30 Mad. 61; 30 Mad. 300 ref. (*Bakerell and Phillips, JJ.*) KUTTIKAT v. KUNHIKAYAMMA.

23 M. L. T. 67=7 L. W. 119=  
(1918) M. W. N. 235=43 I. C. 989.

— — — *Kanom*—Held on *onubharam* tenure—Redeemability of See MALABAR LAW, LAND TENURE. 42 I. C. 379

— — — *Karnavanan*—Appointment by family *Karar*—Removal of ther.—*Karnavan* and appointment of senior—*Anandran*—Effect—Status and rights of—*New Karnavanan*—Suit for his removal on ground of misconduct—Maintainability—Removed *Karnavan* left with some rights of *Karnavan*—Effect.

A suit lies for the removal of a *karnavan* recognised as such by a family *Karar*.

Where by a *Karar* to which all the members of the *Tarwad* were parties the *Karnavan* for the time being was removed from the general management and the senior *Anandran* for the time being was constituted the *Karnavan* though the removed *Karnavan* was allowed to manage a family temple and its income, held in a suit for the removal of the newly constituted *Karnavan* that the *Karar* had the effect of putting an end to the tenure of office of the removed *Karnavan* and the appointment of the newly constituted *Karnavan* that the supercession of the removed *Karnavan's* rights by the *Karar* could not be affected by any subsequent unilateral act or expression or intention on his part and that the newly constituted *Karnavan* became a *de jure* *Karnavan* and could not be removed by suit for gross misconduct 32 M. L. J. 828 Dist. (*Wallis, C.J.*) *Sadasiva Iyer and Spencer, JJ.* CHINDAN NAMBIAR v. KUNHI RAMAN NAMIAR.

41 Mad 577=34 M. L. J.  
400=23 M. L. T. 316  
=(1918) M. W. N. 283=  
7 L. W. 543=  
45 I. C. 26 (F. B.)

— — — *Karnavan*—Debts incurred by—Injunction order restraining him from contracting loans—Loans for family purposes during pendency of order—Binding nature as against *tarwad*—Effect of injunction order in such cases.

Where, in the course of a suit by the junior members of *Malabar Tarwad* against their

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*Karnavan* for removing him from the *Karnavan's* office, an injunction was issued restraining the *Karnavan* from contracting loans, but, during the pendency of the injunction order the *karnavan* nevertheless borrowed money for the necessary purposes of the family and utilised it for such purposes, held, in a suit brought to recover the amount so lent, that, the injunction order notwithstanding, the debt was binding on the *tarwad*. 9 All. 497 25 All 481 foll. (*Abdur Rahim and Oldfield, JJ.*) PUZHAKKAL EDMOND v. MAHADEVA PATTAR. 35 M. L. J. 96=47 I. C. 778.

— — — *Karnavan*—Delegation of management—Right to resume—*Melcharth* grant of—Improvident transaction—*Melcharth* granted before expiry of the term under which land is held—Effect of—Rights of grantee—Successor if bound by the transaction.

Where the *karnavan* of a *tarwad* allows another member to discharge the duties of *karnavan*, it is open to the former to resume management at any time.

If a *karnavan* habitually grants improvident leases and thereby renders himself unable to fulfil his obligations towards the other members of the *tarwad* this would be a ground for removing him from his office but a particular lease granted by a *karnavan* cannot be declared to be void as against the lessee merely because it is not proved to be beneficial to the *tarwad*.

A *melcharth* granted by a *karnavan* before the expiry of the previous term is not *ab initio* void; but the succeeding *karnavan* will not be bound by the transaction 27 M. L. J. 175- 27 M. L. J. 690 and 27 M. L. J. 691 ref. (*Oldfield and Phillips, JJ.*) ABDULLA KOYA v. EACHARAN NAIR. 35 M. L. J. 405=47 I. C. 945.

— — — *Karnavan*—Powers of—Revival of barred debt not binding on *Tarwad*.

The powers of a *Karnavan* of a *Malabar Tarwad* are more like those of a manager of a Hindu family than those of a Hindu father and the *Karnavan* has no power to revive a barred debt against that *Tarwad*.

A mortgage executed by a *Karnavan* in payment of a decree debt which was barred by limitation at the date of the mortgage is not binding on the junior members of the *Tarwad*. (*Seshagiri Iyer and Napier, JJ.*) MANKOOTHIL CHATHUKUTTI NAIR v. KOMMAPPAN NAIR. 35 M. L. J. 380=(1918) M. W. N. 144=44 I. C. 572.

— — — *Kuzhikanom* lease for term—Expiry of term—Position of lessee after—Suit to recover possession from such lessee—Notice to quit—Necessity—Decree to be passed in such suit. See (1917) DIG. COL. 363; *THEMA v. KUNHI PATHUMMA*. 41 Mad. 118=34 M. L. J. 128=(1917) M. W. N. 784=6 L. W. 570=43 I. C. 757.

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———*Landlord and Tenant—Decree for ejectment of tenant on payment of compensation—Execution of decree, barred—Fresh suit for ejectment, if maintainable—Cause of action—Merger of, in decree.*

A landlord who obtains a decree for ejectment against a Malabar tenant on payment of compensation but allows execution of the decree to become barred by limitation, cannot institute a fresh suit for ejectment. 23 Mad. 629, diss. 25 Mad 300 ref.

Wallis, C. J.—Ordinarily when a man has a cause of action and brings a suit upon it, that cause of action is merged in the decree *transit in rem judicatum*; and then his remedy is in execution, and if he does not enforce his remedy and allows it to become barred his rights are gone. (Wallis, C. J. and Sadasiva Iyer, J.) NYNAM VEETIL MAYAN KUTTI v. VALAPILAKATH KUNHAMMAD. 41 Mad 641=34 M. L. J. 167=23 M. L. T. 156=(1913) M. W. N. 205=7 L. W. 143=44 I. C. 110.

———*Land Tenure—Anubhavam tenure—Kasom held under anubhavam tenure if redeemable—Anubhavam, meaning of.*

"Anubhavam" may be used with reference to the tenure of land and it will then *prima facie* import an irredeemable tenure, or it may be used with reference to specified money or grain rent charged on the land and in that case it will not imply any tenure in favour of the grantee.

Where the remuneration mentioned in the deed is a definite quantity of grain out of the produce of the lands the strong presumption is that only a rent charge was granted. If the grantor reserves to himself a definite quantity of the produce as rent, and whole of the produce of the lands subject only to the payment of that small rent is to be enjoyed by the grantee, the presumption is that the land itself is held under the service tenure. 27 Mad. 202 foll. (Oldfield and Spencer, JJ.) PUTHUR TARWAD KARNAVAN v. MUTHIALUR KUEARAN RABICHAN. 43 I. C. 379.

———*Maintenance allowance of female members for period during which she was living with her husband away from the tarwad house. See MALABAR LAW, TARWAD* 35 M. L. J. 509.

———*Maintenance—Right to separate maintenance—Claimant living away from tarwad house—Effect—Claimant living with her husband and maintained by him—Effect—Custom against right to separate maintenance in such cases—Proof—Onus—Quantum.*

In a suit for arrears of maintenance brought against a Malabar Tarwad by a junior member thereof who lived away from the tarwad house, but under the protection of her husband during the period for which maintenance is

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claimed. Held that she was entitled to the maintenance and that her right thereto was not conditional upon her husband being unable to maintain her.

Per Sadasiva Aiyar, J.:—As a general rule, the desirability of living with her husband is a good ground for a Nair lady living away from the tarwad house.

The onus of proving a custom that a junior member of a Malabar tarwad forfeits her claim to separate maintenance by living away from the tarwad house for the purpose of living with her husband is on the party setting up such a custom. (Ayling and Sadasiva Aiyar, JJ.) KUNHI KRISHNA MENON v. KUHKA-VAMNA. 35 M. L. J. 565=24 M. L. T. 449=(1918) M. W. N. 761.

———*Melcharth—Execution of, by agent of devaswam—Melkonondar if bound to scrutiny.*

A melcharth executed by the agent of a Devaswam is not unenforceable merely because the executant describes the nature of his control over the Devaswam.

The grant of a Melcharath by the trustee of a Devaswam is an ordinary incident of its management, the property of which the Melkonondar is under no obligation to scrutinise and the latter is not bound to enquire into the existence of any particular necessity for funds by the Devaswam or into the application of such funds by the trustees. (Oldfield and Sadasiva Iyer, JJ.) VYTHIANATHAN v. PADHMANABHA PATTAR. 45 I. C. 659.

———*Melcharth granted before expiry of the term under which land is held—Effect—Right of grantee—Successor if bound by the transaction. See MALABAR LAW, KARNAVAN.* 35 M. L. J. 405.

———*Moplah—Tarwad—Migration to Rangoon—Self-acquisitions of a member—Right of tarwad to inherit.*

The mere fact that a moplah a member of a tarwad Governed by Marumakkathayam Law has lived for a short period in Rangoon will make no difference in the law applicable to him. His estate will be dealt with in the same way as if he had lived continuously in his native country.

The self-acquired property of a member of a tarwad governed by Marumakkathayam Law devolves upon the tarwad on his death. (Twomey, C. J. and Ormond, J.) SALIKA UMMA v. MOOPANATAGATHAMU 46 I. C. 791.

———*Partition—Consent of one member not obtained—Conditional ratification of partition by will.*

In spite of the dissent of one of the members of a Malabar tarwad a partition was however effected and the share of the dissenting member was kept separate. The dissenting member never brought a suit to set aside the

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partition but on the other hand he left a will in favour of his wife and the children saying that if he did not set aside the partition by legal proceedings before death, the legatees would take the share allotted to him. In a suit for fresh partition by the wife and children of the dissenting member after his death.

*Held*, that the will was a conditional ratification of the partition which became effective when the testator died, that the ratification completed the partition and that the suit was not maintainable 29 Mad. 62 foll. (*Wallis, C. J. and Seshagiri Iyer, J.*) KALLIANI AMMAL v. NARAYANA MENON. (1918) M. W. N. 38—45 I. C. 753.

—Pre-emption—Right of otti mortgagee—If arises in involuntary sales—C. P. Code, S. 65 O. 21, R. 92—Whether consistent with ottidar's right of pre-emption.

The right of pre-emption of an otti-mortgagee does not arise in the case of involuntary sales, unless the statute under which the sale takes place provides for the exercise of such right. The statutory provisions of the C. P. Code as to sales in execution of decrees are inconsistent with the ottidars' right of pre-emption against a purchaser in court auction. 19 All. 224 foll. (*Wallis, C. J. Sadasiva Iyer and Spencer, J.J.*) VASUDEVAN v. ITTIRARICHAN. AIR

41 Mad. 582—  
34 M. L. J. 512—23 M. L. T. 302—  
(1918) M. W. N. 318—7 L. W. 547—  
45 I. C. 46 (F. B.)

—Tarwad—Decree based on compromise—Decree against karnavan—Binding nature of against tarwad.

The onus of proving that a compromise is illegal or void is on the party ascertaining it.

Where a decree is in effect against a Tarwad, the fact that Karnavan was not specially impleaded in his representative capacity will not make it the less a decree against the Tarwad.

It is not the form of the suit that is essential, but the question in each case is whether in substance the person suing or sued conducted the suit for his own benefit or representing the family of which he was the head. (*Ayling and Seshagiri Iyer, J.J.*) RAYABAPPA NAMBIAR v. KOYTAN CHABLE VEETIL. 35 M. L. J. 51—24 M. L. T. 28—8 L. W. 154—45 I. C. 489.

—Tarwad—Right of member for allowance—Nature and basis of—Female member married under Malabar Marriage Act—Claim for maintenance for period during which she was living with her husband—Maintainability—Conditions—Malabar Marriage Act (IV of 1936) Sec 17 and 18—Effect.

Where a suit for arrears of maintenance brought against a Malabar Tarwad by a female member thereof, whose marriage had been

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registered under the Malabar Marriage Act, on her own behalf and on behalf of her children was dismissed by the courts below on the ground that pft. had been maintained by 1st pft's. female member's husband who was bound to maintain them. *Held* by the High Court, reversing the decision of the courts below, maintenance could not be denied to pft's. unless circumstances showed that the tarwad was not in a position to give separate maintenance.

The right of a member of a tarwad for an allowance is an incident of co-proprietorship in the property of the tarwad and is not founded upon moral or quasi legal obligations or inability to maintain himself or herself. (*Seshagiri Aiyar and Bakewell, J.J.*) MANIKATH AMMINI AMMAL v. MANIKATHO PADMA-NABHA MENON. 41 Mad. 1075—35 M. L. J. 569—24 M. L. T. 493—48 I. C. 104.

MALABAR MARRIAGE ACT (IV of 1936) Ss. 17 and 18—Effect. See MALABAR LAW, TARWAD. 35 M. L. J. 569.

MALICIOUS PROSECUTION—Damages—Complaint to Magistrate—Search by Police—Complainant, liability of. See (1917) DIG. COL. 668: JAI PANDE v. JALDHARI RAUT. (1917) Pat 323—4 Pat. L. W. 98—40 I. C. 679

—Damages suit for—Complaint false to the knowledge of complainant—Issue of process—Trial—Acquittal—Malice, proof of.

Where a person was dragged into the original Court by reason of a complaint which to the knowledge of the complainant was false from beginning to end, but after evidence taken the accused was acquitted of all the charges made against him *held* that the cause of action for a malicious prosecution was complete and the facts afforded sufficient evidence of malice (*Tudball and Abdul Raouf, J.J.*) PUTTU LAL v. RAM SARUP. 16 A. L. J. 468—46 I. C. 190

—Damages, suit for—Favourable termination of the prosecution—Discharge of the accused—Charge false to the knowledge of the complainant—Malice—Proof of.

The discharge of an accused person is such a termination of the prosecution as entitles the accused to maintain an action for malicious prosecution.

If a complainant does not go beyond giving what he believes to be correct information to the Police and the Police without further interference on his part think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant, if he misleads the Police by bringing suborned witnesses to support it, if he influences the Police to assist him by

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sending an innocent man for trial before the Magistrate, it would be equally improper to allow him to escape liability because the prosecution has not technically been conducted by him.

Before an action for damages for malicious prosecution can be sustained, something more than an inference from the general circumstances of the criminal case is necessary and it must be definitely proved either that there was malice or that there was such a wilfully false statement to the Police as would justify an inference of malice. (*Saunders, J. C.*)  
**MAUNG PO LUN v. MA NYEIN BON.**  
**3 U. B. R. (1913) 67=46 I. C. 337.**

—Damages suit for—What the plff. has to prove—Innocence proof of, if relevant.

The pivot upon which all actions for damages for malicious prosecution turn, is the state of the mind of the prosecutor at the time he institutes or authorises the prosecution. (1909) L. R. A. C. 549 ref.

In an action for damages for malicious prosecution the plff. must prove: (1) that he was prosecuted; (2) that the prosecution ended favourably to him; (3) that the deft. acted without reasonable and probable cause and (4) that the deft. was actuated by malice. The question of the plff's innocence apart from the acquittal, is only an element of consideration in deciding whether the prosecution ended favourably for the plff. whether there was an absence of reasonable cause for the prosecution and the amount of damages to which the plff is entitled. 25 Bom. 332; 23 Cal. 531; 24 Mad. 59 ref. (*Wallis, C. J. and Sarnier, J.*)  
**GOPALAKRISHNA KUDVA v. NARAYANA KANTHY.**  
**34 M. L. J. 517=**  
**23 M. L. T. 341=7 L. W. 604=**  
**(1918) M. A. N. 454=45 I. C. 303.**

**MASTER AND SERVANT—Liability of master for acts of servant—Act in the course of authority—Breach of condition in a license to fell timber.**

A licensee or other person permitted to fell timber in accordance with certain conditions under rules framed under the Forest Act is liable to be punished under those rules for the acts of his servants whether authorised by him or not, and even if this act is contravention of his instruction, provided that those servants were acting within the scope of their master's authority and unless the master can show that he acted in good faith and did all that could be reasonably expected of him to prevent the breach of the conditions under which he is permitted to fell the timber. (*Rigg, J.*)  
**EMPEROR v. U GYAW.**  
**9 L. E. R. 112=44 I. C. 347=19 Cr. L. J. 331.**

—Termination of Contract of service—Schoolmaster—Termination by notice—Reasonable notice, what is customary notice. See (1917) Dig. Col. 869: **WITTENBAKER v. GALSTANN.**  
**44 Cal. 747=43 I. C. 11.**

**MERGER.**

—Tort—Liability of master for servant's wrong—Principal and agent.

A master is answerable for every such wrong of his servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.

The owner of a vessel is not liable qua-owner for damages caused by the negligence of the crew. He is liable only as employer of the wrong-doer. (*Twomey, C. J. Maung Kin, J.*)  
**DAVID BRUCE v. KYAW ZIN.**  
**45 I. C. 822.**

—Tort by Servant—Master when liable—Act beyond Servant's authority in course of employment—Master not liable. See TORT, MASTER AND SERVANT.  
**20 Bom. L. R. 126.**

—Vicarious liability—None in Criminal law—Rule—Exception. See PENAL CODE, S. 290.  
**47 I. C. 287.**

—Wrongful dismissal—Insolence—Damages—Suit for before expiry of the period contracted for—Maintainability—Right to full wages for the rest of the period—Onus.

Seemingly gross insolence or insubordination would be a ground justifying the dismissal of a servant.

A servant who has been improperly dismissed need not wait till the expiration of the time for which he was engaged to serve before bringing his action for damages.

Though it is the duty of the servant who is discharged to seek employment, the onus rests on the person who denies his right to receive his wages in full to show that he could have obtained employment (*Maung Kin and Rigg, J.J.*)  
**THE MOULMEIN RUBBER PLANTATION CO. v. C. W. MITCHELL.**  
**45 I. C. 615.**

**MEMO OF OBJECTIONS—Court-fee on Necessity—Payment of more than adequate court-fee by appellant—Effect. See COURT-FEE, CROSS-OBJECTIONS**  
**27 C. L. J. 443.**

**MERCHANT SHIPPING ACT (57 and 58 Vic. Ch. 60) S. 636—Extra Territorial jurisdiction—Offence by a subject of a native state on foreign ship in the high seas—Jurisdiction of British Indian Courts to try the accused. See PENAL CODE, S. 4.**  
**20 Bom. L. R. 98.**

**MERGER—Grove holder acquiring fractional share in village—Grove not incident of legal proprietorship of the land of the village—Grove does not pass with the sale of share.**

A grove held by the proprietor of a fractional share in the village from before the time he became proprietor of that fractional share is not necessarily a legal incident of his proprietorship of the land of the village and does not *ipso facto* pass with the sale of the

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fractional share to the purchaser. (*Kandiyia*  
*Loi, A. J. C.*) GULAB RAI v. SAZIM ALI.  
21 O. C. 263—43 I. C. 731.

**MESNE PROFITS**—Claim by successful appellant in appeal against decree for possession—Limitation—Period for which profits will be allowed. See C. P. CODE, S. 144.  
3 Pat. L. J. 367

Decree directing ascertainment in execution proceedings—Execution—Time begins to run from date of ascertainment. See LIMITATION ACT, ART 182 (7)  
16 A. L. J. 68.

Hindu Law—Joint family—Divided member—Alienee from—Right of, to mesne profits from date of alienation. See HINDU LAW, JOINT FAMILY.  
7 L. W. 226.

Hindu Law—Widow—Transferee from—Liability for profits of period, during which deed allowed to stand. See HINDU LAW, JOINT FAMILY.  
21 O. C. 228 (P.C.)

Nature of power of court to award according to the justice of the case. See HINDU LAW, JOINT FAMILY.  
23 M. L. T. 245  
—44 I. C. 606.

Partition suit—Decree for past and future mesne profits—Form of—Time for ascertainment of. See C. P. CODE, O. 20, R. 12.  
43 I. C. 458.

Right to—Alienee from co-parcener after decision in status—Alienee entitled to mesne profits. See HINDU LAW, JOINT FAMILY, PARTITION.  
7 L. W. 226—  
45 I. C. 62.

Right to—Hindu Joint family—Alienation by manager—Suit to set aside by the other co-parceners—Mesne profits—Discretion of court to award according to the justice of the case. See HINDU LAW, JOINT FAMILY, ALIENATION.  
23 M. L. T. 245—  
44 I. C. 606.

**MINOR**—Alienation by guardian—Suit by minor on attaining majority to recover possession. See HINDU LAW, WIDOW.  
34 M. L. J. 229.

Award—Setting aside—Reference to arbitration by guardian—Revocation by guardian—Minor not represented—Award invalid. See C. P. CODE, SCR. II, PARAS. 15 AND 21.  
34 M. L. J. 71.

Contract—Benefit received under—No liability to restore when minor is a defendant. See CONTRACT ACT, S. 65.  
—16 A. L. J. 592.

Contract—Specific performance of, not claimable—No mutuality.

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It is not within the competence of the guardian of a minor to bind the minor or his estate by a contract for the purchase of immovable property and, specific performance of such a contract cannot be decreed even at the instance of the minor for want of mutuality. (*Mittra, A. J. C.*) SAKHARAM v. BEIVRABAI.  
44 I. C. 164.

Contract by—Void—Ratification on attaining majority—Effect of—Execution of mortgage after majority in respect of sums borrowed during minority—Effect. See CONTRACT ACT, S. 11.  
46 I. C. 768.

Decree against, in suit in which minor not properly represented—Validity—Sale of minor's property in execution of decree—Suit for recovery of property by minor after attaining majority—Limitation—Limitation Act, Arts. 13 and 144.

Held, that a decree against a minor, not properly represented, is a nullity. 13 I. C. 414, 17 I. C. 363, 20 C. L. J. 469 ref.

Held also, that the auction purchaser of property sold in execution of such a decree is not protected by the fact that he was not a party to the suit, but a stranger. 20 C. L. J. 469, 19 All. 166 (P. C.) and 14 O. 18 dist.

Held further, that a suit by the minor, after attaining majority against the auction purchaser for recovery of the property is governed by Art 144 and not by Art. 13 of the Lim. Act.

Held also that the plff. could not be compelled to reimburse the auction purchaser. (*Chevis, J.*) HIRA SINGH v. GHULAM QADIR.  
113 P. R. 1918—43 I. C. 399.

Decree against—Avoidance of—Negligence of guardian ad litem—Mismanagement of litigation—Omission to raise money to avert sale—Effect of.

Gross negligence on the part of a guardian or next friend in conducting a suit on behalf of a minor is a good ground for the minor to bring a suit for setting aside the decree.

But mere bad management of a suit by the guardian or an omission to raise money on behalf of the minor by further encumbering the estate, in order to prevent a final decree in a mortgage suit from being passed, is not a sufficient ground for setting aside a mortgage decree unless the conduct of the guardian amounts to fraud or gross negligence. (*Baiton, G. J. C.*) VITHOBA v. SEGO.  
45 I. C. 882.

Ex parte decree against—Remedy of minor—Application to set aside—Fresh suit to set aside decree, barred. C. P. CODE, O. 9, R. 13 AND O. 17, R. 2.  
45 I. C. 882.

Decree against—Representation by guardian ad litem—Setting aside of decrees—Grounds for—Ex parte decrees.

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Where a minor deft. in a suit is properly represented the mere fact that his guardian *ad litem* allowed an *ex parte* decree to be passed against him does not entitle him to impeach the decree by means of a subsequent suit, unless he succeeds in establishing that in the previous suit his guardian was guilty of negligence in the conduct of the suit, i.e., that he could have made a valid defence or produced evidence in support of it with some chance of success. (*Kanhaiya Lal, A. J. C.*)  
**BAJI NATH v. RAOHA RAWAN PRASAD.**  
 43 I. C. 563.

Family arrangement—When and how can repudiate it. See FAMILY ARRANGEMENT  
 23 C. W. N. 118

Guardian—Alienation by, to satisfy rent decree—Money due from minor and another co-sharer—Necessity, extent of. See (1917) DIG. COL. 875 **KALI RAI v. KARU SINGH.**  
 3 Pat. L. J. 78=3 Pat. L. W. 210=42 I. C. 462.

Guardian appointed by court—Mortgage of guardian of minor's property without sanction of court—Moneys spent for minor's benefit—Mortgage only entitled to personal decree against guardian. See GUARDIAN AND WARDS ACT, S. 29.  
 46 I. C. 665.

Alienation of minor's property by de facto guardian—Necessity validity of alienation.

Two brothers A and B borrowed certain amounts from C to pay off debts due to various creditors by mortgaging all their property. In the following year A died, leaving two minor daughters as his heirs—*pliffs*, appellants in the present appeal. No part of the debt on the mortgage having been paid off B executed two *kat kabalas* in favour of C. By the *kat kabalas* the principal of the original mortgage was satisfied: A *kistbandi* stipulated for compound interest at the rate of Re. 1-8-0 per cent per mensem and under its terms the creditor was to remain in possession until the sums mentioned were paid to him and to pay the rent due to the landlord from the usufruct and to take the balance as interest. A year after, B executed three conveyances selling about 12 *bighas* of land to the defendants. With the purchase money B paid off the sums due under the *kat kabalas* and the *kistbandi* bond. The *pliffs*, appellants were living with B when the conveyances were executed. B was also managing the property. The *pliffs'* husbands never asserted any claim to the management of the property.

Held, that B as de facto guardian of the minor's property conveyed their interest by *kabalas* and the sales were binding on the minor. (*Walmesley and Panton, J.J.*) **SRIMATI ISHANI DAS v. GANESH CHANDRA RAKSHIT.**  
 28 C. L. J. 280=48 I. C. 303.

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— If can be agent—Contract by minor on behalf of firm—liability of firm, under—Non-repudiation by minor of his own liability after attaining majority—Effect. See CONTRACT ACT, SS. 184 AND 218. 33 P. W. R. 1918.

— Joint Hindu family—Interest of minor member liable for trade debts contracted by manager in partnership with stranger. See HINDU LAW, JOINT FAMILY, MANAGER.  
 43 I. C. 76.

— Lease in favour of, if valid.

A lease executed in favour of a minor is null and void and cannot confer any right or title on the lessee. 39 Cal. 332, 30 Cal. 539, 32 All. 25, 33 Mad. 322 ref. 22 C. W. N. 180, 38 All. 62 and 40 Mad. 308 dist. (*Jocala Prasad and Courtis, J.J.*) **PROMILA BALA DASSI v. JOGESWAR MANDAL** 3 Pat. L. J. 518=5 Pat. L. W. 147=(1918) Pat. 241=46 I. C. 670.

— Liability of, on bond executed by step-mother as guardian—Liability of estate—Personal liability, none. See T. P. ACT, S. 72.  
 34 M. L. J. 177.

— Negligence of guardian—Minor not liable—Contract and tort—Liability arising from—Difference between. See CONTRACT ACT S. 184.  
 43 I. C. 523.

— Next friend—Death of—Non-prosecution of Suit—Dismissal of Suit—Defts' costs—Liability of deceased next friend's estate—Jurisdiction. See. (1917) DIG. COL. 877. **BRJ MOHAN DAYAL v. SARUF NARAIN.**  
 20 O. C. 340=43 I. C. 257.

— Partnership—Ancestral trade—Liability for debts of, extent of—No personal liability. See CONTRACT ACT, S. 247. 22 C. W. N. 488.

— Partnership—Hindu joint family—Father starting trade on behalf of minor son and himself—Debts—Son not personally liable on attaining majority. See HINDU LAW, JOINT FAMILY TRADE. 35 M. L. J. 473.

— Sale by—Suit to set aside on attaining majority—false representation as to age—Silence if amounts to—Estoppel—Equities on cancellation of sale—Direction to refund consideration—Sp. Rel. Act, S. 41.

Per Curiam:—A minor is entitled to have a sale executed by him during his minority set aside in the absence of proof that he deliberately misled the purchaser into buying by a false representation that he was of age.

Quære:—Whether even such false representation would disentitle the minor from claiming the relief.

Per Seshagiri Iyer, J.—It is not open to the Court to conclude that the minor is guilty of a misrepresentation as to his age from his

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mere silence or conduct in not disputing that he was a major: to deprive the minor of the advantage secured to him by the law, an assertion of an untrue fact must have been made by him.

*Also per Seshagiri Iyer J.*—The grant of the relief to which the minor is entitled does not depend upon and is not affected by the fact that the minor is the plff. and not the deft. in the suit.

Under S. 41 of the Specific Relief Act, 1877, a Court in this country is entitled to call upon the minor to refund the consideration he has received before his prayer for cancellation of sale is granted, but apart from the discretion which the statute confers, there is no general rule of equity under which a minor can be compelled to pay compensation to the transferee on avoidance of the transfer.

Where a minor on attaining majority sued to have a sale deed executed by him during his minority along with his elder brother for a sum of Rs. 800 and it was found that no false representation was made by the minor at the time of the alienation that he was of age.

*Held*, that he was entitled to have the deed cancelled to the extent of his own share only on payment to the purchaser of Rs. 450, his share of the consideration for the sale. (*Coutis Trotter and Seshagiri Iyer, JJ.*)  
MALLACHURUVU RANGATAYYA v. MALLA CHERUVU SUBBAYYA.  
7 L. W. 124=  
43 I. C. 908.

—Sale deed by—Suit to recover possession of property sold—Limitation. See LIM. ACT, ART. 91.  
20 Bom. L. R. 802.

—Specific performance—Contract for sale of minor's property by guardian—Specific performance not to be granted in—Exception ground of clear benefit to minor. See SP. PERFORMANCE.  
45 I. C. 192.

—Specific performance—Contract to sell by guardian with sanction of Court—Contract specifically enforceable. See GUARD. AND WARDS ACT, SS. 29 AND 31.  
22 C. W. N. 377.

—Suit against—Appointment of guardian *ad litem*—Non-compliance of O. 32 R. 3 cl. 4 as to—Effect on validity of decree as against minor. See C. P. O., O. 32, R. 3, Cl. 4.  
4 Pat. L. W. 373.

—Trade—Joint Hindu family—Debts incurred by Manager—Liability of minor's share in Joint family property and not merely his share in the partnership assets. See Hindu Law, Joint family, trade.  
(1918) M. W. R. 44=43 I. C. 73.

—Mirasidar—Thanduwaram—Suit to recover—Denial of right by tenant—Onus of proof—Extent of.

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*Per Sadashiva Iyer and Napier, JJ.*—Where in suit by a mirasidar for the recovery of thanduwaram the tenants deny the right of the mirasidar, the burden of proof is on the mirasidar to prove the existence in himself of the right by establishing a custom to pay such dues.

*Per Sadashiva Iyer, J.*—The burden in such a case is far less heavy than in the case of a claim by mirasidar to Nattham Poramboke lands. (*Wallis, C. J., Sadashiva Aiyer and Kuneraseswami Sastri, JJ.*) KUMARAPPA REDDI v. MANAVALA GOUNDAN.

41 Mad. 374=34 M. L. J. 104=  
23 M. L. T. 44=(1918) M. W. N. 286=  
7 L. W. 243=44 I. C. 699. (F. B.)

**MONEY HAD AND RECEIVED**—For the use of another—Action for, nature and scope of—Assignee of one of two or more creditors in respect of a debt—Collecting whole debt in bona fide mistake of his right—Suit against assignee by real owner if maintainable—Prov. Insolvency Act, S. 16—Attachment after adjudication of insolvency—Validity.

The plff., who obtained a money decree against debts 2, 3 and 4 sought to attach money alleged to belong to them in hands of the 1st deft. who came into possession of the money under the following circumstances. R the principal partner of a firm composed of R and debts 2 to 4 was declared an insolvent and the outstandings due to the firm were put up for sale by the official Receiver and purchased by the 1st deft. R's share at the time of Insolvency was only 1/2, but the 1st deft. seemed to have purchased the whole of the outstandings due to the firm. As such purchaser; the 1st deft. collected a debt due to the firm. Prior to the plff's attachment, debts 2 and 3 had been adjudicated insolvents.

The present suit was brought to recover 3/4ths of the amount collected by the 1st deft. as being the shares of debts 2 to 4 and so liable for plff's claim on the basis that it was money had and received by the 1st deft. for the use of debts 2 to 4.

*Held per curiam* (1) that the plff. had no cause of action against the 1st deft., as no priority had been established between plff. and 1st deft. or between debts 2 to 4 and 1st deft.

(2) also that the attachment by plff. of the shares of debts 2 and 3 was ineffective, as they had become vested in the Court or the Official Receiver, as soon as they were adjudicated insolvents.

English and Indian case law on the point discussed.

*Per Oldfield, J.*—The action for money had and received is no doubt still to be regarded, as it was originally based on an implied or fictional promise. But such promise could not be deduced from the *devisum et bonum*, as it may appeal to the sympathy of the Court in the particular case, or from circumstances, in

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which the debt, having no privity with the pff., when the money was received need not be supposed to have given and had no duty to give any such promise.

Per *Sadasiva Aiyer, J.*—The scope of the action for money had and received ought not to be extended beyond what would be covered by the principles governing the numerous decisions which have laid down what kinds of actions do come within it and what kinds of actions do not. While privity of contract between the parties is of course not necessary to sustain such an action, I think there must be what might be called some privity of a legally recognizable nature such as some knowledge of particular facts in one man who received the money and some mistake or ignorance of fact on the part of the man who paid the money or some relation of trust and confidence between the person who received the money and person claiming the money or a portion thereof on which the Court could fasten as creating the relation of principal and agent (though by fiction) between the pff. and the debt. (*Oldfield and Sadasiva Aiyer, JJ.*) **RAMASWAMI NAIDU v. MUTHUSAMIA PILLAI.**

41 Mad. 923=35 M. L. J. 531=  
(1918) M. W. N. 796=48 I. C. 756.

—Suit for recovery of money paid under decree or order of Court—Mistake or error in judgment or order—Suit not maintainable. See DECREE, SETTING ASIDE.

3 Pat. L. J. 465.

**MORTGAGE—Accounts—** Stipulation not to claim—Mortgagee not discharging debts undertaken to be paid off—Right to account.

A usufructuary mortgagee in possession omitted to pay off certain prior incumbrances out of the consideration, as undertaken by him and the mortgagor had to satisfy those debts. Held, that notwithstanding a stipulation in the usufructuary mortgage that the mortgagee was not liable to account to the mortgagor, accounts should be taken at the time of redemption of the realizations made by the mortgagee. Such accounts should not be adjusted on the footing of the consideration actually advanced by the mortgagee but the mortgagor is entitled to a set off for the amount paid by him in satisfaction of a prior encumbrance. (*Stuart and Keshiaya Lal, A. J. C.*) **PRAG v. MOHAN LAL.** 47 I. C. 161.

—Chattels—Bona fide purchaser from mortgagee, takes goods free of incumbrance. See HYPOTHECATION. 35 M. L. J. 450

—By conditional sale—Suit for possession after expiry of year of grace—Limitation See LIM. ACT, ARTS. 135 AND 144.

79 P. R. 1913.

—Consideration — Failure of partial mortgage valid to that extent.

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It is open to a mortgagor to show that there has been an actual failure of consideration in respect of part of the consideration. The mortgage is good for the balance: 2 M. 312: 36 M. 117 ref. (*Sadasiva Iyer and Napier, JJ.*) **ZAMINDAR OF KARVETNAGAR v. SUBBARAYA PILLAI.**

(1918) M. W. N. 146=  
7 L. W. 36=43 I. C. 871.

—Construction—Hypothecation of immovable property includes fixtures. See TRANSFER OF PROPERTY ACT, S. 8.

44 I. C. 211

—Construction—Provision for payment of arrears of rent due from tenants before redemption—Effect of.

Where a mortgage deed provided that at the time of redemption all arrears due from the tenants must be paid to the holder of the deed.

Held, that the provision meant that the arrears at that time legally due from the tenants, in other words, arrears the recovery of which was not barred by limitation, must be paid in as a condition precedent to redemption. (*Stuart, A. J. C.*) **JANG BAHADUR v. MATADIN.** 5 O. L. J. 159=46 I. C. 80.

—Construction—Usufruct — Mortgage of —Intention.

Where a deed of mortgage of 100 villages began by stating that 100 villages with hamlets tanks, Basams, channel, fruit tree, garden forests, forest poramboke, etc., and then recited that 92 out of the 109 villages were secured without possession and that the remaining eight were mortgaged usufructually, but the addition of.....forest and forest produce was not repeated though it was expressly stated that the mortgagee was to enjoy all the income realisable from the eight villages. Held that the intention was clear to include forest and forest produce in respect of the 8 villages also. (*Sadasiva Iyer and Napier, JJ.*) **ZAMINDAR OF KARVETNAGAR v. SUBBARAYA PILLAI.**

(1918) M. W. N. 146=7 L. W. 36=  
43 I. C. 871.

—Construction—Usufructuary mortgage —Personal covenant—What amounts to.

Where a usufructuary mortgage deed contained the following provision:—

“At whatever cultivation season in the month of Chitrai in any year after the stipulated period of 10 years, I may pay the principal amount, you shall at that time receive the amount; leave the undermentioned lands in my possession and deliver the document also to me.”

Held, that the clause did not contain an implied covenant to pay at the end of ten years, that the stipulation as to payment was one entirely for the benefit of the mortgagor as it allowed him to choose his own time for

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payment if he wished to pay; and that to continue it otherwise would be to destroy the whole effect of the express arrangement between the parties. (*Phillips and Krishnan, J.F.*)  
*RANGAYYA PILLAI v. NARASIMHA AIYANGAR.*  
 (1918) M. W. N. 672=47 I. C. 352.

———Contribution—Mortgagees not affected by the principle—Mortgagees not bound to distribute debts proportionately over the several items. See T. P. ACT, S. 82.  
 20 Som. L. R. 175.

———Debt, transfer of—Registered instrument—Necessity. See T. P. ACT, S. 54.  
 27 C. L. J. 453.

———Decree—Combined decree—Provision in compromise decree, making other properties of mortgagor liable in case of deficiency—Application for personal decree: essential. See C. P. CODE, O. 34, R. 6. 3 Pat. L. J. 645.

———Decree—Construction "Mortgagor do pay" Personal liability, exclusion of, by context See C. P. CODE, O. 34 R. 10.  
 15 A. L. J. 915

———Decree—Costs Charge on mortgaged property and not realisable personally till hypothecum exhausted See C. P. CODE, O. 34 R. 1.  
 40 All. 109.

———Decree—Costs—Personal decree against mortgagor if can be passed.

In a suit for foreclosure a Court may pass a decree directing that the costs of the suit should be recovered personally from the mortgagor, if there is a condition to that effect in the mortgage deed. (*Prideaux, A. J. C.*)  
*SHRIAM v. RAGHURAM* 47 I. C. 542

———Decree—Execution—Appointment of receiver—Power of Court, in the absence of specific provision in the decree. See EXECUTION.  
 43 I. C. 22.

———Decree—Execution—Receiver—Simple mortgage—No power to appoint receiver. See C. P. CODE, O 40, R. 1. 43 I. C. 533.

———Decree—Interest from date fixed for payment to date of realisation—Contract rate Discretion of Court.

The rate of interest which a Court can allow in a mortgage decree from the date fixed for payment to the date of realisation, is in its discretion. In exercising its discretion however, the Court will ordinarily refer to the contractual rate, if it be a reasonable one (*Kendall, A. J. C.*)  
*AJODHIA BANK, LTD. v. RYZABAD v. ABDUL GHANI.* 47 I. C. 701.

———Decree—Interest—Interest after period of grace allowed by preliminary decree to be added to the final decree. See C. P. CODE, O. 34, RR. 4 AND 5. 27 C. L. J. 576.

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———Decree—Preliminary and final—Adjustment after date of preliminary decree and before final decree—Stage of suit—C. P. CODE, O 23 R. 3. applicability of. See C. P. CODE, O. 23, R. 3. 43 I. C. 399.

———Decree—Preliminary and final—Proceedings between—Stage of suit—Application for final decree not an application for execution, but one in the suit. See C. P. CODE, O. 34, R. 5. 43 I. C. 513.

———Decree—Preliminary decree under T. P. Act—Passing of the C. P. Code of 1908 before expiry of time fixed for payment of mortgage money in decree—No right to apply for final decree under O. 34, R. 5 C. P. C.—Remedy by execution. See L.I.M. ACT, ARTS 131 AND 132. 35 M. L. J. 194.

———Decree for sale—Non-compliance with S. 83 of the T. P. Act, (O. 34, R. 4 C. P. C.)—Sale in execution—Purchase by mortgagee decree-holder with leave—Fresh suit for redemption barred—Remedy by application to set aside the sale. See C. P. CODE, S. 47.  
 41 Mad. 403 (P. C.)

———Decree for sale—Transmission for execution—Power to pass supplementary decree—Jurisdiction of executing court and of court which passed decree See C. P. CODE, S. 39; O. 21, RR. 6 to 9. (1915) M. W. N. 4.

———Deposit of money after institution of suit—Effect of on running of interest. See T. P. ACT, SS. 83 AND 84. 35 M. L. J. 605.

———Discharge—Partial—Onus. See BURDEN OF PROOF. 22 C. W. N. 937 (P. C.)

———English mortgage—Ownership, transfer of, to creditor—Liability to be divested on repayment of the loan on the appointed day. See CROWN DEBTS. 22 C. W. N. 793.

———Execution—Denial of—Compulsorily registered—Genuineness—Burden of Proof. See (1917) DIG. COL. 885; *PALLIKANI KATHAPURATH MAMMAD v. MATANCHERI MAMMAD.* 35 M. L. J. 315= (1917) M. W. N. 789=43 I. C. 28

———Execution, validity—Attestation before execution. See T. P. ACT, S. 59. (1913) M. W. N. 853.

———Improvement—Prior and subsequent mortgages—Suit on prior mortgage without impleading subsequent mortgagee—Sale in execution of decree—Purchaser, assignee from—Improvements by—Value of, not entitled to on suit for redemption by puisne mortgagee. See MORTGAGE, PRIOR AND SUBSEQUENT. 23 M. L. J. 106.

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———*Interest—Mortgage amount made up of principal and interest prospectively due—Installments—Default in payment—Liability to interest.*

To the sum found due from debts to plff. an addition was made as prospective interest and a mortgage bond was executed in respect of the total sum by the debts in 1896. The bond provided for payment by instalments, and it was stipulated that in default of payment of any instalment it should carry interest at 12 per cent per annum to be compounded every year. In default of payment of any two instalments the whole sum should become immediately recoverable. Default was made in respect of two instalments on 26th January 1899.

*Held*, that plff. was entitled to recover (a) the principal sum secured by the bond (b) proportionate interest out of the total sum fixed as prospective interest up to 26th January 1899 and (c) compound interest at 12 per cent per annum on the sum due on the date of the first default from that date up to 26th January 1899; and that plff. was not entitled to any interest after the 26th January 1899. (*Stanyon, A. J. C.*) **BHAUJI v. BHAGWANT ATMARAM DHONGDI.** 45 I. C. 722.

———*Keeping alive—Intention of parties—Presumption.* See T. P. ACT, S. 101.

7 L. W. 30.

———*Lease forming part of same transaction—Suit for rent after mortgage amount becomes due—Subsequent suit for principal amount of mortgage—Maintainability.* See C. P. C. O. 2, R. 2. 69 P. R. 1918.

———*Mortgagee with possession—Heirs of mortgagor entitled to receive annuity—Equity of redemption—Acquisition of by mortgagee—Effect on right to receive annuity.* See (1917) DIG COL. 889. **LACHMI NARAIN v. SAJJADI BEGAM.** 39 All. 700=15 A. L. J. 671=41 I. C. 839.

———*Occupancy holding—Void under S. 20 Agra Ten. Act—Suit for redemption—Maintainability.* See AGRA TEN. ACT, S. 20. 16 A. L. J. 747.

———*Prior and subsequent—Decree and sale in execution of decree on prior mortgage without impleading puisne mortgagee—Purchase in execution—Alienation to stranger—Improvement—Suit for redemption by puisne mortgagee.*

The owner of certain houses and lands created 8 simple mortgages on them the first on the houses to a fund; the second, on the lands, to S; the third on the houses to the plff's husband. S sued on his mortgage without making the plff's husband a party, obtained a decree for sale and himself purchased the properties mortgaged to him for an amount which nearly paid off his debt. He obtained

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possession and assigned them to third parties. The properties having risen in value, the plff. now sued on the mortgage to her husband and offered to redeem the assignees of S who were in possession of the house and had improved them at great expense. The assignees of S in possession of the lands were not impleaded in the suit. On the question of the terms of redemption.

*Held*, that S, and his assignees are entitled on redemption to get the principal and interest according to the terms of the first two mortgages calculated up to time of payment. The price of redemption is the same whether it is the puisne encumbrancer or the mortgagor who redeems. The first two mortgages which are revived against the mortgagee (S) though extinguished against the mortgagor, are kept alive to the fullest as if no action had ever been brought on them.

S. and his assignees are bound to account for the profits of the properties from the date of possession to the date of payment. It cannot be taken as a rule of law that in such cases the profits should be taken as equivalent to interest. If either party insists, an account of the profits must be taken allowing interest on the mortgage as provided in the bond.

The person in possession of the lands not being impleaded, and the plff's suit not being based upon but to avoid the mortgagee's purchase, this is not a case for partial redemption and therefore, the plff. should pay the whole of the mortgage amount found due.

The assignee of S in possession of the houses is not entitled to the value of improvements made to the houses. 31 Mad. 253 foll. and 88 Mad. 18 doubted. (*Abdur Rahim and Oldfield, JJ.*) **MUTHAMMAL v. RAZU PILLAI.** 41 Mad 513=23 M. L. T. 106=(1918)

M. W. N. 251=7 L. W. 420=44 I. C. 753.

———*Prior and subsequent mortgage—Suit for sale by prior mortgagee against mortgagor and puisne mortgagee—Decree in form 7 Appx D, C. P. Code—Rights of puisne mortgagee—His claim not satisfied—Fresh suit by him for recovery of his mortgage amount—Maintainability—C. P. C. S. 47—Applicability—Res judicata.*

In a suit for sale on a mortgage brought by prior mortgagee against the mortgagor and A, a puisne mortgagee, a decree was passed in Form No. 7, Appendix D. of the C. P. Code. That is, the decree declared the amounts due to the plff. and A, but directed the redemption only of plff's mortgage and ordered the sale of the mortgaged properties only in the event of the amount of the plff's mortgage not being paid. As regards the puisne mortgagee, A, the only right given to him by the decree was the right to share in the surplus, if any, arising out of the sale. The mortgagor sued the mortgaged property by a private sale and paid off the amount due to plff's decree holder. The amount found to be due to A under his

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mortgage not having been paid, he instituted a suit for the recovery thereof against the mortgagor and the private purchaser from him. On the pleas being raised (1) that A's remedy was to execute the decree in the prior suit and a separate suit was barred under S. 47 of the C. P. Code and (2) that the suit was barred by *res judicata* held (1) that A was not entitled to execute the decree in the prior suit and S. 47 had no application to the case and (2) that the suit was not barred by *res judicata* because (a) it was beyond the pecuniary limits of the jurisdiction of the Court which tried the prior suit and (b) A was not in a position to have his claim satisfied in the prior suit. (*Phillips and Kumaraswami Sastri, JJ.*) *VEDAVYASA AIYAR v THE MADURA HINDU LABHA NIDHI CO., LTD.*

42 Mad. 90=35 M. L. J. 639=  
24 M. L. T. 473=9 L. W. 70=  
(1918) M. W. N. 898

—Prior and subsequent—Suit for sale by puisne mortgagee—Right of prior mortgagee to apply for personal decree against mortgagor. See C. P. C. O. 34 E. 6. 33 M. L. J. 382.

—Priority—Negligence—Earlier registered mortgage—Title deeds with mortgagor—Subsequent mortgagee if entitled to priority.

A subsequent mortgagee who has wilfully abstained from the obvious course of searching in the registration office, cannot obtain priority over an earlier registered mortgage, merely on the ground that the latter did not call for the title deeds and retain them in his control. (*Twomey and Maung Kin, JJ.*) *THE BANK OF BENGAL, AKYAB v. AUNG THA HLA.* 47 I. C. 774.

—Priority—Property owned by five brothers, mortgage of—Subsequent mortgage of the share of 4 brothers—Partition—Rights of mortgagees

Property belonging to 5 brothers including a minor represented by a guardian was mortgaged by them to N. Then it was mortgaged by the four adult brothers to G. The adult brothers became insolvent and the Receiver in insolvency got the joint property partitioned and the mortgaged property was allotted to the four adult brothers, which was then sold by the Receiver at the instance of a prior mortgagee who was paid off out of the sale proceeds.

Held, that N. was entitled to the whole of the balance of the sale proceeds in priority to G. as he had not lost the priority to the extent of the 1/5th share which belonged to the minor brother by reason of the partition and sale of the property. (*Teunon and Newbould, JJ.*) *GOPI NATH MONDAL v. ASHUTOSH GHOSH* 44 I. C. 1003.

—Proof of—Ancient mortgage—Entry in partition record, how far evidence—Suit in ejectment—Plea of possession under ancient

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mortgage—Burden of proof. See (1917) DIG. COL. 880. *BISHESHAR SINGH v. BRIJ BHOO-KHAN SINGH.* 20 O. C. 336=43 I. C. 300.

—By Purdanashin—Execution—Attestation—What amounts to See T. P. ACT, S. 59. 4 Pat. L. W. 417.

—Redemption—Barred debt—Mortgagor not bound to pay redeeming subsisting mortgage—Merger—Simple money bond—Conversion of into mortgage debt or judgment debt—Deed—Construction—Charge—Creation of mortgage and lease when viewed as parts of the same transaction. See (1917) DIG. COL. 892; *RAMAKRISHNA KUNKILAYA v. N. KUP-PANNA.* 33 M. L. J. 581=22 M. L. T. 422=6 L. W. 621=43 I. C. 286.

—Redemption of—Barred debt—Rights of mortgagor and mortgagee—Possession left with mortgagor on condition of paying rent annually—Default to pay rent—Decree for rent—Execution allowed to become barred—Suit for redemption brought long after decree for rent becomes barred—Right of mortgagee to claim for amount covered by decree for rent

A deed of mortgage by conditional sale of the year 1863 provided that the mortgagor should himself continue in possession as the mortgagee's tenant paying stipulated rent every year before the end of March and that if he failed to pay rent on the due date in any year the mortgagee was to have the right to take possession at once and to charge rent at an amount equal to 12% interest on the mortgage money. The deed also provided that 12% interest should be paid on the arrears of rent, that the mortgaged property should be liable for the total amount and that on redemption the mortgagor should pay the mortgage money with any arrears of rent and interest due. Default having been made in 1871 in the payment of the rent due, the mortgagee sued the mortgagor and obtained a decree for possession for arrears of rent and interest at 12% with future rent and interest at the same rate. In execution of that decree the mortgagee obtained possession of the mortgaged property but did not recover the rent decreed and allowed the decree to become barred to that extent. In a suit instituted by the mortgagor in 1915 for redemption on payment of the mortgage money (principal) alone, the mortgagee, claimed to be paid in addition to the amount due to him under the decree for rent aforesaid with interest thereon. Held, that the mortgagee was not entitled to do so and that the mortgagor was entitled to redeem on payment of the mortgage money alone:—

Per *Phillips, J.*—The case was one of election of reliefs to which a party is entitled and by obtaining a decree for money for the rent in arrears, which decree could be enforced a

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once, the mortgagee must be deemed to have abandoned the charge which he could only enforce later and could not, after he has allowed his decree for money to become barred, fall back upon the right to the charge.

Per *Krishnan, J.*—Even assuming that a mortgagee does not lose his charge by obtaining a personal decree for the rent in arrears but can plead it and claim to be paid the amount of it in a redemption suit, he can do so only so long as the claim under the decree is not barred by limitation. (*Phillips and Krishnan, JJ.*) *MANGESHWAR NARAIN RAO SHIVA RAO.* 41 Mad 1043=35 M. L. J. 414=24 M. L. T. 370=(1918) M. W. N. 917=8 L. W. 405.

—Redemption—Clog on equity of—Malabar law—Kanom—Demise of land in perpetuity with covenant for renewal every 12 years—Validity of covenant. See *MALABAR LAW, KANOM.* 23 M. L. T. 67.

—Redemption—Clog on—Postponement of redemption for 37 years if a clog on. See *T. P. ACT, SS. 60 and 62.* 35 M. L. J. 287.

—Redemption—Clog on—Mortgage—Preliminary decree for foreclosure—Subsequent compromise for foreclosure of portion of mortgaged property—Validity, of.

The only objection to any agreement for the purpose of clogging the equity of redemption entered into by the mortgagees with the mortgagor arises if it constitutes part and parcel of the original loan or mortgage transaction. But there is nothing to prevent that being done, if it is effected by an agreement which in substance and in fact is subsequent to and independent of the original bargain. (*Mitra, A. J. C.*) *DHARAM SINGH v. GANESHRAM.* 43 I. C. 399.

—Redemption—Mortgagors—Discharge of mortgage by one of co-mortgagors—Right to a charge as against other co-mortgagors—Nature the charge—Redemption.

One of several mortgagors, the first defendant paid off the mortgage debt and remained in possession of the mortgaged property with the consent of the other heirs. Subsequently his creditors obtained a decree against him and attached his property and sold it in execution. One of the other mortgagors then sued to redeem the property impleading the other mortgagors and the auction-purchasers as parties to the suit.

*Held*, that the transaction between the first deft. and his co-mortgagors amounted to a joint charge given by the latter to the former on their joint undivided share of the property in respect of the amount of their share in the debt, and that the plff. being one of the co-heirs on whose behalf the joint charge was made was entitled to redeem it.

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The charge was not an interest in the land, and therefore, all that the auction-purchaser obtained by his purchase was the share of the 1st deft. in the mortgaged property. (*Twomey, C. J. and Ormond, J.*) *KYA ZAN v. TUNGEAW.* 9 L. B. R. 169=47 I. C. 121.

—Redemption—Condition in mortgage that mortgagee was to be absolute owner on default of payment within fixed time—*T. P. ACT*, not applicable. See (1917) *DIG. COL. 894; ABDUL HAMID v. DWARIAH BIBI.* 10. Bur. L. T. 219=36 I. C. 959.

—Redemption—Interest of mortgagor described as a mortgagee right—Mortgagor formally mortgagee subsequently full owner—Sale what passed at—*Privy Council practice in point not argued in High Court against decision of first Court—Interest—When may be granted in absence of contract.*

A mortgagee, D. of immoveable property, after certain judicial proceedings, became full owner in 1883, and mortgaged it in 1886 to one S, who caused the property to be put to sale in 1897, but by mistake described the property in the application for execution as "the mortgagee right" of D, and the same description appeared in the sale proclamation and at the sale the defts. became purchaser. The representatives of D having sued the defts. for redemption of the mortgage, which in fact had been extinguished in 1883, the High Court *held*, having regard to the description of the property in the sale proceedings of 1897, that the defts. bought no more than that of the mortgagee's right and decreed redemption. On appeal to the Privy Council:

*Quere.*—Whether in the circumstances anything passed by the sale of 1897:

*Held, however*, that the appellants whose plea that the sale was null and void was rejected by the first Court not having appealed against it in the High Court, the Privy Council, according to well-settled practice, must refuse to entertain it.

That, in the absence of evidence to the contrary, a statement in the judgment appealed against that a point urged later on in appeal was not pressed by his advocate in the lower Court must be accepted by the Appellate Court.

Interest depends on contract, express or implied or on some rule of law allowing it. (*Lord Sumner*) *LALA KALYAN DAS v. SHEIKH MAQBAL AHMED.* 40 All 497=

16 A. L. J. 693=22 C. W. N. 866=35 M. L. J. 169=5 Pat. L. W. 159=24 M. L. T. 110=8 L. W. 179=(1918) M. W. N. 535=20 Bom. L. R. 884=28 C. L. J. 181=46 I. C. 548 (P. C.)

—Redemption—Lease created by mortgagee—Termination of. See *MORTGAGOR AND MORTGAGEE.* 34 I. C. 839.

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—Redemption—Partial owner of equity of redemption if can redeem whole. *See* (1917) DIG. COL. 895; *BAIKUNTHA NATH DEY v MOHESH CHANDRA DEY*, 22 C. W. N. 128=44 I. C. 77.

—Redemption—Prior and subsequent mortgages—Decree and sale in execution of decree on prior mortgage—Without impleading puisne mortgagee—Purchaser in execution—Assignee from—Improvements by—Value of, if can be charged against puisne mortgagee seeking to redeem. *See* MORTGAGE, PRIOR AND SUBSEQUENT. 23 M. L. T. 105.

—Redemption—Right of—"Interest in property"—Meaning. *See* T. P. ACT, S. 91 (a). 14 N. L. R. 117.

—Redemption—Right to—Owner of a portion of the equity of redemption—Right to sue for redemption. *See* T. P. ACT, S. 60. 22 C. W. N. 800

—Redemption—Suit for—First suit for redemption decreed—Subsequent suit for redemption barred. *See* RES JUDICATA. 20 Bom. L. R. 164.

—Redemption—Suit on foot of one mortgage—Relief on another mortgage, if and when given—Plff. connecting a false document not entitled to relief.

The general rule that where a plff. fails to establish the specific mortgage sued on, he should not be given a decree on a mortgage to be spelled out from documents or pleading is subject to exceptions, e. g., where the plff. is under an error induced by the defts. 18 M. 482; 18 M. L. J. 274; 1915 M. W. N. 105, (1916) 1 M. W. N. 171; 30 M. 888 Ref.

In no case can a plff. who has fabricated a document be allowed to obtain a decree on the admission of deft. (*Seshagiri Aiyar and Napier, JJ.*) *MADHAVAN VYDIAR v. LAKSHMANA PATTAR*. (1918) M. W. N. 139=7 L. W. 284=44 I. C. 447.

—Redemption—Time fixed by consent, whether can be extended by Court. *See* (1917) DIG. COL. 896; *MAUNG SAN LIN v. MAUNG ZHUE THIN*. 10 Bur. L. T. 240=37 I. C. 672.

—Redemption—Usufructuary mortgage of Sir lands prior to Tenancy Act—Sale of mortgagor's proprietary rights after Tenancy Act—Ex-proprietary Tenancy—Redemption of mortgage. *See* T. P. ACT, S. 91. 16 A. L. J. 796.

—Redemption—What is—Whether payment of balance amounts to, T. P. Act, Ss 60 89 and 95—C. P. Code, O. 84, R. 5.

Where there have been payments in part satisfaction of a mortgage the payment of the

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balance due is as much a redemption as the payment of the whole sum due in case in which there has been no previous part-payments.

Redemption is effected by the releasing of the security and where the security is extinguished the property is redeemed by the act which extinguished it.

S. 95 of the T. P. Act is not limited in its scope to cases in which delivery of possession of the property itself is rendered possible by the fact that the mortgagee was an usufructuary mortgagee. The section is also applicable to cases of simple mortgage when the property, not being in the possession of the mortgagee, cannot be transferred to the party releasing the security. 31 Cal. 363, 25 Cal. 703, 28 All. 483 ref. (*Roe and Conitts, JJ.*) *MUSSAMMAT HIRA KUER v. PALKU SINGH*. 3 Pat. L. J. 490=(1918) Pat. 274=5 Pat. L. W. 144=46 I. C. 479.

—Rights of mortgagee—Subsequent agreement or act of mortgagor, not to prejudice rights of mortgagee.

A mortgagee cannot have his rights created on the date of his mortgage, impaired by any subsequent act or agreement of the mortgagor to which he is not a party. (*Stanyon, A. J. C.*) *JAIRAM v. DEBIDAYAL*. 46 I. C. 789.

—Rights of sale of prior and puisne mortgagor—Several mortgages on same property. *See* C. P. CODE, O. 34, R. 1. 12 S. L. R. 1.

—Sub mortgagee—Rights of sub-mortgagee—Discharge of original mortgage by substitution of other mortgages how far affects—Rights of sub-mortgagee—Right of sub-mortgagee to sell.

There is no necessity to give notice of an assignment of a mortgage to the mortgagor, and such want of notice will not render the sub-mortgage invalid, save in so far as the assignee hold subject to the accounts between him and the original mortgagee.

The substitution of one mortgage by another mortgage will not affect the rights of the sub-mortgagees from the original mortgagee's rights under the earlier mortgage to sale.

A sub-mortgagee has the right to sell the mortgagee's rights against the particular properties sub-mortgaged to him for the whole amount due to him and the mortgagor's remedy against him is just what he would have against the original mortgagee if the latter sought to enforce his debt against those particular properties viz., to redeem by paying the amount due. (*Wallis, C. J. and Napier, J.*) *PAPALA CHAKRAPANI v. LACHMIACHI*.

35 M. L. T. 309=28 M. L. T. 300=(1918) M. W. N. 249=46 I. C. 769

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———*Subrogation—Discharge of prior mortgage by stranger—Keeping alive.*

Irrespective of the clause in a document definitely keeping alive the mortgage, the payment of the mortgage debt to a third party with the consent of the mortgagee (who had a second mortgage) for the repayment of his first mortgage was in itself sufficient to warrant the presumption that the prior mortgage would be kept alive as against the second mortgage. 10 C. 1035 Ref. (*Sharfuddin and Roe, JJ.*) RAI BENODE BEHARY BOSE v. HIRA SINGH. (1918) Pat. 76= 44 I. C. 726.

———*Subrogation—Prior mortgagee paid off with borrowed money—Vendor's lien. See* (1917) DIG. COL. 899; MA PYEE v. V. R. N. E. CHETTY. 10 Bur. L. T. 232= 36 I. C. 992.

———*Subrogation—Right of prior mortgagee obtained by subrogation if can be enforced by suit—Presumption, keeping alive.*

The right of prior mortgagee obtained by subrogation can be enforced by suit. The right of subrogation is an equitable right. To recognise an equitable right and then to refuse the means of enforcing it, would in effect result in refusing the equity. 34 All. 102 foll. (*Phillips and Krishnan, JJ.*) A RAMA MAO v. MANDACHALUGAI. 35 M. L. J. 467= (1918) M. W. N. 505=8 L. W. 175= 24 M. L. T. 133=47 I. C. 882.

———*Suit for interest after principal becomes due—Subsequent suit for principal—Maintainability—Res Judicata. See C. P. C. O. 2, R. 2.* 88 P. R. 1918.

———*Suit for redemption—Parties—Withdrawal of suit as against one of several mortgagees—Effect. See C. P. C. O. 34, R. 1.* 4 Pat. L. W. 391.

———*Suit for sale—Right to apply for personal decree—Suit by puisne mortgagee against mortgagor and prior mortgagee—Decree entitling both mortgagees to apply for sale—Right of prior mortgagee to apply for personal decree in his favour. See C. P. C. O. 34, R. 6.* (1918) M. W. N. 4.

———*Suit—Parties—Prior puisne mortgagee—suit for sale by prior mortgagee—Effect of not making puisne mortgagee a party—Order absolute for sale—Substitution of right to sale for right under security. See MORTGAGE, SUIT FOR.* 38 M. L. J. 1= 16 A. L. J. 607=5 Pat. L. W. 88= 45 I. C. 798 (P. C.)

———*Suit—Parties—Title paramount not to be adjudicated in—Rule—Exception. See C. P. CODE, O. 34, R. 1.* 4 Pat. L. W. 417

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———*Suit—Preliminary and Final Decrees—Proceedings between, proceedings in suit and not proceedings in execution See C. P. CODE, O. 34, RR. 4 AND 5.*

40 All. 203 also. 16 A. L. J. 437 also. 10 A. L. J. 143 also, 7 L. W. 438.

———*Suit—Receiver appointment of—Floating charge. See RECEIVER.*

46 I. C. 389.

———*Transfer of mortgaged property on footing of no mortgage—Some of mortgagees parties misrepresentation—Effect as against them and as against their co-mortgagees. See ESTOPPEL.* 27 C. L. J. 453.

———*Usufructuary mortgage—Right of mortgagor to possession according to terms of contract.*

A mortgagee whose right to possession is unconditionally and automatically determined by the terms of the contract cannot claim to remain in possession thereafter in spite of demand by the mortgagor. In such a case the mortgagor can maintain a suit for ejectment against the mortgagee. (*Mitra, A. J. C.*) PARAM SUKH v. YADOGI 46 I. C. 743.

———*Usufructuary—Stipulation for payment of principal and interest by appropriation of usufruct—Option to redeem on a particular date before expiry of the period—Default mortgagor not entitled to redeem before expiry of original term fixed. See T. P. Act, Ss. 61 and 62.* 35 M. L. J. 287.

———*Without possession—Sub-mortgage by mortgagee—Payment by mortgagor to sub-mortgagee—Effect as against mortgagor. See LIMITATION ACT, S. 20 (1).* 3 P. R. 1918.

**MORTGAGOR AND MORTGAGEE—Accounts—**  
*Suit for when maintainable—Incidental to other relief—Mortgagor and mortgagee—Accounts to be ordered only in suit on mortgage.*

Apart from any special statutory provisions accounts cannot be adjudicated upon by a Court where no relief can be granted. Ordinarily a suit for accounts upon a mortgage cannot be maintained by the mortgagor unless he asks for redemption.

An adjudication which cannot be the basis of any relief is not binding on the parties. (*Botten and Mitra, A. J. C.*) MUKUND RAM. SUKUL v. SHEO NARAIN. 47 I. C. 21.

———*Accounts—Usufructuary mortgage—Omission to keep accounts—Presumption against mortgagor.*

Where on taking the accounts of a usufructuary mortgage, it appears that the mortgagee has kept no regular accounts, every reasonable presumption should be made against him. (*Botten and Mitra, A. J. C.*) MUKUND RAM. SUKUL v. SHEO NARAIN. 47 I. C. 21.

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———Accretion—Mortgage by wargdar with possession of warg land and kumaki land attached thereto—Subsequent classification of kumaki as Poramboke and assignment to wargdar mortgagor—Effect of — Enures for benefit of mortgagees. See SOUTH CANARA, KUMAKI LAND. 35 M. L. J. 120.

———Adverse possession during continuance of mortgage if and when possible.

If the mortgagor dies without leaving any issue or reversioner in a definite degree of relationship and land has been claimed by the proprietary body as the ultimate heirs to the property and they omit to sue within 12 years from the death of the last person in possession or within 12 years when the mortgage could have been redeemed under the terms of the original contract, their right to sue becomes barred by time.

Generally speaking a mortgagee cannot set up adverse possession, but a mortgagor can do so, if on the death of the mortgagor he claims to be the heir of the mortgagor and the mutation has been effected in his favour as such, and no person brings a suit against him for more than 12 years. (*Shah Din, J.*) RAM SINGH v. BASTI. 59 P. W. R. 1918= 43 I. C. 447.

———Equity of redemption—Purchase of, by mortgagee in execution of decree—Contravention of S. 99 of the T. P. Act—Right of mortgagor to redeem. See T. P. ACT, S. 99. 28 C. L. J. 151.

———Mortgagor in possession on condition of paying rent—Default—Mortgagee obtaining decree for arrears of rent but allowing execution to become barred—No right to insist on payment of barred items before redemption. See MORTGAGE, REDEMPTION. 35 M. L. J. 414.

———Lease created by mortgagee—Termination of, on redemption by the mortgagor.

Obiter.—A lease created by a mortgagee determines *ipso facto* on redemption of the mortgagor or the purchaser of the equity of redemption. The position is, however, different where the mortgage is only assigned (*Spencer and Krishnan, J.J.*) GOVINDASWAMI PILLAI v. PETEAPERUMAL CHETTY. 44 I. C. 839.

———Mortgagee related to mortgagor—Bond executed in consequence of mortgagee becoming aware of the demand by another creditor of mortgagor for repayment of amounts due to him—Mortgage whether fraudulent.

Where the debts, Nos. 1 to 3 executed a mortgage bond in favour of the plff. for Rs. 16,000 due to the latter in consequence of the latter having come to know that debt No. 4 another creditor of the debts, Nos. 1 to 3, was pressing

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for payment and thereafter debts. No. 4 obtaining a decree against debts, Nos. 1 to 3, purchased the mortgage properties, and the plff brought the present suit to enforce the security whereupon the debt No. 4 contended that the mortgage was fraudulent.

Held, because the plff. was related to debt No. 2 and was aware of the fact that debt No. 4 was demanding his dues from debts Nos. 1 to 3 and was bringing pressure to bear upon them was no reason by the plff. should not require the debts Nos. 1 to 3 to secure the repayment of the money due to him. 21 C. W. N. 585 and 43 Cal. 521 foll. (*Toumon and Richardson, J.J.*) RASH MOHAN SAHA v. KRISTODAS RAY. 22 C. W. N. 982=47 I. C. 412.

———Revenue—Arrears of—Payment of, by mortgagee after preliminary decree—Right to a charge. See T. P. ACT, S. 72. 43 I. C. 190.

———Rights of mortgagee—Part of the consideration kept in deposit and paid afterwards.

Where at the time of execution of a mortgage bond for Rs. 8,000, only the sum of Rs. 1,000 was advanced to the mortgagor and the balance was kept in deposit with the mortgagee which was subsequently paid over to the mortgagor on a registered receipt after the expiry of the due date of re-payment stipulated in the mortgage bond.

Held, that in regard to the balance of Rs. 2,000 subsequently advanced the remedy of the mortgagee was not a mere personal action based on a simple contract but he could recover the whole amount of Rs. 3,000 by a suit on the mortgage security. (*Fletcher and Huda J.J.*) KASHI NATH MITRA v. DHIKAN CHARAN. 45 I. C. 778.

———Rights of mortgagee with possession—Possession left with mortgagor on condition of paying rent annually—Default—Decree for rent—Decree barred—Subsequent rent for redemption—Right of mortgagee to claim for amount of rent covered by decree. See MORTGAGE, REDEMPTION. 35 M. L. J. 414.

———Right to possession—Stipulation for, on default of payment of interest half yearly—Default waived—Subsequent default—Notice of intention to take possession necessary.

A mortgagee, who has once waived the right to possession of the mortgaged land upon default in payment by the mortgagor interest due on the principal mortgage money, must if he desires to avail himself of the right upon a future default, give the mortgagor clear and reasonable notice of his intention. (*Rattigan, C.J. and Shah Din, J.*) BANU MAL v. PARS RAM. 30 P. R. 1918=47 P. L. R. 1918. 33 P. W. R. 1918=43 I. C. 656.

**MORTGAGOR AND MORTGAGEE.**

—Sub-mortgages—Rights of—Discharge of original mortgagee by substitution of other mortgages, if affects rights of sub-mortgagee—Right of sub-mortgagee to sell. See *MORTGAGE, SUB MORTGAGE*. 45 I. C. 769

—Usufructuary mortgage—Right of mortgagee to remain in possession after mortgage is satisfied by the usufruct—Terms of the document.

A usufructuary mortgagee has no right to remain in possession of the mortgaged property after the mortgage money is satisfied from the usufruct, even though the parties may have mis calculated that the liquidation of the mortgage money from the usufruct shall take a longer period and may have said so in the deed. (*Stuart and Kanhaiya Lal A. J. C.*) PRAG v. MOHAN LAL. 47 I. C. 161.

—Usufructuary mortgage—Theka granted by mortgagee at a certain rate of rent in last during term of the mortgage—Sale of equity of redemption for arrears of rent—Suit for arrears of rent under theka if maintainable.

On July 28rd 1908, deft. made a usufructuary mortgage of his zemindari in favour of the plff. and on the same day the plff. granted a theka of the mortgaged property to the deft. at a certain rate of rent, to last during the term of the mortgage. The rent under the lease having fallen into arrears, a suit was brought against the 1st deft. on June 26th 1912, and in execution of the decree made in the suit the equity of redemption was put up for sale on March 20th, 1913. It was purchased by a third person, and the mortgage was proclaimed at the date of sale. The purchaser did not take steps to have mutation effected in his favour and the records continued as before. The plff. now sued the deft. for arrears of rent under the theka for a period partly prior and partly subsequent to March 20th, 1913 at the rate fixed therein. The deft. contended that after the 20th March 1913, he was not liable to pay any rent he having become an ex-proprietary tenant after the date of sale. Held, that whether rightly or wrongly, the mortgage must under the circumstances, be assumed to be subsisting and as such the lease also must be deemed to subsist and the deft., as thekadar was liable for rent as prescribed in the theka (*Tudball and Abdul Raof, J.J.*) MITHAN LAL v. CHHAJJU SINGH

40 All. 429=16 A. L. J. 384=45 I. C. 329.

**MOTOR VEHICLES ACT (VIII OF 1914) S. 11**

—Rules under part II—Rules 3 and 19 contravention of—Owner's liability for the acts and conduct of servants See (1917) DIG. COL. 907. BAIDYANATH BOSE v. EMPEROR.

45 Cal. 430=22 C. W. N. 72=26 C. L. J. 37=42 I. C. 601.

—Ss. 11 and 16—Rule framed under the Act—Rule 12, Cl. (1)—Violation of—Lamp fixed on each side in front, meaning of.

**MUSSALMAN'S WAKF VALIDATING ACT.**

Rule 12 of the rules framed by the Local Government under s. 11 of the Motor Vehicles Act provides that 'the person shall drive a motor vehicle during the period commencing half an hour after sunset and ending half an hour before sunrise unless such vehicle is provided with light as follows:—(1) in the case of vehicles other than motor cycles, (2) one lamp showing a white light in front affixed on each side of the front portion of the vehicle, (b) one lamp showing a red light at the rear and showing a white light at the side affixed at the back of the vehicle in such manner as to illuminate with the white lights and render easily distinguishable the signs and numbers on the plates' Accordingly when a person drives in a motor with two lamps affixed on each side of the front portion of his car showing a white light in front, held that the rule was fully complied with and the conviction of such a person for the violation of the rule was bad in law.

The words 'front portion' in clause (a) must be read as contradistinguished from the rear and the back of the vehicle mentioned in clause (b). It does not mean the extreme end of the bonnet or the extreme end of the front portion, but means the portion which is outside the seats and the steering wheel. (*Banerji, J.*) MAHOMAD SAID v. EMPEROR.

16 A. L. J. 623=46 I. C. 1004=19 Cr. L. J. 860.

—RULES 10 and 17—Motor Car—Driving without lights—Liability of owner for act of driver in his absence.

Held, that rules 10 and 17 of the rules under the Motor Vehicles Act apply only to the driver or to a person using the car at the time and an absent owner cannot therefore be fined because his servant drove his motor car without lights after lighting up time. (*Scott-Smith, J.*) EMPEROR v. SOHAN SINGH.

27 P. R. (Cr.) 1918=37 P. W. R. (Cr.) 1918=47 I. C. 444=19 Cr. L. J. 928.

MOVABLES—Hypothecation—Bona fide purchase of—Without notices of encumbrance—Effect. See HYPOTHECATION, MOVABLES. 35 M. L. J. 460.

MUNICIPAL COUNCIL—Corporation—power of—Bona fide exercise of powers—Interference by Courts. See MAD. DT. MUNICIPALITIES ACT, Ss. 21 AND 27. 35 M. L. J. 251.

MUNICIPALITY—Constitution of duties and powers of—Liability for acts of misfeasance—Negligence of contractor—Effect of—Municipalities in India not a sovereign power or agent of the State. See MADRAS DT. MUNICIPALITIES ACT, Ss 172 AND 173. 44 I. C. 308.

MUSSALMAN'S WAKF VALIDATING ACT, (VI OF 1913)—Ss. 3 and 4, retrospective in operation. See MAHOMEDAN LAW, WAKF. 16 A. L. J. 841.

## MUTATION.

**MUTATION** — Absentee — Parties owning land in two villages — Absence of 45 years — Issue of Revenue Circular No 2 of 1903 — Mutual settlement evinced by mutation-en try binding on parties although more advantageous to one of them — Onus of proving mistake of, etc., in the mutation.

Where A and B owned land in two villages C and D and since 45 years A was absent from C and B was absent from D and on issue of the Revenue Circular No 2 of 1903, A. and B agreed that A would get  $\frac{1}{2}$  of the land in possession of B at C and that B would get  $\frac{1}{2}$  of the land possessed by A at D and mutation was accordingly effected in the Revenue papers relating to both the villages, and the arrangement was subsequently acted upon by the parties at least on one occasion:—

*Held*, that the settlement, as evidenced by the mutation entries, was binding upon the parties notwithstanding that it was much more advantageous to one party than to the other; for instance the fact that one of them got considerable quantity of land without any right is no consideration for cancelling the contract. It was not necessary to determine whether the agreement of 1st May, 1905 required registration.

*Held*, also that the onus of proving that a mistake was made and the intention of one of the parties was not correctly expressed in recording the mutation entries, lies very heavily upon the party seeking to impugn the entries on that ground specially where it appears that the

(a) parties were present at the time of mutation.

(b) Revenue officers made every effort to ascertain what they wished to be done, and

(c) mutation entries themselves are quite clear. (*Rattigan, C. J. and Chevis, J.*) *WADHAWA SINGH v. BALWANT SINGH*  
2 P. W. R. 1918=44 I. C. 277.

**NATTUKKOTTAI CHETTIES** — Maral — Deposit in A's name *maral* B — Maral man neither trustee nor entitled to operate upon it. See LIM. ACT, ART. 60. (1918) M. W. N. 564.

Practice of — Thavanai interest, meaning of. See INTEREST. 43 I. C. 972.

**NEGLIGENCE** — Carrier — Extraordinary cause — Railway administration — Goods consigned not delivered to consignee — Liability. See (1917) DIG. COL. 908; *SURENDRA LAL CHOU. DHURY v. SECY. OF STATE*.

21 C. W. N. 1125 =  
25 C. L. J. 37 = 38 I. C. 702 = 43 I. C. 263.

Suit for damages for — Plaintiff — Amendment by increasing amount claimed — Order allowing — Validity — Application made at beginning of a trial — Order made later See PRACTICE, 7 L. W. 415.

## NEGOTIABLE INSTRUMENTS ACT S. 15.

— Suit for damages for — Measure of damages — Principles — Assessment of damages by trial court — Interference in appeal — Principles. See DAMAGES. 7 L. W. 415.

**NEGOTIABLE INSTRUMENT** — Inadmissibility in evidence — Suit on original consideration Maintainability — Conditions.

Where A, who was indebted to B in the sum of Rs. 1,400 under a mortgage bond executed by the former in favour of the latter, paid Rs. 1,000 in cash and executed a trust for the balance of Rs. 400 due under the mortgage and B (the creditor) wrote an endorsement on the back of the deed to the effect that the whole amount due under the mortgage had been received, *held* that the legal effect was to extinguish the creditor's rights under his mortgage and that that result was not affected by the circumstance that the trust could not be sued after because it was insufficiently stamped. (*Shadi Lal, J.*) *FIRM OF BHAGAT RAM v. CHAJJU RAM*. 15 P. W. R. 1918 = 44 I. C. 886.

Promissory note given for debt — suit on note — dismissal on merits — Fresh suit on original consideration — Maintainability. See RES JUDICATA, PROMISSORY NOTE. 87 P. W. R. 1918.

Test of — Transferable by delivery — Holder — Right of to sue *pro tempore*.

Before an instrument can be considered to be negotiable, it must be in a form which renders it capable of being sued on by the holder of it *pro tempore* in his own name and it must be by the custom of the trade transferable like cash by delivery. (*Chaudhuri, J.*) *HAZARI MULL SHOHANLAL v. SATIS CHANDRA GHOSH* 22 C. W. N. 1636.

**NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881)** Hundi Payable on demand — Interest to run from a future date — Instrument might be payable on demand though it is not physically possible to get immediate payment. See PAER CURRENCY ACT, S. 26. 8 L. W. 501.

S. 15 — Indorsement by person not satisfying definition of 'Indorsee' — Suit on instrument not maintainable. See NEG. INS. ACT, S. 118 (e). 43 I. C. 186 (Mad.)

Ss. 26, 27 and 28 — Trustee of a charity drawing a bill or making a note — Whether personally liable on the bill or note — Agent, meaning of in S. 27.

A person drawing a bill or making a note as trustee of a temple or charity is personally liable on such bill or note

"Agent" in Ss. 27 and 28 means the agent of a person capable of contracting within the meaning of S. 26; and when the agent is not liable the principal is liable. A person drawing a bill or making a note as a trustee of

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a temple or charity is not acting on behalf of such a principal and cannot claim the benefit of S. 28, 17 M. L. J. 615; (1911) 1 M. W. N. 143, 26 I. C. 866 foll 2 L. W. 118 diss. (Wallis, C. J. and Spencer J.) PALANIAPPA CHETTIAR v. SHANMUGAM CHETTIAR 41 Mad. 815=35 M. L. J. 90=24 M. L. T. 51=8 L. W. 317.

—S. 28—Agent signing *pronote* with initials of firm—Exclusion of personal knowledge.

Where the agent of a firm who executes a promissory note expressly stated in the body of the note that the debt was to be made against the firm and signed the note prefixing the initials of the firm to his name.

Held that there was sufficient indication of an intention under S. 28 of the Negotiable Instruments Act to exclude the personal liability of the agent and that the agent was therefore not personally liable on the note. 33 Mad. 482 dist. (Spencer and Krishnan, JJ.). NATESA AIYAR v. SATTAYA PILLAI. 8 L. W. 622.

—S. 48—Promissory note—Endorsement by stranger—Suit on note not maintainable. See N.G. INS. ACT S. 118 (e). 43 I. C. 186.

—S. 56—Promissory note—Endorsement of whole of balance due under—Validity.

S. 56 of the Negotiable Instruments Act is no bar to the indorsement or transfer of the whole of the balance due with a promissory note. (Johnstone, C. J.) JAI CHAND v. SARDAR SINGH. 5 P. W. R. 1918=44 I. C. 264

—Ss. 64 and 76—Non-presentment by holder—Drawer's liability—Onus of proving that no loss will ensue to drawer.

N who had sold potatoes to H drew a hundi payable at sight on the latter which was in favour of M. sold it to plffs who sent in an unregistered letter to their agent at Cawnpore. The letter miscarried, and the loss, owing to the carelessness of the plffs. was not discovered till after fourteen months of the loss. The plffs did not present the bill to N but brought a suit on foot of the hundi against N and H.

Held, that N was not liable under the Hundi inasmuch as the plffs had not shown that N could not suffer loss by reason of non-presentment for payment. (Richards, C. J. and Tudball, J.) NANHEY MAL v. CHAIT RAM. 16 A. L. J. 899=43 I. C. 364.

—S. 83—Applicability of—Hundi payable at sight—Holder for valuable consideration—Return of consideration money.

S. 83 of the Negotiable Instruments Act does not apply to cases of *hundis* payable at sight, for they are present not for acceptance but for payment.

Holders of *hundis* for valuable consideration are entitled to return of the consideration money paid by them to their endorers, if the *hundis* subsequently turn out to be worthless and no payment can be obtained upon them. (Lindsay, J. C.) RAM DAYAL v. LALTA PRASAD. 5 O. L. J. 415=47 I. C. 683.

—S. 118 (e)—Endorsement on negotiable instrument—Order of endorsements—Presumption as to—Suit on *pronote* endorsed by stranger if maintainable.

In the absence of direct evidence that the endorsements on a negotiable instrument were made in a particular order, the statutory presumption under S. 118 (e) of the Negotiable Instruments Act that they were made in the order in which they appear on the instrument will prevail.

Per Wallis, C. J.—*Seemle*, A suit cannot be filed on the strength of an endorsement in a *pronote* by a person who does not satisfy the definition of an endorser in the Neg. Ins. Act. (Wallis, C. J. and Sadaswa Iyer, J.) KOTHANDARAMASWAMI NAIDU v. MUTHIAH CHETTI. 45 I. C. 186.

NON-OCCUPANCY HOLDING—*Raiyati interest*—Sale of, in execution of money decree—*Raiyat's* right to raise question of non-transferability.

A non occupancy *raiya*ti holding was sold in execution of a money-decree whereupon the judgment-debtors objected on the ground of non transferability. The patta of the land prohibited any kind of transfer without the consent of the landlord and gave the landlord the right of khas possession in case any such transfer took place.

Held, that if the terms of the lease gives the landlord a right of reentry in the case of a transfer without his consent that may raise a question between the purchaser, if any, at the Court sale and the landlord, but does not clothe the *raiya*ti with a right to object to the sale (Richardson and Beachcroft, JJ.). LELONG v. RAJANI KANTA CHOWDHURI.

22 C. W. N. 792=46 I. C. 417.

NOTICE—Non-issue of as required by S. 9—Proceeding under Land Acquisition Act—Effect of, validity of proceedings. See LAND ACQUISITION ACT, S. 9. 16 A. L. J. 689.

—Requisites of a valid notice to quit. See LANDLORD AND TENANT.

35 M. L. J. 713=23 C. W. N. 77 (P. C.)

—Service of—Test of sufficiency of—Delivery by post—Presumption—Effect of registering letters containing notice to quit. See LANDLORD AND TENANT.

35 M. L. J. 713=23 C. W. N. 77 (P. C.)

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—Suit against Railway Company for damages for misdelivery—Notice of claim for compensation if essential. *See RAILWAYS ACT, S. 77.* 35 M. L. J. 35.

**NUISANCE**—*Actionable Nuisance*—*Carrying on of business when amounts to—Finding as to whether carrying on of business constitutes actionable nuisance or not—Interference in Second Appeal.*

In deciding whether a particular business carried on by a neighbour is or is not an actionable nuisance the court must consider the locality, the question whether the nuisance had been long in existence, whether the trade which causes the nuisance is commonly carried on in that locality and other questions of a like nature.

Where the final court of fact keeps all these questions in view and comes to a conclusion either that the business is or is not a nuisance, its finding will not be interfered with in second appeal (*Wadli, C. J. and Sadasiva Aiyar J.*) *SADASIVA CHETTY v. RANGAPPA RAJOO.* 24 M. L. J. 17=1918 M. W. M. 293 =7 L. W. 508=45 I. C. 428

—Order for removal—Proceedings under S. 133 Cr. P. Code, nature of enquiry. *See CR. P. CODE, S. 133.* 28 C. L. J. 211.

**OATHS ACT, (X of 1873) S. 5**—Accused incompetency of, to be a witness in a criminal trial. *See CR. P. CODE, S. 342 (4).* 27 C. L. J. 91

—**S. 11**—*Oath under—Effect on person not joining in challenge—Right of such party to appeal against decree on oath.*

An oath is under S. 11 of the Oaths Act conclusive only as against the person who offered to be bound by it and not as against one who never joined in the challenge and such persons have the ordinary right of appeal against the decree.

Order 23, Rule 3, C. P. Code, has no application to the persons who did not join in the challenge and under the provisions of O. 43, R. 1 (m) an appeal is now competent against an order under O. 23, R. 3 which was not so under the provisions of the Old Code. vide S. 375, and 558 of that Code. (*Chevis and Broadway, J.J.*) *TALAWAND v. FATEH DIN.* 83 P. R. 1918=50 P. W. R. 1918=45 I. C. 230.

—**S. 13**—*Deposition of boys of tender years—No oath or affirmation taken under a promise to speak the truth.*

At a criminal trial the Sessions Judge examined as witnesses three boys between seven and nine years of age without administering an oath or affirmation to any one of them, but only after a promise from them to speak the truth. Relying on the evidence of these

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three boys and an eye-witness, the learned Judge convicted the accused. On appeal, the evidence of the boy witness was objected to as having been inadmissible.

*Held by Shah, J.* that the evidence of the boy witness, even if taken without any solemn affirmation in the prescribed form, was admissible under S. 13 of the Indian Oaths Act, though it should be received with due care and caution; and that the evidence of the three boys coupled with the evidence of the eye-witness showed that the accused was rightly convicted.

*Per Marten, J.*—The conviction ought to stand even if the evidence of the three boys were eliminated.

*Per Shah J.*—It is necessary before proceeding to examine such a witness (*i.e.*, a witness of tender years) the court should satisfy itself that the witness was competent to testify, that he was capable of understanding the questions put to him and of giving rational answers to those questions; and that thereafter the Court should proceed to administer the oath or affirmation as required by the Oaths Act. If the witness is found to be incapable of understanding the obligation of such an oath or affirmation, provided he is found to be a competent witness. These facts may be noted so that the record may show that before taking the statement of a witness of that character the trial Court had ascertained that the witness was a competent witness under S. 118 of the Evidence Act and that the omission to administer an oath or affirmation was due to his want of understanding the obligation of an oath. (*Shah and Marten, J.J.*) *EMPEROR v. HARI RAMJI PAVAR.* 20 Bom L. R. 365=45 I. C. 497=19 Cr. L. J. 593.

—**S. 13**—*Scope of—Applicability of.*  
S. 18 of the Oaths Act does not extend to cases where the omission of the oath or affirmation has been intentional. (*Twomey and Pariett J.J.*) *DEYA v. EMPEROR.* 9 L. B. R. 88=43 I. C. 86=19 Cr. L. J. 54.

**OCCUPANCY HOLDING**—*Mortgage of, by tenant—Death of tenant without heirs—New tenant not bound by mortgage.*

Where an occupancy holding is mortgaged by a tenant, on the death of the tenant without heirs the mortgage grafted upon it necessarily determines also.

The doctrine that a voluntary surrender by tenant cannot operate to prejudice the rights of one holding under him by virtue of a transaction good against the landlord has no application to a case where a tenant dies without heirs (*Drake Brockman, A. J. C.*) *RANI BAHU PARWAR v. BORHA RAM.* 43 I. C. 912.

—*Non-transferability*—*Objection by tenant, if maintainable.*

OCCUPANCY HOLDING.

A tenant can object to the sale of a non-transferable holding in execution of a money decree even if the landlord consents to it. (*Imam and Thornhill, J.J.*) **RAMESWAR SINGH BAHADUR v KESHWAR RAI.**

47 I. C. 790.

Non-transferability—Tenancy before T. P. Act—Not for agricultural purposes—Custom of transferability.

A tenancy created before the passing of the T. P. Act which is not Kaemi mokurrari and which is not for agricultural purposes, is not transferable except under a custom of transferability. (*Woodroffe and Smither, J.J.*) **TARA KANTA DAS CHOWDHURY v. GOPAL CHANDRA SIL.**

46 I. C. 191

Non-transferable by custom—Execution sale of—Objection to—Attachment before judgment by consent in execution of money decree against holder—Effect—Estoppel. See **ESTOPPEL.** 5 Pat. L. W. 185.

Non transferable—Devise of, portion of holding.

A non transferable occupancy holding, or a part thereof cannot apart from custom or local usage be devised by will 42 C. 172 dist; 42 C 254 foll.

Per *Chatterjee, J.*—The validity of a transfer of the whole or part of an occupancy holding made voluntarily appears to depend upon the principle of estoppel and that of a transfer made involuntarily upon the principle of acquiescence and waiver. No such principles are applicable to the case of a testamentary disposition. (*Fletcher and N.R. Chatterjee, J.J.*) **UMESH CHANDRA DUTTA v. JOY NATH DAS.**

22 C. W. N. 474=  
43 I. C. 779.

Non-transferable—Gift of, binding on donor and his heirs. See (1917) DIG. COL. 913; **BEHARI LAL GHOSE v. SINDHUBALA DAS.**

45 Cal. 434=22 C. W. N. 210=  
27 C. L. J. 497=41 I. C. 878.

Non-transferable, mortgage of—Death of tenants without heir—Effect of.

Where a non-transferable occupancy holding is usufructually mortgaged by the tenant without the consent of the landlord the latter is entitled to eject the mortgagee from the holding on the death of the tenant without heirs. (*Richardson and Beachcroft, J.J.*) **HABAPALI SARKAR v. RAJABALI MIA.**

44 I. C. 721.

Non-transferable occupancy Holding—Transfer of portion, Validity—Rights of landlord and transferee—Consent to transfer of some of the landlords—Effect—Rent decree obtained by landlords against recorded tenant—Suit for declaration of its invalidity by transferee—Maintainability.

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There is no justification for the contention that because a landlord cannot eject the transferee of a portion of a non-transferable occupancy holding and because if he does not eject him, he is liable to restore possession, the transferee has a right to obtain a declaration prohibiting the landlord from proceeding with an action against his recorded tenant.

The transferee is not entitled before he is actually dispossessed by the landlord to bring an action against the landlord for a declaration that a tenant alleged by the landlord to be his recorded tenant is not in fact his tenant and that a decree obtained by the landlord against the alleged tenant is fraudulent. Having no legal title or interest which the landlords are concerned to deny, the transferee cannot invoke the operation of S. 42 of the Specific Relief Act. 42 Cal. 172 ref.

If some out of a number of co sharer landlords transfer either a part or the whole of a non-transferable occupancy holding, the remaining co sharers are not entitled to eject the transferee. By obtaining recognition from a co-sharer landlord the transferee does not acquire any rights or valid title in the holding itself as against the entire body of landlords. Notwithstanding such recognition the remaining co-sharers can sue the original tenant for the entire rent by impleading the transferee.

If the consenting co-sharer landlords choose to repudiate their consent and to join the non-consenting landlords in suing the original tenant for the entire rent on the footing that the consent given by them does not create a division of the tenancy it is open to them to do so. It may be that the transferee will be entitled to sue the consenting co-sharer for damages for fraud.

No division of a holding under the B. T. Act is operative unless all the landlords consent to it and a suit for rent brought by the joint landlords against the recorded tenant is a properly constituted action 10 C. L. J. 618 ref (*Miller, C. J. and Mullick, J.*) **GANAPATH SATPATHY v. HARIHAR PANDHI.** (1918) Pat. 289.=5 Pat. L. W. 232=43 I. C. 389.

Non-transferable—Purchaser of portion of—No right to claim possession as against landlord purchasing holding in execution of rent decree. See C. P. CODE, O. 21, R. 100. 5 Pat. L. W. 129.

Non-transferability without landlord's consent—Landlords, members of joint Hindu family—Transfer with consent of karta of joint family—Validity See (1917) DIG. COL. 915; **GOLAPDI MEAH v PURNA CHANDRA DUTTA.** 21 C. W. N. 774=27 C. L. J. 276=41 I. C. 37.

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—Non transferable—Sale in execution of money-decree—Co-sharer raiyat if can object to sale.

One of several raiyats who jointly hold a non transferable occupancy holding cannot object to the sale of a part of the holding in execution of a money-decree. His objection must be confined to the extent of his share (*Woodroffe and Smither, JJ*) **FELANI MONDALANI v. MUKONDA LAL MONDAL.**

46 I. C. 781.

—Non-transferable—Transfer of ttenant—Settlement by landlord, effect of.

Plff. purchased a non transferable occupancy holding from the heirs of the original tenant. A few days later the deff. purchased the same holding from a relation of the original tenant who had no right, title, or interest in the occupancy holding. Both the plff. and the deff. obtained settlement of the land from the landlord. the deff's, settlement being prior to that of the plff.

Held that the settlements made by the landlord might be regarded as signifying the landlord's consent to the transfers respectively set up by the plff. and the deff. and that in as much as the transfer set up by the deffs. was from a pretended owner, the consent of the landlord could have no validating effect upon the title derived by the deff. from that transfer but it operated to validate and confirm the title derived by the plaintiff from the true owners. (*Teunon and Richardson, JJ.*) **WAHID ALI BHUYA v. MAHAMAD ANSAR ALI.**

47 I C 147

—Succession to on the death of the holder—Right of one of the heirs to take up the entire holding.

On the death of an occupancy-tenant the occupancy right devolves by operation of law on all the heirs as co-tenants and any one of them willing to do so can take up the whole tenancy in the event of the other heirs being unwilling to do so. (*Stanyon, 4 J.C.*) **KALWA v. BHAWAB SINGH.**

44 I C. 1001.

—Suit for possession of, by lessee from usufructuary mortgagee in possession—Lease granted and registered by mortgagee during the pendency of proceedings for compulsory registration of mortgage—Right of lessee to recover possession without paying off the mortgage.

Where an occupancy tenant made a usufructuary mortgage of certain plots of lands, but during the pendency of the proceedings to get the mortgage-deed registered granted a registered lease of some of these plots of land and no fraud or collusion on the part of the lessee was proved and the lessee sued to recover possession from the mortgagee who had been put in possession held, that the lessee was entitled to possession without having to pay the mortgage money. **8 A. L. J. 981 dist.**

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(*Piggott and Walsh JJ.*) **HABIB-UL LAH v. MANRUP.**

40 All 228=  
16 A. L. J. 137=43 I. C. 514.

—Testamentary disposition of it, valid. See C. P. TEN. ACT, S 46

44 I. C 1001

—Transfer of—Payment of nazar to landlord—Custom—Proof of—Amount undetermined—Vague and uncertain.

In order to establish a custom of transferability subject to the payment of a customary nazar, the evidence must show that the landlord is bound to recognize when nazar of the amount, or, at the rate, determined by custom is tendered to him.

A practice or course of business in a zemindary office according to which a transferee is recognised provided that the amount of the nazar is satisfactory to the landlord is not sufficient.

The payment of nazar without more is an indication that the jotes are not transferable without the landlord's consent given on receipt of the nazar.

A custom which leaves the amount or rate of nazar indefinite must be void for uncertainty (*Richardson and Walmsley, JJ.*) **RANI MINA KUMARI SAHEBA v. ICHHAMOYEE CHAUDH-RANI.**

22 G. W. N. 929=  
27 C. L. J. 587=46 I. C. 747.

—Transfer of—Right of landlord to eject—Transferable and non transferable holding. See 1917 DIG. COL §15; **RAMJI PRASAD v. MOHAMAD ANWAR ALIKHAN.**

3 Pat. L. W. 299=  
(1917) Pat. 360=43 I. C. 377,

**OCCUPANCY RIGHT**—Personal right—Not transferable beyond life time—Bengal Rent Act *Stanyon, 4 J.C.*) **RAMPRASAD v. KISHORI LAL.**

46 I. C. 657.

—Ryotwari waste land—Claim of occupancy right by cultivating tenants—Maintainability of—Evidence necessary to prove. See **LANDLORD AND TENANT, PERMANENT TENANCY.**

7 L. W. 190, also 34 M. L. J. 294.

**OCCUPANCY TENANT**—Sub-lease by—Validity—Landlord's consent—Necessity. See **LANDLORD AND TENANT.**

14 N. L. R. 188.

—Sub-tenancy from year to year of field—Termination—Notice—Necessity—Intention of parties—Presumption.

When there is a sub tenancy from year to year of a field of an absolute occupancy tenement there is no presumption in the absence of an express agreement that the sub-tenancy terminates at the end of every year without notice being given. It should be presumed

**OCCUPANCY TENANT.**

that the intention of the parties was that the sub-tenancy would not come to an end without reasonable notice given by one party or the other. (*Batten, A. J. C.*) **SHEOMANGAL v. NANHELAL.**

14 N. L. R. 3=43 I. C. 392.

———*Transfer of, in favour of Zarpeshgidar—Rights of re-entry in favour of landlord.*

Where a non-transferable holding is sold to a *zarpeshgidar* of the holding the landlord has a right of re-entry even where the *zarpeshgi* right of the purchaser had been recognised by the landlord prior to suit. (*Roe and Coutts, J.J.*) **MUKHRAM SINGH v. SADASIVA KOER.**

47 I. C. 132.

**OFFICIAL LIQUIDATOR** — *Position of, in relation to Bank.*

The official Liquidator of a Bank cannot be looked upon as agent of the Bank. He is an officer of the Court whose rights depend on the terms of his appointment. (*Chaudhri, J.*) **DEUTSCH ASIATISCHE BANK v. HIRA LAL BURDHAN AND SONS.**

47 I. C. 122.

**OPIUM ACT (I OF 1878), S. 9—Possession of excess quantity of opium—Joint possession—what constitutes.**

The fact that the accused gave opium to his father and children to eat was of itself insufficient to show that he alone was not in possession of the quantity discovered in his almirah. (*Shah Din and Chevis, J.J.*) **EMPEROR v. WAZIR SINGH.**

3 P. R. (Cr.) 1918=

44 I. C. 588=19 Cr. L. J. 364.

———*Rule 38 (2) as amended — Possession of more than one tola of opium.*

The amendment of R. 38 (2) under the Opium Act, which limits to one tola the amount which two or more persons may without a license at one time have in their possession collectively, renders it unnecessary to give a decision on the conflict of this Court's rulings in 13 P. R. (Cr.) 1897 and 10 P. R. 1901 (Cr.) (*Rattigan, C. J. and Wilberforce, J.*) **RAM RAKHA v. EMPEROR.**

15 P. R. (Cr.) 1918=

22 P. W. R. (Cr.) 1918=

88 P. L. R. 1918=46 I. C. 46=

19 Cr. L. J. 686.

**ORDER—Dismissing objection to appointment of Receiver—Appeal from.** See O. P. C. O. 40 R. 1.

3 Pat. L. J. 573.

**ORISSA TENANCY ACT (II of 1913) Ss. 31 and 250—Occupancy holding—Registration fee for transfer, suit for recovery of—Second Appeal**

The transferee of an occupancy holding is bound to deposit the registration fee prescribed

**ORISSA TENANCY ACT, S. 154.**

ed by S. 31 of the Orissa Tenancy Act 1913 and if he fails to do so the landlord may sue for it. In such a case a second appeal lies to the High Court from the order of the lower appellate Court. (*Mullick and Atkinson, J.J.*) **MRITUNJOY PRAHARAJ v. SREE JAGANNATH JEU.**

3 Pat. L. J. 351=

47 I. C. 34.

———*Ss. 37, 215, 220 and 221—Interest of an under-raiyat if an incumbrance—Effectment of under raiyat by auction purchaser—Procedure for.*

An under-raiyat in occupation of land is an incumbrancer within S. 215 of the Orissa Tenancy Act, and, therefore, Ss. 220 and 221 regulate the manner in which the incumbrance can be annulled by an auction-purchaser.

Where the procedure for annulment of incumbrances provided by S. 221 is not followed and a year is allowed to elapse by the purchaser without taking steps to annul the incumbrance he is not entitled to eject the under raiyat under S. 57. But if the purchaser takes the prescribed steps to annul incumbrance and the under raiyat refuses to give up possession, the latter can be ejected under S. 57. (*Mullick and Atkinson, J.J.*) **SHIBA DAS v. GAJENDRA NATH DAS.**

3 Pat. L. J. 112=44 I. C. 593.

———*Ss. 154 and 232, Nijchas Land—Occupancy rights in, acquisition of—B. T. Act, Ss. 20, 21—Bengal Rent Act, S. 7.*

S. 154 of the Orissa Tenancy Act does not entitle a landlord to a declaration that lands are nijchas or proprietor's private lands unless the land was recorded as nijchas not only in the Provincial Settlement but also in the settlement between the years 1906 and 1912.

The section makes a distinction between the expressions nijchas and nij chote.

Defts. lessees were introduced into the land under kabuliyats of the months of May and June 1901 in which they expressly stipulated that after the expiry of the term they would leave the lands to the khas possession of the pft's. Held, that this stipulation amounted to a contract by the lessees that they should not acquire occupancy rights in the land and was binding on them, as at that date there was no provision in Orissa which prevented a tenant from contracting himself out of the provisions of S. 20 and 21 of the B. T. Act which were then in force there. The provisions of S. 232 (2) of the Orissa Tenancy Act make it clear that the Legislature when they enacted that Act, meant to give effect to contracts made between landlord and tenants under which the tenants could be prevented from acquiring occupancy rights in land, provided the contract had been made more than six years before the commencement of the Act. **S L. B. R. 185 ref. (Chapman and Roe, J.J.) SUREKA**

## ORISSA TENANCY ACT, 215.

AKBAR ALI v. GOPAL PRASAD CHOLE.  
3 Pat. L. J. 475=46 I. C. 556.

—Ss. 215, 220 and 221—Interest of under-rajyat, an incumbrance—Annulment under Ss. 220 and 221 necessary before ejectment. See ORISSA TEN. ACT SS. 57. AND 215,  
3 Pat. L. J. 112.

—S. 232 See ORISSA TENANCY ACT, S. 154.  
3 Pat. L. J. 475.

**ODDH CIVIL DIGEST, Para 172**—*Execution of decree transferred from one court to another—First attempt unsuccessful—Competence of court to persevere with execution.*

A decree does not become incapable of execution within the meaning of Para 172 of the Ouddh Civil Digest, merely because one attempt to execute it has proved unsuccessful. The Court to which a decree is sent for execution is competent to persevere with the execution until it is made to appear either that satisfaction has been obtained or that execution is no longer possible. (*Lindsay, J. C. and Stuart, A. J. C.*) GUR DAYAL v. MESSES. BEGG SUTHERLAND AND CO.  
21 O. C. 261=48 I. C. 722.

—**PARA 272**—*Free certificate—Govt. Pleader appearing for Tahsildar, acting as liquidator of Co-operative Society.*

A Government Pleader appearing in a case for a Tahsildar, who has been impleaded in his capacity as a liquidator appointed under S. 42 (1) of the Co-operative Societies Act is not exempted from filing his fee certificate as required by para. 272 of the Ouddh Digest. (*Stuart and Kankhaiya Lal, A. J. C.*) BENI MADHO SINGH v. LIQUIDATOR, DEWARA BANK.  
4 O. L. J. 583=44 I. C. 353.

**ODDH ESTATES ACT (I of 1869)**—*Primogeniture Sanad—Issue of—Effect of.*

Where a primogeniture sanad had been issued to a talukdar who died before the Ouddh Estates Act came into force, succession to the estate would be governed by the terms of the sanad in the case of succession under a testamentary disposition. (*Stuart and Kankhaiya Lal, A. J. C.*) FAKH JAHAN BEGUM v. MD. ABDUL.  
3 O. L. J. 49=45 I. C. 307

—**Sanad, effect of**—*Lord Canning's proclamation—Confession of property—Property in the hands of widow—Rights of reversioners put an end to—Regrant to widow sanad, effect of.*

Lord Canning's Proclamation of the 15th March 1858 had the effect of divesting all landed property from proprietors in Ouddh and to transfer it to and vest it in the British Government. Where any such property was in possession of a Hindu widow at the time of the proclamation the result of it was to destroy any interest which the lady or any of the

## ODDH RENT ACT, S. 12.

reversionary heirs of her husband had in the property.

The Second Summary Settlement in Ouddh was a temporary measure and meant no more than that the person with whom it was made was permitted to engage for the payment of revenue for a period of three years. It did not amount in any way to the acknowledgment of the existence of any proprietary title; nor did it of itself vest the absolute proprietary and heritable right in the Taluqa.

When the Governor-General issued his letter of the 10th October 1859 it was not intended to declare any particular terms regarding the estates which were in possession of widows and the general declaration in para. 2 of this letter ought to be deemed to include cases in which the person admitted to engage for the revenue was a woman. It was not the intention to bestow in any case less than the full estate described in the letter.

This letter purported to grant a fresh title altogether and not merely to acknowledge and restore a title which had vested prior to the confiscation and had been destroyed thereby. Held, further, that it was not the effect of this letter and the Sanads which followed upon it to revive all rights which might have been enforced against the talukdars prior to the time of confiscation such for example as those of the reversionary heirs of a deceased Hindu widow in possession of the estate. (*Lindsay, J. C. and Stuart, A. J. C.*) BISHESHUR BAKSH SINGH v. RAJA REMESHAR BAKSH SINGH.  
21 O. C. 1=44 I. C. 368.

—**Ss. 15, 22 and 23**—*Estate entered in List II and held under primogeniture sanad—Bequest in favour of a person outside the line of succession—Ordinary law, whether includes terms of Sanad—Hindu Law—Will—Necessary elements of.*

S 15 of Act I of 1869 is a declaratory section operating both prospectively and retrospectively.

Where a person whose estate was entered in List II dies before Act I of 1869, came into force, bequeathing his estate to his son-in-law, who was neither a talukdar nor a grantee nor a person who would have succeeded to the estate, had he died intestate

Held, by *Lindsay, J. C.* that the effect of S. 15 was to put the sanad out of consideration altogether and that the succession to the estate on the death of such a legatee would be governed by the rules which would have governed the succession if the legatee had bought the same from a person, not being a talukdar or a grantee, or in other words by the ordinary law, irrespective of the rule of succession contained in the sanad.

Held by *Kankhaiya Lal, A. J. C.*, that the effect of that section was to relieve such a legatee from the disability imposed by Act I of 1869 on talukdars and grantees in the matters

# **OUDH ESTATES ACT, S. 22**

of transfer and succession and not from any rules which might be applicable independently of the Act, and that the succession laid down in the sanad as restricting or qualifying the personal law.

*Held*, also that the rule of succession contained in the sanad was inapplicable to a person, who gets the estate otherwise than by inheritance. (*Lindsay, J. C. and Kanhaiya Lal, A. J. C.*) **BALRAJ KUAR v. MAHADEO PAL SINGH.** 4 O. L. J. 589=20 O. C. 360=44 I. C. 59.

—S. 22—Scheme of—Widow, position of—Reversioner no vested right in—Transfer of estate by reversioner, void

Although under the scheme of inheritance laid down in S. 22 of the Oudh Estates Act the widow of a Hindu talukdar has an interest which is in many respects different from the interest held by a female heir under the ordinary Hindu Law, yet this does not make any difference in the nature of the legal position of the person who is entitled to succeed after the widow's death.

Where it was found that a person was entitled to the estate left by a talukdar under S. 22, cl. 14 of the Oudh Estates Act, but for the existence of the talukdar's widow who was in possession of the estate under clause 8 of that section.

*Held*, that during the widow's life-time he had no vested interest, but merely an expectancy of inheritance in the estate which he could not transfer. (*Lindsay, J. C. and Stuart, A. J. C.*) **HAR NATH KUAR v. INDRA BAHADUR SINGH.** 47 I. C. 214.

—S. 22 (4)—Taluka—Succession to—Death of talukdar—Competition between members of natural and affiliated family

The succession to a person, obtaining a taluka under the provisions of S. 22, clause 4, of the Oudh Estates Act, and dying intestate, goes, in the absence of any male lineal descendant, to the line of the person who affiliated him and treated him in all respects as a son, and not to his natural line. (*Stuart and Kanhaiya Lal, A. J. C.*) **LAL TRIBHUWAN NATH SINGH v. DEPUTY COMMISSIONER, FYZABAD** 47 I. C. 228.

# **OUDH LAND REVENUE ACT (XVII OF 1876)**

S. 17—Scope of—Acquisition from profits of property under the superintendence of Court of Wards—Section not applicable.

The language of S. 174 of the Oudh Revenue Act points to the property which was actually under the superintendence of the Court of Wards and not to any profits that may be derived therefrom after the release or to any acquisition made from the same.

Property purchased by a person from the profits realised by him from his estate after its release from the superintendence of the Court

# **OUDH RENT ACT, S. 3.**

of Wards, is liable to attachment in execution of a decree obtained against him in respect of a contract entered into while the estate was under the superintendence of the Court of Wards (*Kanhaiya Lal, A. J. C.*) **DEBI BAKSH SINGH v. BED NATH.** 3 O. L. J. 30=45 I. C. 219.

**OUDH LAWS ACT (XVIII OF 1876)—Pre-emption—Member of village community—Rent-free grantee, if a Muafidar—Acquisition of status of under-proprietor—Condition.**

A mere rent free grantee is not a member of the village community for the purposes of pre-emption.

A mere muafidar or rent free-holder however long he may have held the muafi as such, does not thereby acquire the status of under-proprietor, unless proceedings have been taken by the Revenue Court under S. 107 of the Oudh Rent Act. (*Kanhaiya Lal and Daniels, A. J. C.*) **MURLI v. GAJRAJ SINGH.** 21 O. C. 124=46 I. C. 443.

—S. 9 and Ch. II—Pre-emption in respect of sale of house by raiyat.

Under S. 9 of the Oudh Laws Act unless the transferor is a proprietor of a proprietary or an under proprietary tenure or a share in such a tenure, no right of presumption arises. A sale by an occupier of a house in a village who has merely the ordinary rights of a raiyat in it does not give rise to a right of pre-emption exercisable under Chap. II of the Oudh Laws Act. 4 O. C. 26 f.1. (*Stuart, J. C. and Kanhaiya Lal, A. J. C.*) **ARRAS BANDI BIBI v. ABDUL GHANI** 47 I. C. 673.

—S. 25—Transferred, meaning of.

The word "transferred" as used in S. 25 of the Oudh Laws Act, if so general import and its meaning cannot be restricted to cases in which the transfer has been made under orders of the Court. (*Lindsay, J. C.*) **NADIR SINGH v. IN. DAR SEN SINGH.** 47 I. C. 652.

# **OUDH RENT ACT (XIX OF 1861) Ss 3, 52, 182.**

—Oudh land laws—Tenures recognised in Oudh—Proprietor, under-proprietor and tenant—No other kind of tenure recognised—Incidents of tenure attached by law—Cannot be varied by consent of tenure-holder.

The Oudh Rent Act, 1868, recognises three classes of persons and three only, as having an interest in and entitled to hold land in the province of Oudh, viz., proprietor, under-proprietor and tenant.

The law attaches to the status of under-proprietor certain rights, among them the right to transfer and while he retains that status cannot be divested of any of those rights.

Where therefore at the time of a settlement a land-owner applied to be recorded as an under-proprietor, and under pressure from the settlement officer consented to be recorded as

# **ODDH RENT ACT, S. 27.**

an under-proprietor without right of transfer.

*Held*, that he was creating a tenure unknown to the law and that no effect could be given to the words "without right of transfer" in the settlement officers decree. (*Mr. Ameer Ali J.*)  
**LAL SRIPAT SINGH v. LAL BASANT SINGH.**  
 22 C. W. N. 995=8 L. W. 328=21 O. C. 180  
 =(1918) M. W. N. 638=

35 M. L. J. 595=24 M. L. T. 434=  
 20 Bom. L. R. 1101=16 A. L. J. 817=  
 8 Pat. L. W. 255=28 C. L. J. 468=  
 47 I. C. 424 (P. C.)

—S. 27—*Compensation for improvement by tenant—Amount of.*

Where it is found that a tenant is entitled to compensation for improvements made by him on his holding a Court is not justified in reducing the amount of compensation on the ground that a cheaper improvement could have served the tenant's purpose unless such a plea is raised by the landlord, such a consideration not coming within S. 27 of the Oudh Rent Act. (*Campbell, S. M. and Lovett, J. M.*)  
**DWARKA v. BHAGWATI PRASAD SINGH.**  
 5 O. L. J. 69=45 I. C. 227.

—Ss. 52 and 141—*Maintenance grant—Tenancy held under special agreement—Interest on arrears of rent.*

Deft. held a village for his maintenance under a grant from the Talukdar on condition of paying the revenue assessed on the same and 16 per cent, *malikana* and 7 per cent was paid to the talukdar. The grant was expressed resumable if the grantee failed to maintain the members of his family, though it was hereditary; the grantee was debarred from selling or mortgaging the village.

*Held*, that the grantee was a tenant holding under special agreement under S. 52 of the Oudh Rent Act and was therefore, liable to pay interest on the arrears of rent due from him under S. 141 of that Act. (*Kankaiya Lal, A. J. C.*)  
**SHEORAJ SINGH v. SRIPRAKSH SINGH.**  
 5 O. L. J. 141=45 I. C. 855.

—Ss. 53 and 167 B—*Tenant holding at favourable rent—Ejectment—Resumption—Procedure.*

S. 107 B of the Oudh Rent Act supersedes, S. 53 of the Act in the case of tenants holding at a favourable rate of rent.

Where there is a special provision governing a special class of cases the latter should be dealt with under it, and not under the general provision governing general cases.

A tenant holding at a deliberately, and not accidentally, favourable rate of rent comes under S. 107 B of the Oudh Rent Act, and is subject to resumption proceedings under Chapter VII A of the Act and cannot be ejected by notice as an ordinary tenant. (*Campbell, S. M. and Ferard, J. M.*)  
**RAM KUMAR v. PARTAB BARADUR SINGH.**  
 44 I. C. 654.

# **ODDH RENT ACT, S. 127.**

—S. 107 A—*Thikadar—favourable rent payable by—Enhancement of.*

A favourable rent payable by a Thikadar, or person to whom the collection of rent has been leased, is liable to be enhanced under Chap. VII A added to the Oudh Rent Act by the U. P. Act IV of 1901, in the circumstances and subject to the conditions therein provided. (*Sir John Edge*)  
**PARBATI KUNWAR v. DEPUTY COMMISSIONER OF KHERI.**

40 All. 541=16 A. L. J. 865=  
 20 Bom. L. R. 1055=23 C. W.  
 N. 125=28 C. L. J. 449=  
 5 Pat. L. W. 302=35 M. L. J.  
 525=2 M. L. T. 292=8 L. W.  
 586=(1918) M. W. N. 880  
 =47 I. C. 394=  
 45 I. A. 111 (P. C.)

—S. 107G—*Civil Court—Jurisdiction of—Declaration that plaintiff is entitled as under-proprietor and not as tenant—Maintainability of.*

A Civil Court has jurisdiction to try a suit filed by a person who has been held by the Revenue Court to be a tenant under S. 107G of the Oudh Rent Act, for the purpose of obtaining a declaration that he is an under-proprietor and not a tenant. (*Lindsay, J. C.*)  
**NADIR SINGH v. INDAR SEN SINGH.**  
 47 I. C. 632.

—S. 108 (10)—*Jurisdiction—Civil and Revenue Court—Claim of under proprietary right—Proof—Claim—Evidence of.*

*Held*, that on the evidence the plf's under-proprietary title was satisfactorily established and that the present suit in the Civil Court for possession and damages was not barred by reason of the fact that the plf's. remedy under S. 108 (10) of the Oudh Rent Act had been found by the Revenue Court to be barred by time. (*Kankaiya Lal, A. J. C.*)  
**KHADIM HUSAIN v. JAMIL BIBI.**  
 44 I. C. 357.

—S. 127—*Mortgagor in possession of mortgaged land as lessee—Holding over—Ejectment of—Jurisdiction—Civil or Revenue Court.*

A mortgagor took possession of the mortgaged property as lessee from the usufructuary mortgagee. After the expiry of the lease he continued to be in possession and the mortgagee sought to eject him through the Rent Court by notice under S. 127 of the Oudh Rent Act.

*Held*, that it being doubtful whether the mortgagor was in possession of the land as holding over after the lease or as proprietor who had usufructually mortgaged his land and had taken or retained its possession which, if the mortgage was a valid one, would have been in the usufructuary possession of the mortgagee, the mortgagor could not be ejected through the Rent Court by notice under S. 127 of the Oudh Rent Act. (*Holms, S. M. and*

## OWNERSHIP.

*Ferard, J. M.*) MAHOMED NAIM ATA v. MURLI DHAR. 5 O L. J. 163=46 I C 75.

OWNERSHIP—Animals—Wild animals Ownership in—Test of. See ANIMALS

(1918) Pat. 232.

PAHAN—Duties of—Custom of election of Pahan—Pahani lands—Incidents of holding. See (1917) DIG. COL. 926; KHARAT PAHAN v. BIRSA PAHAN. (1917) Pat 283=

4 Pat. L. W. 119=43 I C. 70.

PAKKA ADATIAS—Position of. See CONTRACT ACT, S 40. 34 M. L. J. 350.

PAPER CURRENCY ACT, (II of 1910) S. 26—*Foreign hundi payable on demand—Endorsement whether necessary—Stamp Act, S. 35 Cl. (a)—One anna stamp—Admissibility.*

A hundi drawn at Madura and payable at Singapore ran thus:—Pay to the person who brings this to the order of the aforesaid, on demand the sum of Rs. — (with interest from a certain future date).

*Held*, that the hundi was payable on demand even though interest ran from a future date and that it was not a hundi payable to bearer on demand so as to offend against S. 26 of the Paper Currency Act.

A promissory note may be an 'on demand' note even though it is not physically possible to get immediate payment.

*Held, per Napier, J.*—The note being payable on demand and affixed with an one anna stamp, S. 35, cl. (a) of the Stamp Act did not render it inadmissible in evidence. (*Seshagiri Aiyar and Napier, JJ*) JUTO SE GOPALAYAR v. MAIYAPPA CHETTY. (1918) M. W. N. 177= 8 L. W. 501=45 I. C. 22.

PARSI MARRIAGE AND DIVORCE ACT (XV of 1865) S. 17—*Delegate unable to understand proceedings—Trial unsatisfactory—Challenge of delegate in appeal.*

No trial under the Parsi Marriage and Divorce Act can be satisfactory in which a delegate who is to all intents and purposes a member of a Jury, cannot understand the proceedings.

A delegate under the Parsi Marriage and Divorce Act. is in a similar position to a juror, and cannot be challenged in appeal. (*Batten, A. J. C.*) DINBAI v. FROMBOZ.

43 I. C. 71.

PARTIES—Personal attendance—Order as to—Validity—Condition. See C.P. CODE, O. 10, R. 4. 21 O. C. 252.

PARTITION—Cause of action—Prior partition existence of, bar to re-partition.

The existence of a private partition is a bar to the re-partition of property. Where it is shown

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that the parties have acquiesced in the result of a partition, it must be presumed that they or their predecessors-in-interest were parties to the original partition. The fact that the original partition proceedings have been lost in antiquity is not a reason for disturbing divisions which have existed for a long period. (*Roe and Imam, JJ.*) NANNO CHAUDHURY v. MUNSHI CHAUDHURY. 3 Pat. L. J. 188= 5 Pat. L. W. 97=43 I. C. 393.

—Co-owners—Partition with consent of joint owners—Mortgagee if can intervene.

A partition effected with the consent of the joint owners of the land is not invalidated by reason of the lack of the mortgagee's consent and the mortgagee has no claim to be made a party to the partition proceedings.

*Semble*, a mortgagee with possession may intervene in partition proceedings or be a party to them only when the property to be partitioned is a tenancy of which he is technically the "landlord" i. e., the person under whom the tenants hold land and to whom the tenants are, or, would be but for a special contract, liable to pay rent.

A mortgagee alleging injury to his interest by the collusive partition proceedings of his mortgagor can claim his remedy by regular suit in the Civil Court and a dispute of this character does not come within the functions of a Revenue Officer dealing with a partition under the Land Revenue Act (*Maynard, F.C.*) CHAUDHRI THAKAR DAS v. SULTAN BAKSH. 2 P. R. (Rev.) 1918=3 P. W. R. (Rev.) 1918=45 I. C. 405.

—Co-Sharers—Equities—Mines—Improvements on portion of land by one co-sharer—Right to have that portion allotted to his share. See. CO-SHARER, ACCOUNTS.

22 C. W. N. 441.

—Decree for—Appeal by some of the debts—Remand by appellate Court for inquiry into claims of appellants—Dismissal of suit after remand improper.

One of three brothers brought a suit against his co-sharers for his one-third share impleading the alienees of the property from N. one of the brothers. The suit was decreed against the alienees, two of whom preferred appeals which having been accepted, the case was remanded for fresh enquiry "so far as the appellants were concerned." After remand, a final decree was passed dismissing the suit. An application for the execution of the first decree having been made, the widow of the third brother demanded her share of the property and sought relief against the alienees.

*Held*, that the original decree stood as between the pliffs and those debts. who did not appeal and could not be treated as having been set aside as a whole.

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Every co sharer being entitled to obtain possession of the share allotted to him under a decree for partition, whether he be the plff. or the deft., the widow of the third brother in this case being herself a deft was entitled to take advantage of the decree passed in favour of the plff. and to claim a one-third share under it. (*Shah Din and Scott Smith, JJ.*) DEBI SAHAI v. TARA CHAND.

22 P. L. R. 1918=44 P. W. R. 1918=  
44 I. C. 135.

—Decree—Preliminary and final—Supplemental final decree—Duty of court to pass a decree as regards all items involved—Suit pending, till claim is fully decided.

In an appeal from a preliminary decree in a suit for partition, the High Court during the pendency of the appeal stayed proceedings upon the preliminary decree, in so far as it related to a joint business. Meanwhile the trial Court made a final decree partitioning all other properties involved in the suit. Subsequently upon the dismissal of the appeal by the High Court an application purporting to be under S. 151 of the C. P. Code, made by the plff. to the trial Court for the partition of the joint business, was refused the court pointing out that the only course open to the plff. was an application for review.

Held, that the trial Court had refused to exercise a jurisdiction which was vested in it, inasmuch as it was quite competent to deal with as much of the suit as had not already been dealt with in the final decree and to make a supplementary final decree in regard to the joint business. (*Richardson and Walmsley, JJ.*) JASHODA DASEE v. UPENDRA NATH.

44 I. C. 671.

—Oral arrangement—Validity of.

The law does not require writing to complete a partition which has already been effected by Panchas. (*Drake Brockman, A. J. C.*) FARIRA v. TULSIRAM.

45 I. C. 854.

—Re-opening of—Decree of Court when liable to be re-opened.

There is nothing in any of the statutes and certainly not in any principle of law which would enable a Civil Court to re-open a partition properly made by a decree otherwise than by proceedings by way of review. The view of the matter is based upon both the principle of *res judicata* and also upon the principle that the effect of the final decree of a Civil Court for partition is to put an end to co-tenancy and to vest in each person or a group a sole estate in a specific property or allotment. 19 C. W. N. 581 foll. 22 W. E. 449 dist.

The cases of 22 W. R. 419, 29 Cal. 223, 7 C. L. J. 1 and 12 C. W. N. 528 provide no authority for the contention that a decree for partition effected by a Civil Court does not finally terminate the condition of a co-tenancy and

## PARTITION ACT, S. 2.

put an end to all future right to partition so far at any rate as the Civil Courts are concerned (*Chapman and Atkinson, JJ.*) DEBI SARAN SINGH v. RAJBANS NATH DUBEY (1918) Pat. 134=5 Pat. L. W. 9=45 I. C. 885.

—Suit—Procedure—Decree in favour of defendant—On payment of Court-fee—Procedure not applicable to suit by one of several reversioners to recover share of property alienated by widow, impleading the others as defts. See HINDU LAW, WIDOW, ALIENATION. 35 M. L. J. 153.

—Suit for—Partition between holders of different interests, if maintainable.

A suit for partition is maintainable although the interests of the parties in the property in suit, though permanent are not of the same grade, e. g., one party is an occupancy raiyat and the other a permanent tenure-holder, and although such a partition is likely to be a temporary one. (*Fletcher and N. R. Chatterjee, JJ.*) ROSHON v. ATAB ALI. 43 I. C. 341.

—Suit—Pendency of, till the whole of the claims are adjusted—Duty of court to pass supplementary decree if portion of the subject-matter not divided. See PARTITION, DECREE. 44 I. C. 671.

—Suit—Procedure—Immaterial how parties are arranged.

In a partition suit it is not very material as to whether the plff. is or is not actually in possession of his share. But in this country in the Mofussil Courts it is important, because a person sues for partition and if out of possession must ask, first of all, to be restored to possession of his share and pay additional *ad valorem* fee upon his plaint, whereas in a case where the plff. is in possession he simply sues for partition and separation of his share on his plaint bearing a stamp of Rs. 10 only. (*Fletcher and Huda, JJ.*) AHAMUDDIN TAMIJUDDIN v. AMIRUDDIN. 44 I. C. 216.

—Suit for—Plff. to prove what—Joint ownership and joint possession.

In a suit for partition, the plff. should establish that he and the deft. are not only joint owners but are also entitled to joint possession, as the object of the suit is to transfer the joint possession in severalty. 43 Cal. 504 ref. (*Mookerjee and Beachcroft, JJ.*) DURGA CHABAN ACHARJEE v. KHUNKAR ENAMUL HUQ. 27 C. L. J. 441=45 I. C. 705.

## PARTITION ACT, (1Y OF 1893), Ss. 2 and 3.

—Construction—No issue as to whether a dwelling house could not be reasonably or conveniently partitioned—Application for withdrawal of suit—Rejection of—Discretion—C. P. Code, O. 23, R. 1.

## PARTITION ACT, S. 4.

Plffs. and deft. were co-owners of a certain dwelling-house, the plffs. having 8/9ths share and the deft. 1/9th share. Plffs. sued for partition and stated that as the house could not be reasonably or conveniently divided, the house might be sold by auction and in the alternative offered to purchase it. The deft. offered to purchase the plff's share at a valuation, should the Court be of opinion that the partition could not be effected. The Court, thereupon appointed Commissioners who valued the plff's share and the defts. were allowed to purchase it.

*Held*, (1) that the Court had acted in accordance with Ss 2 and 3 of the Partition Act when the parties were not at issue on the point that a division could not be reasonably or conveniently made, (2) that the Court had exercised a sound discretion in disallowing the application for withdrawal of the suit inasmuch as it had been made at a stage at which the deft. had become entitled to the benefit of S. 3 of the Partition Act and because the application did not satisfy the requirements of O 23 R. 1 of the C. P. Code. (*Piggott and Walsh, JJ.*) **UMRAO SINGH v. UMRAO SINGH.** 16 A. L. J. 584=47 I. C. 905.

—S. 4—"Court" if includes Appellate Court—"dwelling-house" if includes compound and appurtenances.

The word "Court" in S. 4 is not confined to the trial Court but includes the Appellate Court and the Appellate Court like the trial Court is bound, upon any member of the family who is a share-holder undertaking to buy the share of the transferee, to make an appropriate order in pursuance of which the steps necessary to carry out the provisions of the section may be taken either in the one Court or in the other.

In connection with a conveyance or a partition of a "dwelling-house" the word generally means not only the house itself but also the land and appurtenances which are ordinarily and reasonably necessary for its enjoyment. (*Richardson and Wainwright, J.J.*) **PRAN KRISHNA BHANDARI v. SUBATH CHANDRA ROY.** 45 Cal. 873=22 C. W. N. 515=45 I. C. 604.

**PARTNERSHIP—Accounts—Suit for rendition of—One partner—Suit against his legal representative if maintainable.**

A suit for rendition of accounts of a partnership business is maintainable by the surviving partner against the minor son of a deceased partner who in his life-time was manager and had the account books in his keeping. (*Richards, C. J. and Bannerjee, J.*) **SHANKAR LAL v. RAM BABU** 40 All. 416=16 A. L. J. 305=45 I. C. 31

—Contribution, suit for as between partners —When maintainable— Dismissal of

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suit—Interference in revision. *See* (1917) DIG. COL. 931. **DAMODARA SHANBAGA v. SUBBARAYA PAI.** 33 M. L. J. 809=6 L. W. 742=43 I. C. 217.

—Co-ownership in freight and other earnings—Relationship of partners.

Co-owners of a ship are not, as such partners but only tenants in common. If however they employ their ship in earning freight or otherwise as a money making machine they become joint-adventurers or partners and their earnings are subject to the ordinary law of partnership. (*Ayling and Courts Trotter, JJ.*) **VANAMATTI SATTIRAJU v. BALLAPRAGADA.**

41 Mad. 937=35 M. L. J. 87=8 L. W. 582=47 I. C. 640.

—Death of partner—Legal representative of deceased partner, if a partner by implication.

The legal representative of a deceased partner of a firm is not by implication a partner. (*Ayling and Seshagiri Iyer, JJ.*) **PALANIAPPA CHETTIAR v. VEERAPPA CHETTIAR.**

41 Mad. 446=34 M. L. J. 41=44 I. C. 466.

—Dissolution of by death of one partner —Right of surviving partners to release debt to the firm.

After dissolution by the death of one of the partners, the surviving partners still have the right of releasing a debt to the firm. (*Ayling and Seshagiri Iyer, JJ.*) **PALANIAPPA CHETTIAR v. VEERAPPA CHETTIAR.**

41 Mad. 446=34 M. L. J. 41=44 I. C. 466.

—Dissolution — Right of partner to, based not on contract, but on his inherent right to invoke court's protection on equitable grounds—Decree for dissolution even in cases where partnership is to last for a fixed term by contract *See* CONTRACT ACT, SS 251 (6) and 252. 22 C. W. N. 601 (P. C.)

—Good will—Right of every partner to an interest therein—Ejman type of partnership—Working partner—No interest in good will. *See* (1917) DIG. COL. 933. **RAMACHAN. DRA NAIDU v. BATCHA SAHIB.** 22 M. L. T. 225=43 I. C. 661.

—Goods ordered for—Death of a partner —Surviving partner subsequently borrowing amounts to pay for goods—Suit by creditor against surviving partner and legal representative of deceased—Partnership assets liability of. *See* CONTRACT ACT, SS, 249, 251 ETC 8 L. W. 501.

—Minor—Ancestral trade —Minor not personally liable for debts. *See* CONTRACT ACT, S. 247. 22 C. W. N. 489.

## PARTNERSHIP.

Partner, authority of—Partner if can bind firm by submission to arbitration. See (1917) DIG. COL. 933; CHUNDOORU PUNNAYYA v. SREE VENUGOPAL RICE FACTORY CO., LTD. 22 M. L. T. 520= (1918) M. W. N. 51= 7 L. W. 114=43 I. C. 508.

Receiver, appointment of—Effect of See DIG. COL. 934. IMPERIAL OIL SOAP AND GENERAL MILLS CO. LTD. v. RAM CHAND, 91 P. R. 1917=9 P. L. R. 1918. =36 I. C. 986.

Release of debts by some of the partners—Right of other partners to question the release.

The right of some of the partners of a firm to avoid a fraudulent release of a debt by the other partner or partners and to recover their share of the released debt is personal to them and their legal representatives are not entitled to such a right. (*Ayling and Seshagiri Iyer, JJ.*) PALANIAPPA CHETTIAR v. VEERAPPA CHETTIAR. 41 Mad. 446= 34 M. L. J. 41=44 I. C. 466

Sub-partners—Liability of for debts of firm. See (1917) DIG. COL. 934; CHUNDOORU PUNNAYYA v. SREE VENUGOPALA RICE FACTORY CO., LTD. 22 M. L. T. 520=(1918) M. W. N. 51= 7 L. W. 114=43 I. C. 508.

Suit for recovery of money advanced by one partner against himself and another constituting a firm—Whether maintainable. C. P. Code, O. 30, R. 9—Scope of.

The plff. and the def't's father were the partners of a firm carrying on business at Boomangai and Kyato. The plff. had also a firm of his own at Rangoon. The plff. alleged that his Rangoon firm advanced sums of money on different occasions to the def't's firm of which he himself was a partner, that the firm was dissolved long before the institution of the suit, and that on taking accounts a sum of Rs. 25,000 and odd was found due to the plff.'s firm. Plff. sued for  $\frac{1}{2}$  of that sum on the basis that the def't's share in the partnership was  $\frac{1}{2}$ . The def't. contended that that would not be the sum due on taking of the entire account.

Held, that the plff. was practically suing himself and his partner, and that the suit was not maintainable as he had not asked for accounts. 26 Bom. 739, 1 Cal. L. R. 545 foll.

O. 30 R. 9 of the C. P. Code does not profess to lay down the circumstances under which the suits contemplated by the rule would be entertained, and it would not ordinarily be within the scope of the C. P. Code to lay down any such proposition. (*Abdur Rahim and Oudfield, JJ.*) LAKSHMANA CHETTY v. NAGAPPA CHETTY. 34 M. L. J. 408= 45 I. C. 86.

See Also. 34 M. L. J. 32.

## PATENTS.

What constitutes—Capital of the partnership..

Money is also property and, as the capital of a partnership, forms one of the most important items in its property.

Where two persons agree to contribute money towards an undertaking and to share the profits and losses accruing therefrom the agreement amounts to a partnership. (*Saunders, J. C.*) MANIK CHAND v. GIRDHARILAL. 3 U. B. R. (1918) 69= 46 I. C. 342.

PART PERFORMANCE—Doctrine of—Applicability to India—Equity supplements inchoate title—Contract of exchange—Unregistered—Actings of parties—transfer of possession—Effect of. See T. P. ACT, SS. 54 AND 118. 16 A. L. J. 98.

Doctrine of, applicability to India—Possession under unregistered contract of sale—Ejectment suit—Defendant in possession—Right to maintain possession. See TRANSFER OF PROPERTY ACT, S. 54. 28 C. L. J. 77.

Doctrine of—Sub division of holding—Recognition of by landlord—Non-compliance with statutory form—Actings of the parties—Cure of defect. See B. T. ACT, SS. 88 AND 188. 4 Pat. L. W. 316.

Exchange—Unregistered document—Acting of parties—Part performance—Cure of defect in title. See T. P. ACT, SS. 54 and 118. 40 All. 187.

PATENT—Novelty—Specification—Combination of old materials.

The plffs. patented a process of turning out *banslochen* (a medicinal power manufactured by a calcining process from the interior of bamboo found in Singapore) of which the essential features were the treatment of the substance at red heat, with sulphuric acid inside crucible or retort made entirely of earthenware. The advantage involved were (a) no iron or other metal being used in the composition of the crucible there was no danger of any deleterious action on the part of the furnace of the acid upon the metal aforesaid; (b) the retort or crucible was entirely closed from the time when the acid was added until the process of calcination was complete; the result being that the necessity of a chimney communicating with the retort for the purpose of carrying off the fumes was dispensed with. This process was one of a new combination of admittedly old material. Held, that it was a good subject-matter for a patent. (*Piggot and Walsh, JJ.*) LAKHPAT RAI v. SRI KISHAN. DAS. 16 A. L. J. 941=48 I. C. 450.

## PATENTS AND DESIGNS ACT.

**PATENTS AND DESIGNS ACT (II of 1911)**  
Form No. 20, Use of, limited to applications by a registered owner though framed in a general way. See PATENTS AND DESIGNS ACT, Ss. 62, 64  
22 C. W. N. 58.

—S. 43 *New and original design, meaning of—Novelty, test of.*

Though the shape of a band could not be said to be new and original, the application of it to a watch to be worn on the wrist might be for a purpose so different from and for a use dissimilar to the purpose and use of the bracelet that the design in question might be said to be original.

Per Woodroffe, J.—There was novelty in applying what was an old thing to new use. If that was so the design should be protected, provided, it was not merely, to use the words of the cases, analogous.

*Sanderson, C. J.* (approving *Fletcher, J.*) The test of novelty is the eye of the Judge. He must place the two designs side by side and see whether the one for which novelty is claimed is new. (*Sanderson, C. J. and Woodroffe, J.*) **ERNEST OTTO GAMMETER v. THE CONTROLLER, PATENTS AND DESIGNS.**  
45 Cal. 606=22 C. W. N. 580=48 I. C. 437.

—Ss. 62, 64, 70 and 77—*Design—Wrist band Novelty—Jurisdiction of Controller—Non-insertion or omission from the register—Cancellation of entry in register—Quasi—Jurisdiction—Mandamus—Application to the High Court—Specific Relief Act, S. 45.*

The appellant applied to the Controller of Patents and Designs for the registration of a design, described therein, in class I, calling it the "Novelty" band. The Controller registered that design. The respondents B & Co., applied to the Controller for cancellation of the registration, and, after hearing both the parties, the Controller cancelled the registration. Upon that the appellant moved the High Court under S. 45 of the Specific Relief Act, for an order that the Controller of Patents and Designs should place the design upon the Register of Designs in such manner as this was prior to the cancellation.

Held, that the Controller upon the application of B & Co., had no jurisdiction to cancel the registration.

The ordinary way of expunging the registration of a design is to apply to this Court under S. 64 of the Patents and Designs Act of 1911.

The only persons who can apply under S. 62 of the Patents and Designs Act are the registered proprietor or some person in whom his interest vested.

The words 'non-insertion' in or omission from the register, in S. 64 do not include cancellation and so the High Court cannot interfere under that section when there has been an improper cancellation.

## PEDIGREE.

Form No. 20 (under the Patents and Designs Act of 1911) must be limited to applications of a registered owner though it has been framed in a general way

Under S. 45 of the Specific Relief Act, 1877, the High Court can interfere when, in the opinion of the High Court, the doing or forbearing of the required act is 'consonant to right and justice'. Therefore the High Court, before it can direct the Controller to restore the registration of the design, has to consider, whether, the design is new and original. (*Sanderson, C. J. and Woodroffe, J.*) **ERNEST OTTO GAMMETER v. THE CONTROLLER PATENTS AND DESIGNS.**  
45 Cal. 606=22 C. W. N. 580=48 I. C. 437.

—Ss. 64 and 70, Controller—No. jurisdiction to cancel an entry in register—Improper cancellation—No appeal to the High Court—Interference by mandamus in a proper case. See PATENTS AND DESIGNS ACT, Ss. 62, 64 ETC  
22 C. W. N. 580.

**PATNI REGULATION (VIII OF 1919) Ss. 3 (3) AND 17 (3)**—Patni tenure—Successive rent decree Sale in execution of last decree—Right of zemindar to a charge on surplus sale proceeds for amounts of previous decrees—B. T. Act, Ss. 65, 165 and 165, (c)—T. P. Act, Ss. 73 and 100—Charge for arrears of rent—Nature of. See (1917) DIG. COL. 925; *SATYA SHANKAR GHOSHAL v. MANAMOHAN GUHA.*  
22 C. W. N. 131=43 I. C. 996.

—S. 13—*Effect—Deposit of patni rent by Darpatnidar—Possession given to Darpatnidar—Patni rent payment by Darpatnidar—Rent if can be added to demand.*

Under S. 13 of the Patni Regulation, the defaulter can recover his tenure on payment of the advance made with interest, or on proof that the advance has been realised from the usufruct. But the person making the advance is not entitled to add to his demand the rent paid to the superior landlord for the years during which he has been in possession. 12 Cal. 185 ref. (*Beachcroft and Walmesley, J.J.*) **BEHARI LAL BISWAS v. NASIMUNESSA BIBI.**  
27 C. L. J. 480=41 I. C. 694.

—S. 14—*Proceeding before Collector—Nature of money paid under, to prevent sale of patni—Suit to recover on the ground of payment under pressure and illegal if maintainable. See CHOTA NAGPUR ENCUMBERED ESTATES ACT, (6 OF 1979) 35 M. L. J. 347=22 C. W. N. 1009 (P. C.)*

**PATWARI**—Office of—Emoluments are self acquired property of office-holder. See **HINDU LAW, IMPARTIBLE PROPERTY.**  
43 I. C. 137.

**PEDIGREE**—Question of—Plf. and his witness, not directly cross-examined on the

## PENAL CODE, S. 4.

case raised by *Def.*—Court if should accept such case—*Plff's* case believed by trial court—Reversal by High Court on such basis if correct *See*. (1917) DIG COL. 938; MAHOMED ABDUL AZIZ *v.* MIR TASADUQ HUSSAIN

21 C. W. N. 373=7 L. W. 66=(1917)  
M. W. N. 529=42 I. C. 3 (P. C.)

**PENAL CODE (XIV of 1860) S. 4—Extra Territorial jurisdiction—Offence by a subject of a native state on board a ship in the high seas—Jurisdiction of British Indian Courts to try the accused—Merchant Shipping Act, (57 and 58 Vict. Ch. 60.) S. 685.**

The accused, a subject of the State of Junagabad, was charged with the offence of attempt to murder on board a ship belonging to him on the high seas some eighteen miles off the coast of the Kanara District. He was tried for the offence by the First Class Magistrate of Karwar, where he raised the point that the Magistrate had no jurisdiction to try him.

*Held*, that the First Class Magistrate at Karwar had no jurisdiction to try the accused. (*Heaton and Shah, JJ.*) **EMPEROR *v.* PUNJA GUNI.** 42 Bom. 234=20 Bom. L. R. 98.  
=44 I. C. 449=19 Cr. L. J. 337.

—Ss. 21 and 225 (A)—Public servant — Villagers assisting a head of a village in arresting accused *See* (1917) DIG COL. 939. **EMPEROR *v.* NGA PAW E.**

10 Bur. L. T. 170=(1916) U. B. R. 122=  
38 I. C. 735.

—S. 21—Public servant —Who is—Quarter Master—Clerk if a public servant.

A Quarter-Master clerk merely as such is not necessarily a public servant within the meaning of S. 21 of the Penal Code. A person who is otherwise an officer in the pay or service of Govt. does not lose his status as a public servant, if, while still such an officer, he is employed as a Quarter Master clerk. (*Rattigan, C.J. and Le Rossignol*) **AHAD SHAH *v.* EMPEROR.**

18 P. R. (Cr) 1913  
=26 P. W. R. (Cr) 1918=45 I. C. 150=  
19 Cr. L. J. 486.

—S. 21 (9)—Public servant, who is—Holding of office, essential—Mere receipt of pay not enough

The mere fact that a person is in pay or service of Government is not enough to constitute him a public servant within the meaning of S. 21 of the Penal Code. He must also be an 'Officer' i. e., holder of some office. The office may be of dignity and importance or it may be humble; but whatever its nature, it is essential that the person holding the office should have in some degree delegated to him certain functions of the Government.

A Quarter Master's clerk merely as such is not necessarily a public servant within the

## PENAL CODE, S. 71.

meaning of S. 21 of the Penal Code, but a person otherwise is an officer in the pay or in the service of the Government, does not lose his status as a public servant if while such an officer, he is employed as a Quarter-Master's clerk. (*Rattigan, C. J. and Le Rossignol, J.*) **AHAD SHAH *v.* EMPEROR.**

18 P. R. (Cr) 1918=26 P. W. R.  
(Cr) 1918=45 I. C. 150=19 Cr. L. J. 486.

—S. 25—'Defraud' meaning of—Obtaining by unfair means admissions of a person's title from a stranger—Fraudulent conduct. *See* PENAL CODE, SS. 464 and 467.  
43 I. C. 593, 599.

—S. 30—Valuable security—Document acknowledging legal liability.

A document whereby a person acknowledges himself to be under a legal liability is a valuable security within the meaning of S. 30, I. P. C. 12 Mad. 148 foll. (*Roe and Iman, JJ.*) **IDU JOLAH *v.* EMPEROR.** 3 Pat. L. J. 386.

—S. 30—Valuable security—Document incomplete on its face, if a. *See* PENAL CODE, SS. 464 AND 467. 43 I. C. 593, 598.

—Ss. 34, 147 and 149—Scope of—Proof of common intention apart from common object, essential for conviction—Proof of commission of criminal act in furtherance of common intention. *See* PENAL CODE, SS. 147 AND 149. 4 Pat. L. W. 120.

—Ss. 71 and 143 —Forcible rescue of cattle seized under Cattle Trespass Act—Conviction under S. 143, I. P. C. and S. 24 of the Cattle Trespass Act—Illegal.

Where the accused forcibly rescued cattle which were causing damage to the earth-work newly thrown on an embankment of the complainant's master and which were being taken to the pound.

*Held*, that separate punishments under S. 143 of the Penal Code as well as under S. 24 of the cattle Trespass Act were illegal. S. 71 of the I. P. C. contemplates several punishments for an offence against the same law and not under different laws (*Jwala Prasad, J.*) **SUKHNANDAN RAI *v.* EMPEROR.**

43 I. C. 445=19 Cr. L. J. 157.

—Ss. 71, 147, 149 and 325 —Sentence—Separate conviction and sentences for rioting, and for being member of an unlawful assembly causing grievous hurt, if valid.

The accused were convicted and sentenced on charges under Ss. 147 and 325, I. P. C. The Lower Appellate Court substituted for the conviction under S. 325 read with S. 149, conviction under S. 325 *Held*, that the Lower Appellate Court could not do so and that the High Court, in revision, would not convict the accused of this offence in the absence of any opportunity to plead to a charge in respect of it.

## PENAL CODE, S. 72.

It is illegal to record separate convictions or offences under S. 147 and S. 325 read with S. 149 and separate sentences in respect of the two offences are also illegal.

An accused cannot in addition to being convicted under S. 147 be also convicted under S. 25 although it be shown that he himself caused grievous hurt to the opposite party. 17 B. 290 : A. 645 ; 7 A. 757 ; 16 C. 442 ; 3 C. W. N. 174 ; C. W. 245. (*Mullick and Thornhill, J.J.*)

ALTU SINGH v. EMPEROR.

3 Pat. L. J. 641=48 I. C. 677

—S. 72—One offence falling under different sections—Separate trials and convictions—Illegality. See CRIMINAL TRIAL.

23 P. L. R. 1918.

—Ss. 75 and 379—Previous conviction—Enhanced punishment—Rules regulating infliction of.

In the case of men with previous convictions, regard should be had to their career and to the time that had elapsed between the convictions passed upon them. S. 75 I. P. C. was not intended for the purpose of automatically enhancing by a kind of geometrical progression the sentence to be passed after a previous conviction. The reason for passing a more severe sentence in the case of a criminal with a previous conviction is primarily to protect society from the predations and offences committed by an habitual rogue, who has shown no signs of repentance. A Magistrate or Judge should make some enquiry into the repute and the antecedent behaviour of a man whom he proposes to sentence severely. (*Rigg, J.*) PO NYEIN v. EMPEROR 45 I. C. 847=19 Cr. L. J. 655.

—S. 75—Sentence—Enhancement of—Previous conviction—Subsequent to commission of offence. See (1917) DIG. COL. 940 ; POSO v. EMPEROR. 11 Bur. L. T. 107=42 I. C. 1007=19 Cr. L. J. 47.

—Ss. 79, 147, 448—Forcible removal of wife by husband—Wrongful restraint—Justification

There is no justification within the meaning of S. 79, I. P. C. for a husband either under the Hindu law or Mahomedan law to use force or restraint to compel his wife to leave with him in spite of the general English law and the provisions of the I. P. C. Ss. 339, 340, 350.

The forcible removal of the woman amounts to an offence and therefore a conviction could be maintained under Ss. 147 and 448, I. P. C. (*Crouch and Pawcett, A. J. C.*) EMPEROR v. RAMLO. 12 S. L. R. 29=47 I. C. 807=19 Cr. L. J. 955.

—S. 84—Offence by person labouring under delusion—Exemption from criminal liability—Extent of.

## PENAL CODE, Ss. 96 AND 97.

Where a person otherwise sane but labouring under the influence of an insane delusion commits an act of revenge for some supposed grievances or injury, he is nevertheless punishable according to the nature of the crime that committed, if at the time he understood, he was committing a wrong and unlawful act. In other words he must be considered in the same situation as the responsibility of a sane person would be if the facts with regard to which the delusion exists were true. *Mac Naghton's case* (1843) 10 Cl. and F. 200 ref. (*Dawson Miller, C. J. Chapman and Atkinson, J.J.*) GHINUA ORAON v. EMPEROR.

3 Pat. L. J. 291=(1918) Pat. 57=43 I. C. 423=19 Cr. L. J. 135.

—S. 84—Unsoundness of mind—Proof—Quantum.

Under S. 84 of the Penal Code, a person is exempt from criminal liability only if, by reason of unsoundness of mind, he is incapable of knowing the nature of the act done by him or that he is doing what is either wrong or contrary to law. It must be shown that the cognitive faculties of the person had been impaired by the unsoundness of his mind. 23 C. 604 ref. (*Chevis and Martineau, J.J.*) RAMZAN v. EMPEROR.

30 P. R. (Cr.) 1918=43 I. C. 942.

—S. 90—Consent—Girl of fifteen—Kidnapping—Capacity to consent. See PENAL CODE, SS 866, 360 AND 90.

20 Bom. L. R. 372.

—S. 96—Private defence—Right of—Resistance of and assault on attacking party—Hurt to aggressor if an offence.

Where an attacking party was resisted in removing the property in the judgment-debtor's house, when S., a person present there, assaulted that party, in consequence of which he received grievous and serious hurt in the fight.

Held, that as S was the aggressor the party did not exceed their right of private defence and consequently they were not guilty of any offence. (*Scott Smith, J.*) DEVI DAS v. EMPEROR. 36 P. L. R. 1918=

20 P. W. R. (Cr.) 1918=45 I. C. 683=19 Cr. L. J. 635.

—Ss. 96 and 97—Private defence—Trespass on property—Resistance without sending for the police—No offence.

The right of private defence against an act of trespass on one's property is not lost by reason of the omission to send word to a Police Station which is at some distance from the place of occurrence. (*Kumaraswami Sastri, J.*) PENUMETSA THIRUMALARAJU v. EMPEROR. 44 I. C. 40=19 Cr. L. J. 248.

## PENAL CODE, S. 97.

— S 97 — Right of private defence — Alternative case of *alibi*—Both pleas open to accused. See EVIDENCE ACT, S. 105.

16 A. L. J. 169.

— Ss. 99, 147, 148 and 326—*Private defence*—Collection of armed men to prevent forcible removal of crops before arrival of the police—*Fracas*—Injury—Trial assessors—Duty of Judge in dealing with question of private defence.

The accused finding that the opposite party were cutting the crops from his field, remonstrated with them. They thereupon threatened him and he retired. He sent a messenger to the police for help and returned to his field accompanied by his nephew and three others. He asked the leader of the opposite party why the field was being looted and the latter thereupon assaulted him. A *fracas* occurred in which one person was killed and one man was injured on the opposite side.

*Held*, that neither the accused nor his followers were guilty of an offence as S was justified in collecting his men and arming them sufficiently to prevent the crops being removed from his field in the event of the police not arriving in time.

In cases where the possession of the accused is admitted and where the right of private defence is pleaded, it is not sufficient for the Judge to put to the assessors such questions as "are any of the accused persons guilty of any offence?" "Is the offence of rioting proved against any of the accused?"

Assessors being laymen who are not familiar with the niceties of the law of private defence, it is the duty of the Sessions Judge to assist them by putting specific questions concerning the facts upon which the law will turn. (*Atkinson and Manuk, JJ.*) SUNDER BUKSH SINGH v. EMPEROR. (1918) Pat. 359=

3 Pat. L. J. 653=48 I. C. 163.

— S. 107—*Abetment of offence*—*Mere presence at the scene of occurrence if amounts to.*

Mere presence on the occasion of the commitment of the offence does not amount to an abetment within S. 107, I. P. C., unless there is an obligation cast by the law upon the persons present to prevent the commission of the offence. (*Chapman and Jwala Prasad, JJ.*) CHATRU GOPE v. EMPEROR.

43 I. C. 95=19 Cr. L. J. 63.

— S. 108, EXPL. 4—*Abetment—What constitutes—Instigating person to instigate—Magistrate to accept bribe is an offence under S. 161.*

The words "when the abetment of offence is an offence" in Expl. 4, S. 108, I. P. C., do not mean "when an abetment of an offence is actually committed." They mean when the abetment of an offence is by definition or

## PENAL CODE, Ss 116 AND 161.

description an offence under the Code, that is, when an abetment of an offence is punishable under S. 109 or S. 116 or some other provision of the Code, then the abetment of such abetment is also an offence. (*Richardson and Huda, JJ.*) SRILAL CHAMARIA v. EMPEROR. 22 C. W. N. 1045=48 I. C. 817.

— Ss. 111, 114 and 302—*Conspiracy to obtain a girl by force—Culpable homicide by one of the conspirators—Others if guilty of murder.*

Where in pursuance of a conspiracy to obtain a certain girl by show of force, two persons went to her mother's house and asked her to give up the girl and on the mother's refusal one of them fired a gun at her with the result that she died of the wounds.

*Held*, that the other conspirator was not guilty of abetting the death of the mother, inasmuch as the death was not a probable consequence of the conspiracy, and was not caused under the influence of the instigation or with the aid or in pursuance of the conspiracy which constituted the abetment. (*Richards, C. J. and Bannerjee, J.*) SUKHA v. EMPEROR.

43 I. C. 827=19 Cr. L. J. 235.

— Ss. 114 and 302—*Conspiracy to obtain a girl by force—Culpable homicide by one of the conspirators—Others not guilty of murder. See PENAL CODE, SS 111, 114 AND 302.*

43 I. C. 827.

— Ss 116 and 161—*Public servant—Abetment of bribery—Active suggestion essential to constitute offence—Laudableness of motive—Sentence—Plea not raised in lower courts when considered in revision by the High Court.*

The accused was convicted under Ss. 116 and 161 I. P. C. for having thrust some currency notes into the hands of a Sub-Magistrate accompanied with a request that the latter should show favour to a person against whom a case was pending in his Court. The defence of the accused both in the trial Court and on appeal was that the prosecution case was a complete concoction. In revision before the High Court it was contended for the accused that in thrusting the notes into the Magistrate's hands, he was merely laying a trap to catch a Magistrate reputed to be corrupt so as to bring him to justice and consequently he was not guilty. *Held, per curiam*, that the accused did not stop with placing a temptation in the way of a public servant, but actively stimulated the Sub-Magistrate to commit an offence under S. 161 of the I. P. C. by thrusting the Currency notes in the latter's hands with a request to show favour to a person undergoing trial in his court; and that however laudable his motive or intention might have been the accused was guilty of abetment of bribery.

## PENAL CODE. S. 146.

Per *Sadasiva Aiyar, J.*—Though the defence set up by the accused in the courts below was false. Still it was open to the High Court to consider defences other than those originally set up and to deal with the case on the evidence on record. The primary object of the accused was only to trap a Magistrate suspected of corruption and he was therefore entitled to a reduction in the sentence.

Per *Phillips, J.*—The plea of the accused that he merely set a trap in offering the bribe to the Magistrate not having been put forward either in the original or in the Appellate Court the High Court would not accept it in revision especially as it did not appear that it was obviously a true plea. (*Spencer, J.*) LAKSHMINARAYANA AIYER v EMPEROR

(1917) M. W. N. 831=22 M. L. T. 373=  
6 L. W. 677=42 I. C. 939=  
10 Cr. L. R. 21.

— S. 146—*Unlawful assembly—Rioting, offence of—Force or violence need not be directed against any body.*

It is not necessary for the purpose of S. 146 I. P. C., that the force or violence referred to in the section should be directed against any particular person or object.

*Held, further*, that under the circumstances of the case the brandishing of bamboos and the cutting of a branch of the pipal tree amounted to an exhibition of force by persons who were members of the unlawful assembly. (*Lindsay, J. C.*) GHANI KHAN v EMPEROR.

21 O. C. 134=46 I. C. 844=19 Cr. L. J. 828.

— S. 147—*Appellate Court—Judgment—Conviction for rioting case, of each accused to be considered separately—Cr. P. Code, S. 307.*

The real difficulty in cases of charges under S. 147 of I. P. C. is to find whether individual accused who deny their presence at the offence were members of an unlawful assembly and consequently it is the duty of the Appellate Court to discuss the evidence as against each of the accused. 40 Cal 316 foll. (*Kumaraswami Sastri, J.*) DAKSHINAMURTHI RAJALI In re.

(1918) M. W. N. 129=7 L. W. 83=  
43 I. C. 616=19 Cr. L. J. 200.

— S. 147—*Charge under—Common object to be clearly specified—Conviction—Case of each accused to be considered separately. See CR. P. CODE, SS. 221, 222 AND 537.*

7 L. W. 83.

— Ss. 147, 149 and 34—*Common object to beat off complainant's party from certain lands in possession of complainant and to take forcible possession—Accused party found to be in possession—Conviction for rioting if legal—Hurt, conviction for, if legal.*

The complainant claimed to be in possession of certain lands in respect of which there was a riot and one man was killed and other

## PENAL CODE, S. 147.

persons received injuries some of which amounted to grievous hurt. The accused were put on their trial before the Sessions Judge with the aid of assessors on charges under Ss. 147, 149, 302, 325 and 326 with the common object of (1) beating of the complainant's party (2) looting the crops on the land in dispute and (3) taking forcible possession thereof. The High Court disagreeing with the Sessions Judge on the evidence found that the complainant's party was never in possession of the land in dispute but that the accused party was and had always been in possession.

*Held*, that on the finding the object of the assembly must be held to have been resistance against dispossession of the accused by the complainant's party which was unlawful. To sustain a conviction in a case of unlawful assembly the rule is that the common object stated in the charge must agree in essential particulars with the common object established on the evidence.

The language of S. 34 of the Indian Penal Code is far more restrictive than that of S. 149 I. P. C. and the Legislature clearly intended to narrow down the scope of S. 34. To establish guilt under that section it is necessary to prove a common intention as distinguished from a common object as in S. 149, I. P. C. and must be shown that the criminal act was committed in furtherance of the intention.

Where the alleged common object of an unlawful assembly fails the accused persons cannot be convicted under S. 147, I. P. C. under Ss. 325 or 326. They can be convicted only if individual acts causing hurt simple or grievous can be proved against each of them singly. (*Atkinson and Imam, JJ.*) EMPEROR v. RITBARAN SINGH. 4 Pat. L. W. 120 =  
46 I. C. 709=19 Cr. L. J. 789.

— Ss. 147 and 323—*Conviction under S. 323—Appeal against—Alteration by appellate court of conviction into one under S. 147 while maintaining sentence—Legality. See Cr. P. C. S. 423.* (1918) Pat 192.

— S. 147—*Conviction under—Right of private defence—Tenant in possession of land—Land under water—Lease of fishing rights on the same by landlord to stranger—Opposition by tenant—Whether unlawful.*

Where part of a tenant's holding was under water, and the landlord gave the right of fishing therein in lease to a stranger who wanted to catch fish but was opposed by the tenant.

*Held*, that it having been found that the tenant was in possession, he had a right of private defence, as against the landlord's lessee, and he and his party could not be convicted of rioting as the right of private defence had not been exceeded.

The fact that on a previous day the lessee had succeeded in fishing without molestation on the part of the tenant would amount only to a disturbance of possession as distinguished

## PENAL, CODE, S. 147.

from a dispossession. (*Mullick and Thornhill, JJ.*) BINDESWARI PRASAD SINGH v. EMPEROR. 5 Pat. L. W. 461=

46 I. C. 413=19 Cr. L. J. 733.

—Ss 147 and 325—Judge disbelieved whole evidence—Conviction on suspicion—Legality. See (1917) DIG. COL. 945; SHEOBANS SINGH v. EMPEROR.

15 A. L. J. 850=42 I. C. 997=19 Cr. L. J. 37.

—Ss. 147 and 148—Private defence—Right of, to property in possession of accused—Forcible attempt by complainant to remove crop grown by accused whether justification. See. 4 Pat. L. W. 111.

—S. 147—Rioting—Cross cases—Conviction none, on plea of guilty—No bar to conviction in cross case. See CRIMINAL TRIAL, CROSS CASES. 46 I. C. 606.

—S. 147—Rioting—Rescue of woman arrested by police under a warrant, inaccurately issued—Assault of police officers.

The Magistrate ordered the issue of a warrant for the arrest of K, the victim of an abduction apparently intending to act under S 90 of the Cr. P. Code, but the warrant erroneously charged K herself with an offence under S 198, I. P. C. Under this warrant the head constable arrested K and had taken her to a distance of about 200 Kadams where a large concourse of people assembled, amongst them were the present petitioners who took away the woman from the custody of the head constable and the constables with him and inflicted certain injuries upon them.

Held, that the petitioners had been rightly convicted of an offence under S 147 of the Penal Code. (*Broadway, J.*) ATTAR SINGH v. EMPEROR. 9 P. R. (Cr.) 1918=

37 P. L. R. 1918=14 P. W. R. (Cr.) 1918=44 C. 742=19 Cr. L. J. 390.

—Ss. 147 and 114—Rioting—Unlawful object—Illegal rescue of attached property—Attachment not signed by judge but by sheristadar, and not sealed—Attachment bad—No offence.

An attachment warrant was not signed by the judge issuing it, but by the sheristadar and did not bear the seal of the Court. The accused were charged with rioting with the common object of resisting and rescuing the attached property.

Held, that the attachment was bad for non-compliance with O. 21, R. 24 (2) C. P. C. and that the resistance or rescuing was not illegal. The mere fact that the warrant was signed by the sheristadar and not by the Court did not invalidate it and it lay on the accused to prove that officer signing the warrant had no authority to sign. (*Mullick, Thornhill, JJ.*) RHIDIR BAKSH v. EMPEROR. 3 Pat. L. J. 636.

## PENAL CODE, S. 173.

—Ss 147, 149 and 325—Separate conviction and sentences for offences under S 147 and under S. 325—Illegality of. See PENAL CODE, SS 71, 147, 149 and 325

3 Pat. L. J. 641.

—S 161—Inciting person to instigate Magistrate to accept bribe if an offence. See PENAL CODE, S. 108, EXPL 4.

22 C. W. N. 1035.

—S 161—Offence under—Discharge of duties as public servant, while taking illegal gratification if essential.

It is not necessary that at the time of the bribe taking the accused person should be actually discharging the functions which constitute him a public servant; it is sufficient that he is a public servant and his act falls under one of the three clauses specified in the Section 9 P. R. 1898 appr. (*Rattigan, C. J.* and *Le Bessamel, J.*) AHAD SHAH v. EMPEROR

18 P. R. (Cr.) 1918=26 P. W. R. (Cr.) 1918=45 I. C. 150=19 Cr. L. J. 486.

—Ss. 161 116 and 107—Public servant, offer of bribe to. —Offence—Abetment See (1917) DIG. COL. 948 EMPEROR v. NGA HNIN 10 Bur. L. T. 252=38 I. C. 439.

—S 168—Police Officer—Carrying on trade—Police Act (V of 1861) S. 10.

The Conduct of a Police servant carrying on a shop comes within the prohibition contained in S. 10 of the Police Act and he is, therefore, liable to be convicted under S 168 I. P. C. The words "any employment or office whatever" in S. 10 of the Police Act are wide enough to cover the case of a Police Officer who engages in trade (*Richardson and Beachcroft, JJ.*) EMPEROR v. SAGAR SINGH.

43 I. C. 440=19 Cr. L. J. 152.

—S. 170—"Under colour of office," meaning of.

Where the accused went to the platform of a railway station and obtained admission on the pretence that he was a C. I. D. Officer without purchasing a ticket.

Held that his conviction under S. 170 I. P. C. was wrong inasmuch as to sustain a conviction under that section there must be one which assumes an official authority. The mere assumption of false character without any attempt to do an official act is not sufficient to bring the offender within the meaning of S. 170 I. P. C. (*Roe and Imam, JJ.*) UKHEDEO PATHAK v. EMPEROR

3 Pat. L. J. 389=1918 Pat 287=

4 Pat. L. W. 39=43 I. C. 785=19 Cr. L. J. 209.

—S. 173—Offence under—Refusal to take a sub-pena not a.

## PENAL CODE, S. 173.

The refusal to take a sub-pœna under S. 160 of the Cr. P. Code does not constitute an offence under S. 173 of the I. P. C. (*Lindsay, J. C.*) CHANDIKA PRASAD v. EMPEROR

21 O. C. 150=46 I. C. 317=19 Cr. L. J. 801.

— S. 173—Refusal to receive summons on tender, if an offence.

Under the Cr. P. Code the mere tender to person of a summons is sufficient and a refusal by him to receive it does not constitute the offence of intentionally preventing service thereof on himself under S. 173 of the Penal Code. (*Knock J.*) SAFDEO RAI v. EMPEROR

40 All. 877=16 A. L. J. 453=  
46 I. C. 522=19 Cr. L. J. 746

— S. 174—Summons to give evidence at police investigation, disobedience to—Service not effected through departmental superior, effect of—Cr. P. Code, S. 72, scope of. See (1917) DIG. COL. 949; GUMPARTHI VENKATARAMIAH *In re*.

40 I. C. 733=  
16 Cr. L. R. 1.

— S. 175—Conviction under—Essential of offence.

In order, to sustain a conviction under S. 175 I. P. C. it must be clearly shown that the accused was in possession of the document required to be produced and when it was doubtful which of two persons had it they could not be convicted. (*Jwala Prasad, J.*) DAMRI RAM v. EMPEROR

4 Pat. L. W. 65=  
43 I. C. 793=19 Cr. L. J. 217.

— S. 182—Charge under—Complaint of theft—Family Quarrel—Compromise—Prosecution for offence quarrel under S. 182 I. P. C. *inexpedient*

Where a complaint of theft brought by a person against his brother was compromised and thereafter the complainant was prosecuted under S. 182 I. P. C.

*Held*, quashing the proceedings under S. 445 of the Cr. P. Code that this was a not case in which any action ought to have been taken or any proceedings instituted. (*Banerji, J.*) CHATTAN LAL v. EMPEROR.

16 A. L. J. 734=46 I. C. 410  
=19 Cr. L. J. 730

— Ss. 182 and 211—False complaint to the police—No definite charge, grounds of suspicion—If amount to an offence under S. 211—Cr. P. Code S. 162. See (1917) DIG. COL. 949; MALLALA OBIAS *In re*.

(1917) M. W. N. 875=42 I. C. 998=  
19 Cr. L. J. 38.

— S. 182—False information—Mention of suspicion to police officer.

Where a person in whose house a theft took place informed the police that he suspected two persons as the perpetrators of the crime.

## PENAL CODE, S. 186.

*Held* that this did not amount to giving false information within the meaning of S. 182 of the Penal Code. (*Chitty and Smither, JJ.*) ANANGA MOHAN DUTTA v. EMPEROR. 22 G.

W. N. 478=27 C. L. J. 230=44 I. C. 352=  
19 Cr. L. J. 336.

— S. 182 *Gist of the offence* — Giving false information to public servant

S. 182 I. P. C. applies to a case in which it is intended that a public servant should do or omit to do something which he would be legally justified in doing or omitting to do if he knew the true facts. Asking a public servant to do an act which would be an illegal act, even if true facts were stated to him would not come within the purview of the section. (*Banerji, J.*) MANOHAR v. EMPEROR

16 A. L. J. 614=47 I. C. 91=  
19 Cr. L. J. 385.

— S. 186—Obstruction to public servant—Decree, form of—Execution—Warrant, not in form—Validity of—Obstruction to execution of invalid warrant—No offence.

In an application for execution of a decree for restitution of conjugal rights a warrant was issued directing the executing peon to seize the wife and deliver to her husband, failing which to bring her under arrest before the executing Court. The peon seized the woman in execution of the warrant but he was resisted and the woman was snatched away.

*Held* that the warrant, the execution of which was resisted, was illegal and therefore no offence was committed under S. 186 I. P. C. (*Chitty and Smither, JJ.*) GAHAR MAHAMMED SARKAR v. PITAMBAR DAS.

22 C.W. N. 814=47 I. C. 868=19 Cr. L. J. 968.

— Ss. 186 and 225 B—Obstructing public servant—Resistance to lawful apprehension—Failure to obey order directing accounts under a preliminary decree—offence.

Where, in a suit for account, a preliminary decree was passed ordering the debt to furnish an account within a specified time and, he failed to do so, and together with two companions, resisted a peon sent by the court to arrest him under the provisions of O. 21, R. 32 of the C. P. Code, *held*, that the arrest of debt. was unlawful and that the conviction of himself and his two companions of offences under Ss. 186 and 225 B of the Penal Code could not stand. The order for furnishing accounts was not an injunction within O. 21, R. 32. (*Mullick and Atkinson, JJ.*) ARJUN SUIE v. EMPEROR.

3 Pat. L. J. 106=  
44 I. C. 737=19 Cr. L. J. 385

— S. 186—Obstruction to warrant in execution of a decree for restitution of conjugal rights.

## PENAL CODE, S. 186.

A decree for restitution of conjugal rights was executed more than a year after its date by taking a warrant against the wife and the latter obstructed the execution of the warrant.

*Held*, that the wife was guilty of an offence under S. 186 of the Penal code. (*Richardson and Huda, JJ.*) **ABDUL WAZED v. EMPEROR.**

47 I. C. 876=19 Cr. L. J. 976.

—S. 186—Offence under —Written authority under which public servant was acting, if must be shown to accused.

Under S. 186 I. P. C. it is not necessary to prove that the written order under which the public servant was acting was actually shown to the accused. It is enough if it is found that the public servant had the order with him and could show it to anybody who wanted to see the same or question his authority. (*Kankaiya Lal, A. J. C.*) **TIBHAWAN v. EMPEROR.**

45 I. C. 833=  
19 Cr. L. J. 641.

—S. 188—Order under S. 144 Cr. P. Code prohibiting disturbance—Disobedience to—Prosecution for, unsustainable if no disturbance caused.

By an order under S. 144 of the Cr. P. Code the petitioners were directed not to make any disturbance over a certain persons' right of a ferry and thereafter the Petitioners being found plying another ferry at the site in question but not causing any disturbance were ordered to be prosecuted under S. 188 I. P. C.

*Held* that the order for prosecution was infructuous. (*Teunon and Richardson, JJ.*) **SOJAL BISWAS v. SAMIRUDDIN MANDAL**  
22 C.W.N. 569=46 I. C. 518=19 Cr. L. J. 739

—S. 189—Petition of resignation to Collector as Officer in charge of Court of Wards—Untrue account of affray and defamatory statements about others—Whether false information.

Where a person submitted a petition of resignation to a Collector as the Officer in charge of the Court of Wards and such a petition contained an untrue account of an affray and defamatory statements and the Dt. Magistrate ordered the petitioner's prosecution for giving false information under S. 182 of the Indian Penal Code *held*, that the ingredients of an offence under the section were wanting and the conviction was bad. (*Piggot, J.*) **DEBI v. EMPEROR.** 16 A. L. J. 108=41 I. C. 113=  
19 Cr. L. J. 257

—S. 192—Fabricating false evidence—Document helping to form correct opinion—No offence. See (1917) DIG. COL. 950 **BADRI PRASAD v. EMPEROR.**

40 All 35=  
15 A. L. J. 819=42 I. C. 514  
=19 Cr. L. J. 2.

## PENAL CODE, S. 193.

—Ss. 192 and 193—False evidence fabricating—Dishonest and fraudulent intention.

N, one of the appellants was proposing to sell some property to B. A kobilā dated 28rd May, was written out by N on a stamp paper of Rs. 5. The sale having fallen through it became necessary to apply to the Collector for the refund of the stamp duty. N took advice with regard to this and was told that no refund would be made after two months. M, the other appellant, gave him this advice and also told him that he might alter the date in the document from 28rd May to 23rd September. This was quite unnecessary on their part inasmuch as the period was not two months but six months. They were charged with forgery and abetment of forgery:

*Held*, that there was undoubtedly a dishonest and fraudulent intention but, they were guilty of fabricating, and abetting the fabrication of false evidence under Ss. 192 and 193 I. P. C. and not of forgery. 6 Cal. 482 ref. (*Chitty and Richardson, JJ.*) **MOHESH CHANDRA CHOU DHURY v. EMPEROR.** 28 C. L. J. 213=  
47 I. C. 871=19 Cr. L. J. 971.

—Ss. 192 and 193—Prosecution of plff. in a suit for offence under—Ex parte decree in favour of plff. not set aside—No bar to prosecution. See CR. P. CODE S. 195 (1) (b).  
2 Pat. L. J. 688.

—S. 193—Fabricating false evidence—Making false entry with intention of using it in evidence—Entry inadmissible in evidence—Effect of.

A person is guilty of fabricating false evidence when he makes a false entry in a document intending that it shall appear in evidence and mislead the Judge or Magistrate, and the mere fact that the entry is not legally admissible in evidence cannot affect his guilt. (*Chevis, J.*) **AMOLAK RAM v. EMPEROR.**  
56 P. L. R. 1918=13 P. W. R. (Cr.) 1918=  
43 I. C. 429=19 Cr. L. J. 141.

—S. 193—Perjury—Conviction for legality—Deposition before civil court not noted to have been read over to accused—Effect—Presumption as to deposition having been read over—Evidence Act. S. 80.

An accused person may be convicted of the offence of having given false evidence before a Civil Court, notwithstanding that the Court has made no note in writing to the effect that the evidence has been read out to the deponent. In the absence of evidence that the deposition was not read out the Magistrate ought to assume that the Judge of the Civil Court complied with the provisions of O. 18. R. 5 of the C. P. Code. (*Ratnagar & J and Le Rossignol, J.*) **EMPEROR v. JAGAT RAM.**

28 P. R. (Cr.) 1518=39 P. W. R. (Cr.) 1918=  
47 I. C. 872=19 Cr. L. J. 972.

## PENAL CODE, S. 193.

— S. 193 — *Perjury—Prosecution for—Statement slightly discrepant owing to confusion of mind.*

Prosecution for perjury under S. 193 of the Penal Code should not be ordered where the statements complained of are slightly discrepant owing to inaccuracies of mind and are not deliberately false (*Chitty and Smither, JJ.*) CHANDRA MOHAN NANDA v. EMPEROR.  
43 I. C. 822=19 Cr. L. J. 230.

— S. 193—*Perjury—Sanction for—Prosecution under S. 476 Cr. P. Code—Omission to specify statements upon which prosecution relies—Effect—Fresh enquiry or notice to accused if and when necessary before granting sanction—Cr. P. C. S. 360—Deposition of witness—Reading over what amounts to—Procedure in case under, S. 107 Cr. P. C.—Prosecution for perjury in deposition—Evidence—Record of deposition—Admissibility.*

The object of specifying the offence and the occasion when the offence is committed is to give not only notice to the accused but also to the trying Court of specific offences against the accused. In a case under S. 193 of the I. P. C. for perjury where the prosecution is based upon certain statements being false made by the accused, it is essential to set out the exact statements in detail upon which the prosecution wants to proceed.

Where the Sub-divisional Magistrate in his explanation to the High Court detailed the statements.

*Held*, that he ought to have done so in the order under S. 470 of the Cr. P. Code. The High Court directed that the statements should be detailed upon which the charge is proposed to be formed against the accused.

When the order for sanction is made upon the very date or the day after the witnesses, cross examination had finished, and upon a clear statement against the witnesses; and after an opportunity having been given to them to explain the inconsistencies in their statements in chief and in their cross-examination it was not incumbent upon the Magistrate to institute a fresh enquiry or to give any notice to the accused.

It is not necessary that the deposition should be read over after the examination in chief is concluded. There is nothing in S. 360 of the Cr. P. Code, to indicate the exact time when the deposition should be read over. If the deposition is read over at the close of the cross-examination, if it fulfils the requirements of the section and also the object of the section which is to give an opportunity to the witnesses to explain or correct the statements by them.

A case under S. 107 of the Cr. P. Code is triable as a summons case and the deposition to be received in a summons case is that provided by S. 355 of the Cr. P. Code, S. 360

## PENAL CODE, S. 211.

of the Cr. P. Code lays down a certain procedure and that is the reading over of the deposition to the witnesses when the deposition is recorded under S. 355 of the Cr. P. Code.

The only evidence in a case under S. 193 I. P. C. regarding the statement made by witnesses including the fact of their having been taken on oath, is the record of the deposition prepared by the Magistrate. That record is only admissible under S. 91 of the Indian Evidence Act read with S. 80 of that Act. (*Jwala Prasad, J.*) RAMDHARI SINGH v. EMPEROR.  
(1918) Pat. 13=

4 Pat. L. W. 44=43 I. C. 585=  
19 Cr. L. J. 169.

— Ss. 201, 203 and 211—*Offence under—Accomplice conviction of—False information to police implicating innocent person to screen real offender.*

A person who gives false information to the Police accusing another of an offence of murder in order to screen the real offender, commits offences not only under Ss. 201 and 203 I. P. C. but also under S. 211. (*Teunon and Newbould, JJ.*) TAPRINNESSA v. EMPEROR.  
47 I. C. 275=19 Cr. L. J. 803.

— S. 210—*Offence under—Ex parte decree not set aside—No bar to prosecution of plff. under the section. See CR. P. CODE, S. 195 (1) (b)*  
2 Pat. L. J. 688.

— S. 211—*False charge—Charge to be preferred to person having authority to set the law in motion—False report cannot be basis of. See. (1917) DIG. COL. 253; MATHURA PRASAD v. EMPEROR.*  
39 All. 715=  
15 A. L. J. 767=42 I. C. 761.

— S. 211—*False charge against several persons—Bringing of, if a single offence or separate offences.*

A person who lays an information containing a false charge against a number of persons commits a distinct offence against each of the persons against whom he makes a charge and may be separately prosecuted under S. 211 of the Penal Code for each of such offences. (*Parlett, J.*) GNANAKANNU v. VEERAVAGU.  
11 Bur. L. 1, 136=  
48 I. C. 342=19 Cr. L. J. 1002.

— S. 211—*False charge—Instituting or causing to be instituted criminal proceedings—Essentials of offences.*

To sustain a conviction under S. 211 I. P. C. there must be a charge of a specific offence made with the intention of setting the criminal law in motion. A mere suggestion that an offence has been committed is not enough.

A statement of a pleader for an accused person that a certain other person had committed an offence with which the accused is charged is no ground for sanctioning prosecution.

## PENAL CODE, S. 211.

tion of the accused under S. 211. (*Twomey, J.*)  
 NGA PU v EMPEROR 10 Bur. L. T. 259.

—S. 211—False information to police in  
 criminating innocent person to screen real of-  
 fender. See PENAL CODE, SS. 211, 213 AND  
 211. 47 I. C. 275

—Ss. 213 and 214—Offence under—  
*Essentials of.*

To establish the commission of offences  
 under Ss. 213 and 214 I. P. C. it is essential to  
 prove commission of the offences screened.  
 (*Drake Brockman, J. C.*) WARISALI v. MAHO-  
 MED AZIMULLA. 46 I. C. 424.

—S. 223—Policemen suffering prisoner  
 to escape—Negligence. See (1917) DIG. COL.  
 956; GIRDHARI v. EMPEROR

15 A. L. J. 883=43 I. C. 110  
 =19 Cr. L. J. 78

—Ss. 224, 225 and 353—Warrant of  
 arrest—Portion directing arrest not signed  
 but initialled—Warrant shown to accused but  
 purport not explained—Arrest, not illegal—  
 Resistance or obstruction—Offence. See CR.  
 P. CODE SS 75, 77 ETC. 3 Pat. L. J. 493

—S. 225 (B)—Conviction under—*Legality*  
*of.*

Before a person could be convicted of an  
 offence under S. 225 (3) I. P. C., it must be  
 proved that the officer armed with the war-  
 rant of arrest produced his warrants before  
 the person and that he made an attempt to  
 arrest him or that in fact the person was  
 arrested (*Sunder Lal, J.*) EMPEROR v. ALJAZ  
 HUSSAIN. 10 Cr. L. R. 3

—S. 228—Contempt of court—Refusal  
 to answer questions. *Intentional interruption—*  
*Procedure—Cr. P. Code, S. 480.*

The accused while about to be examined in  
 continuation of the previous day's evidence by  
 the Dt. Judge applied for an adjournment of his  
 examination on the ground that it could not  
 be finished on that date. The case was adjourned  
 to the succeeding day, when before entering  
 into the witness box, the accused presented an  
 application to the judge that the inquiry might  
 be stopped for the reasons mentioned in the  
 application. The Dt. Judge rejected the appli-  
 cation and called upon counsel to proceed with  
 his examination in chief. Accused thereupon  
 refused to answer any further questions or to  
 proceed with his allegations because his appli-  
 cation of that date had been rejected, and  
 when the Court thereupon directed the other  
 side to cross examine him with reference to  
 the statement already made, he again refused  
 to obey the order of the Court and declined to  
 answer any questions put to him in cross  
 examination or by the Court. The Court there-  
 on adopted the procedure prescribed by S. 480  
 of the Cr. P. Code, and convicted the accused  
 of an offence under S. 228, I. P. C.

## PENAL CODE, S. 289.

*Held* that the three ingredients of the offence  
 under S. 228, I. P. C. there must be an (1) In-  
 sult or interruption, (2) the insult or interrup-  
 tion must be intentional, (3) and the insult  
 must have been offered or the interruption  
 caused to a public servant sitting in any stage  
 of a judicial proceeding and that the accused  
 was guilty under S. 228, I. P. C. (*Shadi Lal,*  
*J.*) GOPI CHAND v. EMPEROR.

14 P. R. (Cr.) 1918=90 P. L. R. 1918=

24 P. W. R. (Cr.) 1918=46 I. C. 36=  
 19 Cr. L. J. 676.

—S. 289—Negligence—Care of Log—  
 Offence—Elements of. See (1917) DIG. COL.  
 953; LACHMI NARAIN v. EMPEROR.

42 I. C. 913=19 Cr. L. J. 1.

—S. 290—Public nuisance—Liability of  
 occupant of premises and proprietor—Cri-  
 minal Law—Master when responsible for  
 the acts of his servant.

Speaking generally, where the user of pre-  
 mises gives rise to a nuisance the person liable  
 under S. 290 of the Penal Code is the occupier  
 for the time being, whoever he may be. A  
 proprietor who is not in occupation of the  
 premises is not liable, unless his conduct  
 amounts to an abetment of the offence under  
 that section.

The general principle of Criminal law is  
 that a master is not criminally answerable for  
 the acts of his servant. (*Richardson and*  
*Huda, JJ.*) BRUBHAN RAM v. BIBHUTI  
 BRUSAN BISWAS. 47 I. C. 287=

19 Cr. L. J. 915.

—S. 295—Member of Moothan caste in  
 Malabar—Entering a temple—Defilement  
 whether amounts to custom.

A Moothan, one of the divisions of Sudra  
 caste in South Malabar, can enter the 'Nalam-  
 balam' or outer precincts of a temple, without  
 polluting the temple within the meaning of  
 S. 295 I. P. C.

Per *Napier, J.*—The word 'defile' in the  
 section cannot be confined to the idea of  
 making dirty but must also be extended to  
 ceremonial pollution. (*Sadasiva Aiyar and*  
*Napier, JJ.*) KUTTICHAMI MOOTHAN v.  
 RAMA PAITAR. 41 Mad 980=

24 M. L. T. 181=47 I. C. 812=  
 19 Cr. L. J. 960.

—S. 295—Offence under—Killing of  
 cow not an offence

The killing of a cow even if done with the  
 intention of offending the religious suscepti-  
 bilities of others is no offence under S. 295  
 Penal Code, (*Ratingan, C. J., Chevis and Leslie*  
*Jones, JJ.*) ALI MUHAMMAD v. EMPEROR.

10 P. R. (Cr.) 1918=1 P. W. R. (Cr.)  
 1918=44 I. C. 330=19 Cr. L. J. 314 (F. B.)

—Ss. 299, 300, and 326—Death caused  
 by striking a stone in mutual stone-throwing

## PENAL CODE, S. 299.

between two parties—Death—Caused by a swordcut on the injured person—Liability for death—Grievous hurt by swordcut—Liability. See (1917) DIG. COL. 958; DATTU NANA PAWAR v. EMPEROR

19 Bom. L. R. 902=43 I. C. 253  
=19 Cr. L. J. 93.

—Ss 299 Exp. (1) and 360 (2)—*Injury accelerating death of dying person—Knowledge of disorder—Offence.*

Expl. (1) to S. 299 of the Penal Code assumes that the bodily injury was inflicted with the intention of causing death or the knowledge that it would be likely to cause death. It was intended to repeat the English rule that an injury which accelerates the death of a dying man is deemed to be the cause of it, and where death has been caused it is no defence that the deceased was suffering from a complaint which would have caused his death in any event. S. 300 (2) of the Code makes it clear that offender is not responsible for death in such a case unless he knew that the condition of the deceased was such that his act was likely to cause death. (*Pratt, J. C. and Hayward, A. J. C.*) IMPERATOR v. ISMAIL. 11 S. L. R. 79=44 I. C. 335.  
=19 Cr. L. J. 319.

—Ss. 300 cl (2) and 362—*Murder—Poisoning by arsenic—Intention to cause death—Absence of—Knowledge—Guilty.*

Where accused knowing its effect administered arsenic to a boy nine years of age with the object of preventing the father of the boy appearing as a witness against himself in a criminal case, but in such quantity that the boy died in the course of three days: *Held*, that he was guilty of murder, though his intention might not have been to cause death. (*Banerjee and Piggott, J.J.*) GAURI SHANKAR v. EMPEROR. 40 All. 360=16 A. L. J. 178=  
44 I. C. 686=19 Cr. L. J. 382.

—Ss 360, (4) and 304—*Murder culpable homicide not amounting to murder—Fatal assault by the person acting in concert.*

Three men attacked two others with lathis. A free fight took place with the result that considerable injuries were inflicted on both sides. One of the persons attacked received several severe injuries which culminated in his death. The evidence for the prosecution was that some of the injuries were inflicted after the deceased had been felled to the ground. It did not appear, however, which of the injuries had been caused by which of the assailants but the weapons used were lathis and the three persons were acting in concert. *Held*, that the accused were guilty of culpable homicide not amounting to murder under S. 304 of the Penal Code inasmuch as the assault was sudden and the injuries had been inflicted in the heat of passion. 16 A. L. J.

## PENAL CODE S. 304 A.

11 diss. 35 All. 569 and 35 All. 506<sup>ref</sup> (*Tudball and A. Raoof, J.J.*) EMPEROR v. GULAB

40 All. 686=16 A. L. J. 731=  
47 I. C. 865=19 Cr. L. J. 953.

—S. 300 Excep. 5. 302 and 304—*Murder with consent of victim—Liability of.* See (1917) DIG. COL. 959; UJAGAR SINGH v. EMPEROR. 45 P. R. (Cr.) 1917=43 I. C. 413  
=19 Cr. L. J. 125.

—S. 362—*Sentence—Youth of offender, if an extenuating circumstance.*

Ordinarily youth in itself is not an extenuating circumstance in a case of murder. It should always be taken into account by Courts in exercising the discretion vested in them by S. 302 I. P. C. (*Twomey, C. J. and Ormond, J.*) CHIT THA v. EMPEROR.  
11 Bur. L. T. 100=9 L. B. R. 165=  
45 I. C. 840=19 Cr. L. J. 648.

—S. 304—*Beating to exercise a spirit—Death—Offence.*

The accused who professed to be a specialist in witchcraft beat a woman who was believed to be possessed by an evil spirit with the object of exorcising the spirit. The woman died of the beating, protesting that she was not possessed and refusing to be beaten. *Held*, that the accused was guilty of an offence under the second part of S. 304 I. P. C. Intention is a question of fact which must be decided upon the circumstances of each particular case. It may be a legal fiction as, for instance, where knowledge is presumed in the case of a person who is intoxicated and intention is the inference drawn from such knowledge, or it may be proved by evidence of the particular circumstances in each case. (*Saunders, J. C.*) NGA PO THA v. EMPEROR.

44 I. C. 679=19 Cr. L. J. 375.

—Ss 304 and 325—*Common intention—Attack by several persons—Doubt as to who struck the fatal blow—Culpable homicide—Offence if committed.*

Where several persons attack one, and the evidence is doubtful as to which of the assailants struck the blow, which caused the death of the man attacked, the accused could not be guilty under S. 304, I. P. C. of culpable homicide but of having caused grievous hurt under S. 324 because it was not the common intention of all of them to cause death. 29 All. 282 foll. (*Bannerji, J.*) CHANDAN SINGH v. EMPEROR

40 All. 103=16 A. L. J. 11=43 I. C. 438=  
19 Cr. L. J. 150.

—Ss. 304 A. 325, 336, 337 and 338—*Causing death by rash and negligent act—Rioting—Grievous hurt.*

S. 304 A. I. P. C. must be read along with Ss. 336, 337 and 338 and all these sections are

## PENAL CODE, S. 324.

confined in their operation to acts done without any criminal intent, apart from the rashness or negligence which is their essential ingredient.

The accused who were five in number attacked the complainants with *lathis*. In the course of the affray severe injuries were inflicted and suffered by both sides. On the side of the complainants there was a girl of tender years who was sitting very close to her father and she received a severe blow on the head which subsequently resulted in her death. The accused, in addition to being convicted of an offence punishable under s. 147 and 323 I P C. were also convicted of an offence under S. 304 A, the sentences to run concurrently.

*Held*, that the offence of which the accused was guilty was not that of causing death by a rash or negligent act but of voluntarily causing grievous hurt. (*Piggott, J.*) KURE v. EMPEROR.  
16 A. L. J. 615

—Ss 324 and 353—*Escape from lawful custody—Arrest under warrant not signed by anybody, such escape illegal—Unnecessary hurt whether justifiable.*

Where L was convicted of the offence of escaping from lawful custody, the arrest having been effected by a constable on a warrant which was not signed by the magistrate issuing it, and made over to the Thana officer on an order purporting to be made by the Dt. Superintendent of Police, and was not signed by anybody :

*Held*, that the warrant was defective and that the warrant itself was not sufficient authority for the arrest inasmuch as there was no evidence that the constable had reason to believe that the person to be arrested had committed a cognizable offence. As the constable arrested under the cover of the warrant which was bad in law, the escape was not illegal.

As to others who in effecting the accused's rescue caused unnecessary hurt to the constable their convictions were altered from S. 353 to S. 323 I. P. C. (*Roe and Jwalaprasad, JJ.*) MOUSI DAL v. EMPEROR.

(1918) Pat 285.  
5 Pat. L. W. 226=48 I. C. 340.  
= 19 Cr. L. J. 1000.

—Ss. 328 and 304—*Death—Attack by several persons—Doubt as to who struck the fatal blow—Offence of grievous hurt and not of culpable homicide. See PENAL CODE, Ss. 304 and 325.*  
16 A. L. J. 11.

—Ss. 325, 323 and 328—*Robbery—Grievous hurt—Separate charge against each of the accused without specification of common object—Offence—Cr. P. Code S. 106—Liability of.*

## PENAL CODE, S. 326.

Accused Nos. 1, 2 and 8 were charged with having entered the complainant's house, and removed his earrings. The right ear was cut off with the earring and the left ear was torn.

Where accused were charged separately with having entered complainant's house and cut off his ears and removed his earrings and there was no specification of a common intention to inflict grievous hurt *Held*, that as the identification of the person who inflicted the grievous injury was not made out, and as there was an absence of common intent, the conviction under S. 325 was bad, for which must be substituted convictions under S. 323

An order under s. 106 of the Cr. P. Code is not illegal even though there is technically no breach of the public peace by the accused.

A person who enters on another's premises and uses violence to him and deprives him of his property commits a breach of the peace within the wider sense of the expression. (*Oldfield, J.*) SAYARAJULU NAYUDU, *In re*.  
37 I. C. 445 = 13 Cr. L. J. 929.

—S. 330—*Elements of, offence under.*

S. 330 of the I. P. C. contemplates that there must be immediate connection between the assault and the restoration of property, that is to say, that intention of the person causing the assault must be proved to be to obtain from the person assaulted confession of the restoration of the stolen property, and there must be no reasonable ground for explaining the assault otherwise than upon that foundation (*Mullick and Thornhill, JJ.*) SATYA DEVA SWAMI v. EMPEROR.  
5 Pat L W 109=

46 I. C. 525=19 Cr. L. J. 749.

—Ss. 332 and 323—In the discharge of his duty as such public servant meaning of, order of Magistrate under S. 144, Cr. P. Code, for bidding *pragwals* to carry *lathis*—Order ceasing to have operation by expiry of time—Conviction under S. 332:—*Illegal—Simple hurt See (1917) DIG. COL. 962; MADHO v. EMPEROR.*  
40 All. 28=15 A. L. J. 813=

42 I. C. 917=19 Cr. L. J. 5.

—S 336—*Rash or negligent act—Licensed Cab driver asked to wear spectacles at the time of driving—Driving a motor car without using spectacles.*

The accused, a taxi cab driver, was licensed to drive but owing to his defective eyesight, was asked to wear spectacles at the time of driving. One night, whilst he was driving without spectacles, his car collided with another: but it appeared that he was not to be blamed for the accident. The medical evidence showed that the defect in the eye sight of the accused was not very much and that it would not appreciably interfere with his efficiency as a driver.

## PENAL CODE, S. 341.

*Held*, that the accused had committed no offence under S. 336. I. P. C. inasmuch as it was not made out that if he drove his car without wearing spectacles he would be acting so rashly or negligently as to endanger human life or the personal safety of others (*Shah and Marien, JJ.*) **EMPEROR v. ABAS MIRZA.** 42 Bom 356=20 Bom. L. R. 376=43 I. C. 506=19 Cr. L. J. 395.

———S. 341—*Wrongful restraint—Lease of a shop by one co-owner—Locking of the shop by the other co-owner, if an offence.*

The accused, one of the two joint owners of a shop, put her lock on the shop which was let out by the other joint owner without her consent. The tenant charged the accused with the offence of wrongful restraint in that he was prevented by the lock from entering into the shop.

*Held*, that the accused had committed no offence, inasmuch as she had affixed her lock to a house of which she was the joint owner and the complainant was no tenant of hers. (*Heaton and Shah, JJ.*) **EMPEROR v. BAI SAMARTH.** 20 Bom L R 106=44 I. C. 463=19 Cr. L. J. 351.

———S. 342—*Wrongful confinement—Brothel house—Prostitutes in the house—Freedom of movement restricted.*

Accused No. 1 brought a woman, who was his kept mistress from Kolhapur and kept her with accused No. 2, a brothel house keeper in Bombay. On previous occasions too he had supplied women to accused No. 2 to be used as prostitutes. The woman was made to live as a prostitute in the house, the entrance to which was guarded; and a watch was kept over her movements. Occasionally she was allowed to go out under surveillance.

*Held*, that both accused were guilty of wrongfully confining the woman. (*Heaton and Shah, JJ.*) **EMPEROR v. BANDU EBRAHIM** 42 Bom 181=20 Bom. L. R. 79=44 I. C. 114=19 Cr. L. J. 258.

———S. 353—*Conviction under, Validity—Execution of illegal warrant. See CR. P. C. S. 75.* (1918) Pat. 48.

———Ss. 363, 365 and 366—*Kidnapping girl over 16 years of age—Delay in making report, effect of.*

When the accused were charged under S. 36 I. P. C. with having kidnapped a minor girl from the guardianship of her father and it appeared that the girl was over 16 at the time when she disappeared and that there was delay in making a report to the police.

*Held* (1) that the accused were not guilty of an offence under S. 363 of the Penal Code.

(2) that the extraordinary delay in making the first information report was very suspicious

## PENAL CODE, S. 372.

and that fact that she was over 16 strengthened the belief that she went off of her own accord and that consequently the accused could not be convicted under S. 333 of the Penal Code. (*Broadway, J.*) **MIRZA v. EMPEROR.** 43 I. C. 351=19 Cr. L. J. 1011.

———Ss. 363 and 368—*Kidnapping—Lawful guardianship, what constitutes.*

A jat girl under 16 years of age was coming home when one of the accused came to her and persuaded her to accompany him. Her hair was cut and she was dressed in boy's clothes and she lived for some time with both the accused. After this both the accused were taking away the girl when they were discovered by the chowkidar. She was crying and told the chowkidar that she was a girl and not a boy.

*Held*, that the accused were guilty of the offence of abduction having removed the girl from the lawful guardianship of her father without her consent. 6 Bom. L. R. 785. foll. (*Know, J.*) **HAR KESH v. EMPEROR.** 40 All. 507=16 A. L. J. 445=45 I. C. 837=19 Cr. L. J. 645.

———Ss. 366, 360 and 90—*Kidnapping a girl out of British India—Consent of the girl—Girl of 15 years of age.*

A person kidnapping a girl of fifteen years of age out of British India with her consent, for the purpose of seducing her to illicit intercourse, is not guilty of an offence under S. 366 I. P. C. (*Shah and Marten, JJ.*) **EMPEROR v. HARIBHAI DADA.**

42 Bom. 391=20 Bom. L. R. 372=45 I. C. 506=19 Cr. L. J. 602.

———S. 366—*Married woman—Abduction of—Offence.*

S. 366, I. P. C., applies to the case of an abduction of a married woman. The word 'marry' in that section has the same meaning as the same words in S. 494 and means the going through a form of marriage, whether the marriage should prove in fact legal and valid or illegal and invalid. (*Chitty and Richardson, JJ.*) **TAHER KHAN v. EMPEROR.** 45 Cal. 641=22 C. W. N. 695=27 C. L. J. 436=45 I. C. 688=19 Cr. L. J. 640.

———S. 370—*Buying, selling or disposing of a person as a slave—Slave in S. 370 meaning of—Instrument disposing of a certain person his heirs and their services—Surrounding circumstances to be taken into account in judging of the nature of the transaction and intention of the parties. See (1917) DIG. COL. 964; KOROOTH MAMMAD In re.*

41 Mad. 334=33 M. L. J. 430=22 M. L. T. 262=(1917) M. W. N. 894=6 L. W. 603=42 I. C. 977=19 Cr. L. J. 17.

———Ss. 372, and 373—*Essentials of offence under the sections—Making over of possession*

## PENAL CODE, S. 376.

of minor girl under a sale, hire or other similar arrangement necessary.

To constitute the offence under Ss. 372 and 373, it is necessary that there should be a making over of possession of the minor girl either by sale or hire or by a similar arrangement wherewith the help of the 1st accused the mother of the minor girl, the second accused performed the kanyarikaam ceremony—which has the effect of an arrangement by which a person has sexual intercourse with a girl who had just attained puberty for three days—the accused was not guilty of the offences under Ss. 372 and 373 I. P. C. 5 (1911) 2 M. W. N. 479 foll. (*Atdur Rahim and Oldfield, J.J.*) THE PUBLIC PROSECUTOR v. MUDDILA MUTYALU.

35 M. L. J. 157=24 M. L. T. 77=  
(1918) M. W. N. 434=8 L. W. 253=  
47 I. C. 865=19 Cr. L. J. 963.

—Ss. 376 and 511—Attempt to commit rape—conviction of boy of 12 years—Validity See (1917) DIG. COL. 965; EMPEROR v. NGA TUN KAING. 11 Bur. L. T. 455=42 I. C. 175

—S. 376—Rape—Death of complainant—Offence of rape—Inference of guilt.

An inference adverse to the accused in a case of rape, should not be drawn from the fact that the complainant was very much ashamed and even committed suicide owing to the shame brought on her. The fact of the complainant's suicide should not be taken into consideration in passing sentence in case of rape because that is neither the natural nor ordinary nor probable consequence of the accused's act. (*Maung Etn, J.*) NGA SAN PU v. EMPEROR.

43 I. C. 443=19 Cr. L. J. 153.

—S. 377—Offence under—Credibility of person on whom offence is alleged to have been committed—Bloodstains on clothes of accused—Cr. P. Code, S. 439—Revision.

In a charge of an offence under S. 377 I. P. C. it is as a rule unsafe to convict on the uncorroborated testimony of the person on whom the offence is said to have been committed unless for any reasons that testimony is entitled to special weight. (*Martineau, J.*) GANPAT v. EMPEROR.

73 P. L. R. 1918=  
38 P. W. R. (Gr.) 1918=47 I. C. 670.  
=19 Cr. L. J. 946.

—Ss. 379 and 498—Husband—Complaint of theft—Conviction for offence under S. 498, legality—Cr. P. C. S. 199—Effect. See Cr. P. C. S. 193. 2 F. R. (Gr.) 1918.

—S. 379—Theft—Bona fide dispute—Trespasser growing paddy—Possession given to complainant under decree of court—Subsequent removal of paddy, whether amounts to.

A, went into the possession of the disputed land in 1906, B, the complainant, obtained

## PENAL CODE, S. 385.

a decree for possession against A and obtained actual possession of the land on 20-9-1917. Before the execution of the decree, A, grew paddy but reaped it on 14-12-1917.

Held, that A having been a trespasser on the land at the time the paddy was grown, he had no right to go upon the land after the complainant had obtained possession and removed the paddy. Consequently when the paddy was cut A had no right to remove it and there was no bona fide dispute. (*Sanderson, C. J. and Beachcroft, J.*) ABINASH CHANDRA SARKAR v. EMPEROR.

28 C. L. J. 120=  
48 I. C. 678=20 Cr. L. J. 33.

—Ss. 379 and 403—Theft—Crl. mis-appropriation—Bullocks following cow—Possession. See (1917) DIG. COL. 966; NGA SHWE ZAN v. EMPEROR. 19 Bur. L. T. 261=  
38 I. C. 332.

—S. 379—Theft—Removal of crop by order of accused—Offence.

Where a crop was dishonestly cut and removed by the order of the accused, he himself being present:

Held, that the accused was guilty of an offence under S. 379 of the Penal Code. (*Jwala Prasad, J.*) BHAWANI SARU v. PREM MASHI CHRISTIAN.

43 I. C. 404=  
19 Cr. L. J. 116.

—S. 379—Theft—Removal of property asserting bona fide claim of right. See (1917) DIG. COL. 967; LAKANAW v. EMPEROR.

10 Bur. L. T. 166=(1916) 2 U. B. R. 124=  
33 I. C. 391.

—S. 379, Expln. I—Theft—Landlord and tenant—Land in the possession of tenant—Trees belonging to landlord—Possession for payment of compensation to landlord if tenant cut the trees—Removal of trees, if offence.

Where by the terms of the kabuliyat it was provided that if the tenant cut any trees, he would pay to the landlord compensation at a certain rate, and it was found that the tenant mala fide cut some trees in order to injure the landlord:

Held, that although the tenant was in the possession of the land he committed theft by severing the trees from the ground, as they were in the possession of the landlord. (*Caspers and Sharfuddin, J.J.*) ABDUL ALI FAKIR v. NETALI FAKIR.

27 C. L. J. 228=  
44 I. C. 350=19 Cr. L. J. 334.

—Ss. 385 and 44—Offence under—Essentials of—Injury, meaning of.

The accused, stopped the complainant, a cooly, whom he suspected of smuggling arrack from the Nizam's Dominions into the British Territory on the way, took and kept his liquor jar for the night and threatened to report the matter to the Police unless he paid

## PENAL CODE, S. 390.

something. He was charged with wrongful restraint threat to do injury, to commit extortion and causing simple hurt and sentenced to a fine of Rs. 100 for all the offences.

*Held*, that the conviction under S. 385 was bad, there being no fear of any injury within the meaning of S. 44, I. P. C., and the accused only threatened to do what he was bound by law to do and that the conviction under S. 341 was bad, as there was no physical restraint of complainant's person.

For the purpose of S. 335, I. P. C., it is necessary that the accused should have put some person in fear of injury in order to extort some property from him. 'Injury' includes only such harm as may be caused illegally to a person's mind, body, reputation or property (*Spencer, J.*) *In re MANTRI PARGADA MATTAPALLI NARASIMHA RAO.*

44 I. C. 973=19 Cr. L. J. 445.

—S. 390—Robbery—Essentials of the offence—Theft accompanied by violence so as to avoid capture. *See* (1917) DIG. COL. 967; *NGA POTHET v. EMPEROR.* 42 I. C. 987=19 Cr. L. J. 27

—S. 402—Preparation for dacoity—Offence *See* (1917) DIG. COL. 968; *EMPEROR v. KHUSHI RAM.* 42 I. C. 1003=19 Cr. L. J. 43.

—S. 403—Criminal misappropriation—Dishonest detention of property—Wrongful gain or loss.

A letter was addressed to A who received and read it and then threw it on a table at which he and the accused were seated. The accused apparently picked up the letter and it was produced from his custody in court in a proceeding between A and his wife for judicial separation. The Court refused to receive it and returned it to the accused. It was contended that the letter was "property" of A which the accused had misappropriated:—*Held*, that the essential ingredient for the offence of criminal misappropriation being proof of disappropriation or conversion to the use of the accused, the offence was not made out.

*Quære*—Whether the letter the subject of the charge was, under the circumstances, "property" at all. (*Knox, J.*) *ASHBEY CLARKE HARRIS v. EMPEROR.* 40 All 119=

16 A. L. J. 12=43 I. C. 590=19 Cr. L. J. 174

—S. 403—Criminal misappropriation—Essentials of the offence—Dishonest motive—Overt acts, if necessary.

The chief element for a conviction under S. 403 I. P. C. is the dishonest misappropriation of the property or conversion to one's own use.

In the absence of any overt act on the part of the accused no inference of dishonest motive

## PENAL CODE, S. 411.

can be imputed to him simply because he has retained certain documents in his custody. (*Jwala Prasad, J.*) *RAM BYAS RAI v. EMPEROR.* 47 I. C. 537=19 Cr. L. J. 943.

—S. 406—Criminal breach of trust—Moveable property attached in execution of decree—Property entrusted to accused—Non-production at time of sale.

Where the accused were entrusted by a Court officer with certain moveable property attached in execution of a decree, but at the time of sale they did not produce the property and evaded the service of notice, *held* that they could not be guilty of criminal breach of trust inasmuch as they did not misappropriate the property or convert it to their own use or dispose of it in any manner contrary to the terms of the trust. (*Barerji, J.*) *HARNAM SINGH v. EMPEROR.* 16 A. L. J. 600=

47 I. C. 375=19 Cr. L. J. 975.

—S. 406—Criminal breach of trust—Necessary elements to constitute offence.

The complainant owned money to the accused on a mortgage bond and on a certain day went to their house and paid the amount settled as due in full satisfaction of the bond. An endorsement of payment was made on the back of the bond by one of the witnesses for the prosecution and the accused went inside their house with the bond and the money and returned the bond, but they did not come back that day and afterwards denied the receipt of the money: *Held*, that on the facts there was no trust which would bring the case within the terms of S. 406 I. P. C. (*Chitty and Smither, JJ.*) *GOLAM HUSSAIN v. EMPEROR.* 22 G. W. N. 1005.

—S. 403—Embezzlement as servant or clerk—Elements of the offences.

Under an agreement with the Railway Company a station master employed K as a markaman and also allowed him to write the registers. On the station master taking leave he was succeeded by R. L. and he allowed K. to receive cash payments and enter them in the cash registers. The Railway Company did not sanction, nor were they aware of this state of things. The charge against K was that he demanded an over-charge of Rs. 5-10-0 and appropriated it.

*Held*, that no offences under S. 408 I. P. C. was committed in respect of Rs. 5-10-0 the money overcharged not belonging to the Railway Company, (they having repudiated the demand) and it not being entrusted to K, who was neither their clerk nor servant. (*Knox, J.*) *KARIM UD-DIN v. EMPEROR.* 40 All. 565=16 A. L. J. 596=

47 I. C. 867=19 Cr. L. J. 987.

—S. 411—Offence under—Lapse of time after theft—No bar to conviction. *See* EVIDENCE ACT, S. 114, ILLN (a). 43. I. C. 605.

## PENAL CODE S. 411.

—S. 411—*Receiving stolen property*—Possession after considerable lapse of time—No presumption of the knowledge of theft.

Where in a case under S. 411, I P C the stolen property was found in the possession of the accused more than three months after the theft.

Held that having regard to the length of time there was no presumption that the accused knew or had reason to believe the property to be stolen. (*Chitty and Smith v. J.J.*) JOEENULLAH BEPARI v. EMPEROR.

22 C. W. N. 597=46 I. C. 159=  
19 Cr. L. J. 762.

—Ss. 415. and 417—*Cheating—Deception*—Damage or harm to the mind or reputation.

The petitioner proposed to the father of a girl for the hand of his daughter and obtained his consent and was admitted into his house. Subsequently information was received by the father that the petitioner was a married man; this the petitioner admitted to be true. Shortly after the daughter who was major left the parent's protection of her own accord and went to the petitioner. On the complaint of the parents the petitioner was convicted of cheating under S. 417 I. P. C.

Held, that the facts did not bring the case within S. 417 read with S. 415 I. P. C.

That looking at the natural result of the deception that has been undoubtedly practised and that only, between the date the father gave his consent and the date when it became known to him that the petitioner was a married man, and on the facts and the circumstances of the case it could not be said that any damage or harm was done to the mind or reputation of the parents and consequently the charge failed. (*Sanderson, C.J. and Benchcroft, J.*) SERGEANT MILTON v. SPERMAN.

22 C. W. N. 1001=28 C. L. J. 485=  
46 I. C. 701=19 Cr. L. J. 781.

—Ss. 415 and 420—*Cheating—Disposing of woman by misrepresentation as to the status.*

A person who by representing a woman to be a Jat widow, when she is really a sweeper whose husband is alive induces another, to pay Rs. 300 to him commits the offence of cheating under S. 415 of I. P. C. (*Rattigan, C.J. and Scott-Smith, J.*) EMPEROR v. JHANDA SINGH.

6 P. R. (Gr.) 1918=61 P. L. R. 1918=  
16 P. W. R. (Gr.) 1918=44 I. C. 351=  
19 Cr. L. J. 335.

—S. 420—*Cheating—Burden of proof.* See (1917) DIG. COL. 970; *KHAIRATI v. EMPEROR.*

15 A. L. J. 867=  
42 I. C. 1005=19 Cr. L. J. 45.

—Ss. 420 and 489 A—*Cheating—Promise of counterfeiting coin and obtaining money.* See (1917) DIG. COL. 970. *MERRA v. EMPEROR* 10 Bur. L. T. 255=38 I. C. 746.

## PENAL CODE, S. 426.

—S. 426—*Criminal trespass—Annoyance*—Natural consequences of act of accused—Intention might be inferred—Intention to annoy—Positive proof—Unnecessary. See (1917) DIG. COL. 971; *SOMADURAI MUDALIAR v. EMPEROR*

9 Cr. L. R. 196=  
43 I. C. 405=19 Cr. L. J. 117.

—S. 426—*Mischief—Sium tree standing on occupancy holding of tenant—Tenant cutting there under a claim of right whether constitutes mischief.* See B. T. ACT, S. 28.

5 Pat. L. W. 114.

—S. 426—*Mischief—Tenant in possession of land as tenure-holder cutting off the branch of a tree—Bona fide dispute as to title to the trees—No offence—B. T. Act, S. 28.*

The accused cut the branch of a bar tree standing on a plot of land in respect of which he was recorded as *Gair Mazmur* *Malguzar* in the Record of rights.

Held, that he having the status of a tenant in the nature of a tenure holder was entitled to cut the tree standing on his land and the onus of proving that he was precluded by custom from cutting trees was upon the landlord.

If the tree was planted by the accused, he had every right to cut it.

It not having been shown or found that the utility or value of the trees was diminished by reason of the branch having been cut, conviction under S. 426 of the I. P. C. could not be sustained.

There having been *bona fide* dispute between the parties as to right to the trees, the criminal court ought not to have taken cognisance of the case. Where parties are trying to assert their right over the trees in the village and to drive the opposite party to the civil court, the criminal court should be careful in giving any advantage to any of the parties over his adversary. (*Juana Prasad, J.*) SARDAR SINGH v. EMPEROR. 4 Pat. L. W. 251=44 I. C. 451=  
19 Cr. L. J. 335.

—S. 433—*Mischief—Wrongful diversion of water from irrigation channel—Diverted water not allowed to run waste, but used for agricultural purposes—Water stored for being used by other persons, diversion of—Offence.*

The accused entered on the lands of the complainant and cut three bunds which had been erected in a channel that ran through the complainant's land with the result that the water in that channel ran down another channel off the complainant's lands lower down. The accused was convicted of an offence under S. 430, I. P. C. and the conviction was upheld. On appeal. It was contended for the accused in revision that no offence had been committed by him, first because the water diverted by the accused had been used for agricultural purposes and not allowed to run

## PENAL CODE, S. 441.

to waste and secondly because the complainant himself had intended not to use the water for his own field but merely to sell the use of it to other persons though the latter might use it for agricultural purposes. *Held*, overruling both the contentions, that the conviction was legal.

There is no warrant for assuming that S. 430 of the Penal Code was intended only to penalise the waste of water and not of the deprivation of a person having the right to use it. 1 Weir. 507 dist. 1 Mad. 262 (1911) 2 M. W. N. 849: 35 C. 437 Ref. (*Abdur Rohim and Napier, J.J.*) CHIDAMBARAM PILLAI v. MUHAMMAD KHAN SAHIB.

34 M. L. J. 205=23 M. L. T. 248=

44 I. C. 530=19 Cr. L. J. 355.

—S. 441—Criminal trespass—Building on another's land. See (1917) DIG. COL. 972: EMPEROR v. GHASI. 39 All. 722=

15 A. L. J. 793=42 I. C. 1008=

12 Cr. L. J. 46.

—Ss. 441, 497 and 511—Criminal trespass—Intention to commit adultery—Complaint by husband if essential—Cr. P. Code S. 199, effect of—Intention and attempt. Distinction between

Where the object of a trespass is to commit an offence, such offence must be possible on the part of the person to be convicted of the trespass.

An intention to commit an offence punishable with imprisonment is not the same thing as an attempt to commit such an offence. It exists before the attempt is begun. A mere intent is not by itself an offence; therefore where it is used as essential to bring a particular act within the category of criminal offence, and proof has been given that such an act accompanied by such an intent has been committed, the offence is complete, even though the further act intended may not have been committed or even attempted.

Where a person trespasses with intent to commit adultery the complaint of the husband is not necessary for proceedings in respect of house trespass to commit adultery. (*Stanyon, A. J. C.*) EMPEROR v. DHANTUA IODHI

47 I. C. 77=19 Cr. L. J. 381.

—S. 441—Criminal trespass—Trial and conviction for offence by first Court—Reversal of by appellate court solely on the ground that the matter was of a civil nature—Impropiety of. See CR. P. CODE, S. 439

27 C. L. J. 226.

—S. 441—Possession—Actual possession or formal possession delivered by Court. See PENAL CODE, S. 447. 16 A. L. J. 501.

—Ss. 441 and 443—Trespass by person with knowledge that his act is likely to cause annoyance or insult without any intent to

## PENAL CODE, S. 456.

intimidate, insult or annoy person in possession—Act if an offence. See (1917) DIG. COL. 973: VULLAPPA v. BHEEMA RAO

41 Mad. 135=33 M. L. J. 729=(1913)

M. W. N. 81=3 L. W. 794=43 I. C. 578

=19 Cr. L. J. 162 (F. B.)

—S. 447—Criminal trespass—Intention to commit offence, annoy or intimidate—No mala fides—Conviction bad

A Zemindar brought a suit in the Revenue Court for the ejectment of certain persons from a certain holding on the ground that they were non-occupancy tenants. The suit was decreed and formal possession of the holding was given to the Zemindar. The tenants who contended that they were occupancy tenants preferred an appeal and during the pendency of the appeal entered on the land and tried to plough it. The Appellate Court subsequently set aside the order for ejectment, holding that one of the accused was an occupancy tenant. *Held* that the conviction of the accused under S. 447, I. P. C. was illegal inasmuch as there was no mala fides on the part of the accused and they entered on the land in the belief that it formed part of their occupancy tenancy and consequently they did not intend to commit an offence or to intimidate, insult or annoy the Zemindar.

*Semble*—Whether the possession mentioned in S. 441 of the Penal Code means actual possession delivered by a Court (*Banerji, J.*) BHAGWAN DIN v. EMPEROR

15 A. L. J. 501=46 I. C. 160=

19 Cr. L. J. 704.

—S. 447—Trespass—Possession necessary to be determined.

For a conviction under S. 447 I. P. C. the finding on the point as to who was in possession of the land in dispute is necessary.

Where a person enters upon land, not with the object of intimidating, annoying or insulting the complainant, but in bona fide assertion of his own right to remain on the land till he is ejected therefrom in accordance with law, he is not guilty of an offence under S. 447 of the Code. (*Imam, J.*) JAGAN DUBEY v. EMPEROR. 45 I. C. 677=19 Cr. L. J. 629.

—S. 448—Criminal Trespass. See (1917) DIG. COL. 973: BHUKAM SINGH v. EMPEROR. 15 A. L. J. 303=42 I. C. 1008=

19 Cr. L. J. 46.

—Ss. 456 and 441—Lurking house trespass by night—Intention—Inference from facts—Burden of proof.

Per Piggot, J.—Where the evidence shows that a man has been found lurking at night inside the house of another person, a perfect stranger to him, or a person in whose house he has no apparent business, the prosecution will be entitled to ask the court to infer from these facts that there was a guilty intention on the

## PENAL CODE, S. 463.

part of the accused sufficient to bring his action within the purview of S. 441 of the I. P. C. 24 Cal. 291 and 31 Cal. 931 ref.

In dealing with cases of this sort (burgling house-trespass), Magistrates should not overlook the existence of S. 500 of the Indian Penal Code when they are considering the allegation on the part of the prosecution that the entry by the accused in the premises in question must presumably have been with intent to commit some offence; when, however, the accused pleads and establishes, either by direct evidence or by way of reasonable inference from proved facts, that he had some specific intention in entering the house, and that the intention in question was neither to commit an offence nor to intimidate, insult or annoy any person in possession of the house then the provisions of S. 103 of the Evidence Act should be referred to.

Where again, an accused person has forcibly or clandestinely entered a house which he knew to have been definitely closed and barred against him by the owner thereof, in that case the court may find that the intention to insult or annoy under such circumstances, was so clearly inherent in the acts of the accused as to form an essential part of the purpose with which the entry into the house was effected.

Per *Walsh, J.*—If there is an invitation (to enter a house) combined with an intention (on the part of the accused) to preserve strict secrecy, then it is difficult to say that there is any intention to annoy a third person, but if that third person has expressly prohibited the accused then his act becomes a direct defiance to an express order and an intention to annoy the author of the order may be inferred from it.

A person was found inside the house of another at night and he pleaded in defence, first, that he had entered the house at the request of one of the inmates and secondly, that he had no intention of insulting or annoying the complainant. It was found that he had taken the precaution of keeping his presence in the house entirely secret from the owner thereof, and it was not found that he was forbidden to enter the house by the owner, *held*, that the conviction of the accused without enquiry into the truth or otherwise of the defence set up was bad in law. (*Piggot and Walsh, JJ.*) *CHHOTU LAL v. EMPEROR.*

40 All. 221—16 A. L. J. 153—44 I. C. 35—  
19 Cr. L. J. 243.

—Ss. 463, 464, 467 and 471—Elements necessary to prove offences of—Onus if any on accused in case of forgery—Criminal case—Duty of prosecution in.

In a case where the only issue is whether the hand note in question is forged or not, the prosecution in order to establish this issue

## PENAL CODE, S. 464.

must give conclusive evidence to establish that the document is a false document within the meaning of S. 464 and further that it was forged by the accused with one of the intents, mentioned in S. 433 of the I. P. C.

It is wrong to hold that in cases where the prosecution can give negative proof only to establish a *prima facie* case it is for the defence to prove affirmatively that document in question was really executed by the person by whom it purports to have been executed.

The defence has no obligation of any kind, and it is not for the defence in a charge of forgery to prove that the document was a genuine one. It is for the prosecution to prove that the document was a forged one and that the accused did forge it. In the civil case no doubt it was incumbent on the plaintiff, now accused, to prove that the document was a genuine one and as he failed to do so, the suit was rightly dismissed. But upon a criminal prosecution the table is turned and the onus is upon the prosecution.

The prosecution must place before the Court the best evidence available. (*Atkinson and Jwala Prasad, JJ.*) *LUCHMI SINGH v. EMPEROR.*  
(1913) Pat. 36—44 I. C. 466—  
19 Cr. L. J. 344.

—Ss. 464 and 467. Forgery—Incomplete document—Unauthorised interpolation before completion of document—Recitals to be used in support of future bona fide claim—Incomplete document not signed by some of the intended executants if a valuable security—Penal Code, Ss. 25 and 30.

Per *Oldfield and Phillips, JJ.*—A document is 'made' within S. 464, I. P. C. even when some only of the intended executants sign it, as the execution of it by them is complete and the document would be binding on them, on the other intending executants affixing their signature. There is nothing in S. 464 I. P. C. to require that a document should be legally effective and valid in order that its alteration can constitute the offence of making a false document.

A document conferring or creating rights is a valuable security though all the intended executants have not signed it. Under S. 467 of I. P. C. the document must purport to be a valuable security and its validity or otherwise is immaterial.

Per *Oldfield and Sadasiva, Iyer, JJ.*—Where alterations in a document are made by a person who believes in good faith that he might use them to support a bona fide claim, such alterations cannot be said to have been made fraudulently or dishonestly so as to constitute the offence of forgery.

Per *Sadasiva Iyer, J.*—A man cannot be convicted of forgery where his intention in making a false document is to secure some thing to

## PENAL CODE, S. 464.

which he is legally entitled or thinks *bona fide* that he is legally entitled

A document incomplete on its face neither is nor purports to be a document creating or conferring right and cannot therefore be a valuable security and alterations or interpolations therein will not constitute the offence of forgery. (*Oldfield, Sadasiva Iyer and Phillips, JJ.*) RAMASAMI IYER v. EMPEROR.

41 Mad. 589=43 I. C. 593=  
19 Cr. L. J. 177.

—S. 464—*Forgery—Intention to defraud absence of—Signing plaint on another's behalf—No offence.*

The accused, a gomasta of one S. filed a plaint on behalf of S. and verified the words "S. bakalam khas." S. accepted the plaint, gave evidence in support of it and obtained a decree on its basis. During the suit accused admitted that the plaint had been verified by him, but that he had authority from S. S. did not deny this:—

*Held*, that the accused was not guilty of forgery inasmuch as he did not make the signature of S. on the plaint dishonestly or fraudulently. (*Jwala Prasad, J.*) RAM SARUP v. EMPEROR. 43 I. C. 828=19 Cr. L. J. 236.

—S. 465—*Forgery—Essentials of—Offence—Dishonest or fraudulent intention essential—Misdirection.*

Where in a case under S. 465, I. P. C., the charge against the accused was that by personating MB the husband of one S he induced the Mahomedan Marriage Registrar to make an entry of the divorce of S by her husband to which entry he affirmed his thumb impression and the Sessions Judge charged the Jury as follows: If the person who put his thumb impression in the register as Mir Baksha was not really Mir Baksha it is clear that he made a false document within the meaning of S. 464 and that his intention was that fraud should be committed, also that injury should be caused to Mir Baksha. He therefore committed forgery."

*Held*, that the Sessions Judge misdirected the jury in not having left it to the jury to say whether on the evidence they found that the intention of the accused was dishonest or fraudulent.

The High Court did not set aside the verdict holding that it was not erroneous in spite of the misdirection. (*Chitty and Smither, JJ.*) EMPEROR v. NATMADDI. 22 C. W. N. 572=35 I. C. 841=19 Cr. L. J. 649.

—S. 467—*Valuable security—Incomplete document—Alterations in, if an offence. See. PENAL CODE, SS. 464 AND 467.* 43 I. C. 593

—S. 471—*User of forged document—Filing document with plaint.*

## PENAL CODE, S. 428.

The filing of forged documents with a plaint is user of them within S. 471 I. P. C. (*Rice and Imami, JJ.*) IDU JOLAH v. EMPEROR.

3 Pat. L. J. 386=46 I. C. 293=  
19 Cr. L. J. 769.

—Ss 480 and 482—*Using false Trade Mark—Intent to defraud, essential.*

According to an agreement between different Oil Companies it was settled that one Company could use the tins of another Company, provided the Company so using the tins put on the cap a distinctive mark showing that the oil was not the manufacture of the Company whose tins were being used. In pursuance of this agreement the B. O. Co., could use the tins of S. O. Co., by putting on the cap the word "Victoria." The accused sold eight tins of kerosene Oil but only two of the tins had the word "Victoria" on the tin caps and the other six had plain tin caps. At the time of selling, he had told the purchaser that the tins contained oil of the B. O. Co., and the price agreed upon was the price of the B. O. Co., as prevailing in the market *Held* that although the accused was guilty of using a false-trade mark, so far as the six tins with plain caps were concerned, yet (in the absence of a conspiracy between the purchaser and the accused) the accused could not be convicted, under S. 482 I. P. C. of using a false trade-mark, as he had acted without intent to defraud. (*Banerji, J.*) ABDUL RASHID v. EMPEROR. 16 A. L. J. 476=

46 I. C. 402=19 Cr. L. J. 722.

—S. 488—*Essence of offence under. See (1917) DIG. COL. 973. MEWA LAL v. EMPEROR.*

(1917) Pat. 363=3 Pat. L. J. 147=  
4 Pat. L. W. 359=44 I. C. 41.  
=19 Cr. L. J. 249.

—Ss. 497 and 498—*Enticing away married woman—Intention, essential.*

For a conviction under S. 498 I. P. C. there must be an intention that the woman should leave her husband's control without any definite intention that she should return to him or an intention that she should remain away indefinitely. (*Leslie Jones, J.*) AHMAD v. EMPEROR. 145 P. L. R. 1917=

44 I. C. 968=19 Cr. L. J. 441.

—S. 498—*Enticing away married woman—Complaint of—Warrant for attendance of woman enticed away—Issue of—Legality—Condition—Illegal warrant—Security for woman's attendance if forfeited for non-attendance—Cr. P. C., Ss. 90, 514.*

In a case under S. 498, Penal Code, the trying Magistrate is competent to issue a warrant instead of issuing a summons for the attendance of the woman alleged to have been enticed away but in order to comply with the provisions of S. 90, Cr. P. C. it is necessary to

## PENAL CODE, S. 498.

record reasons for issuing the warrant in the first instance and if the Magistrate fails to do so the warrant must be regarded as wholly illegal. In such a case the bond given by the surety for the woman's attendance has no legal force and cannot be forfeited if the woman does not appear. (*Rattigan, J.*) **BELA SINGH v. EMPEROR.**

50 P. L. R. 1918

=7 P. W. R. (Cr.) 1918=44 I. C. 571=  
19 Cr. L. J. 443

—S 498—*Enticing away married woman*  
—*Offence of—Cognisance—Jurisdiction.*

A complaint under S 478, Penal Code, for detaining a married woman for the purpose of illicit intercourse can be inquired into only in the District where such detention occurs. (*Cheris, J.*) **JASWANT SINGH v. EMPEROR.**

51 P. L. R. 1918

=S P. W. R. (Cr.) 1918=44 I. C. 568.  
=19 Cr. L. J. 433.

—S. 498—*Enticing away a married woman—Proof of marriage—Evidence of complainant and his wife—Opinion—Evidence admissibility of—Evidence Act, S. 50, Sec. 1917 DIG. COL. 975.* **SYED MUNIR v. EMPEROR.**

14 N. L. R. 23=42 I. C. 755.

—S. 499—*Defamation—Privilege—Statements contained in written statement* See (1917) DIG. COL. 975; **SUBBAMANIA Aiyar v. THIRIMUDI MUDALIAR.**

11 Bur. L. T. 164=42 I. C. 753.

—S. 499—*Exception 1—Statement by witness in judicial proceeding—True in fact—No offence—Privilege—Evidence Act, S. 132.*

A statement in order to come under the first exception to S. 499 of the Penal Code must be true in fact.

If a statement made by a witness in a judicial proceeding is a true fact and also relevant to the matter under investigation, it is for the public good that it should be made. (*Piggott, J.*) **KALLU v. SITAL.**

40 All. 271=

16 A. L. J. 261=43 I. C. 523=  
19 Cr. L. J. 231.

—S. 499 Excep. 8 and 9—*Defamation—Implications in letter—Recklessness.*

In a petition to the Forest authorities urging an enquiry into the conduct of a Village Munsif accused stated that the Village Munsif was a very rich man and that he had gained over the Range Officer to his side and had been illicitly grazing goats in the reserve.

Held, that the accused was guilty of the offence of defamation, inasmuch as the language employed by him was calculated to harm the village Munsif and lower the Range Officer in the estimation of his subordinates and the public and that exceptions 8 and 9 to

## PENAL CODE, S. 500.

S. 499 of the I. P. C. could not apply to the case inasmuch as the accused had acted recklessly and without due care and caution. (*Seshagiri Iyer, J.*) **MADAPPA GOUNDAN v. EMPEROR.** 43 I. C. 413=19 Cr. L. J. 415.

—S 499 Excep. 9—*Defamation—Privilege—Statement by party to the suit—Relevancy to the case*

A statement made by a party to suit in good faith and for the prosecution of his interests, and which is relevant to the matter in issue, falls under exception 9 of S. 499 of the Penal Code and is privileged. In order to take such a statement out of the exception, express malice must be proved. (*Findlay, O. A. J.*) **BALIA v. BABU.**

45 I. C. 833=

19 Cr. L. J. 631.

—S. 499 Excep. 9—*Imputation in good faith—Calling a man a rogue.*

Whilst an application and a counter application to prevent a breach of the peace were being investigated into by the Police, the accused called the complainant a "rogue." It appeared that some four months previously the complainant was convicted and fined at the instance of the accused. The accused having been convicted of defamation.

Held, setting aside the conviction, that the accused was protected by Excep. 9 to S. 499, I. P. C., inasmuch as the statement was made apparently for the protection of his own interest and when his application was under investigation by the police.

Held, also, that the statement was made by the accused in good faith. (*Shah and Kemp, JJ.*) **EMPEROR v. ESUFALLI.**

20 Bom. L. R. 601=46 I. C. 411=

19 Cr. L. J. 731.

—S. 500—*Defamation—Attributing of selfish motives—Fair comment, plea of—Essentials of—Denial of libel and justification by truth.*

To say of a person that he makes gifts to certain funds not out of charity but from self-advantage is defamatory if the words used incite public contempt and ridicule. A fair comment must be based upon the facts and the writer is not entitled to invent facts and express opinions upon such invented facts, nor can the conduct of public man or of a person in his public character be assailed as dishonest simply because the writer rancies such conduct is open to suspicion. 20 Q. B. D. 275; 3 B. & S. 76.; (1904) 2 K. B. 325; (1904) 2 K. B. 299; (1904) 2 K. B. 80; Ref. An accused justifying his libel cannot both deny as well as justify it. (*Maung Kin, J.*) **C. S. APPA v. M. P. MARICAR.**

43 I. C. 417=

19 Cr. L. J. 429.

—S. 500—*Obscene and insulting language—Words addressed to persons other than intruder after quarrel—Defamation.*

## PENAL CODE, S. 504.

There was an altercation between R. and M. a respectable Muktear. After the altercation R used language in respect of M which was of an obscene and insulting nature. The words were not addressed to M but to third persons. *Held*, that the words complained of not having been used in the course of a quarrel, and not being addressed to M they were calculated to harm M's reputation and R was rightly convicted under S. 500 of the Penal Code. (*Piggott J.*) **RAJA RAM v. EMPEROR.**

16 A. L. J. 498=45 I. C. 1605=  
19 Cr. L. J. 669.

—S. 504—*Insult with intention to provoke breach of the peace Privilege—Barrister*

An intentional insult with intent to provoke a breach of the peace in an offence more cognate to the offence of assault than to the offence of defamation. A Barrister cannot claim privilege in the case of an assault nor can he claim any privilege if his conduct is calculated to provoke an assault. (*Batten, O. J. C.*)

**TIKKER v. PIYARELAL.** 45 I. C. 1002=  
19 Cr. L. J. 666

—S. 511—Attempt—Intention—Distinction between. See PENAL CODE SS. 411, 497 AND 511. 47 I. C. 77

**PENSIONS ACT (XXIII OF 1871) S. 4—Suit for declaration of ownership of a share in Kulkarni Vatan—Certificate from Collector.**

A suit to obtain a declaration that the plff. is the owner of a share in a Kulkarni Vatan falls within the purview of S. 4 of the Pensions Act, 1871 and cannot be entertained in absence of a certificate from the Collector. 14 Bom. L. R. 938 foll 18 Bom. 516 dist. (*Scot, C. J. and Batchelor, J.*) **HALKRISHNA v. DATTA TRAYA.** 42 Bom 257=20 Bom L. R. 325=  
45 I. C. 530.

**PERMANENT SETTLEMENT — Effect on — Military tenures.**

The permanent settlement may destroy a military tenure by a new contract with the holder of the tenure. It cannot affect the position of a tenure-holder with whom the new settlement was not made. (*Roe and Coutts, JJ.*) **RANI KESHOBAI KUMRI v. KUMAR SATYA NERANJAN.**

(1918) Pat. 305=47 I. C. 179.

**PERMANENT SETTLEMENT REGULATION (REGULATION VIII OF 1793)** Independent Taluk, what, is See BENG. REGN. SS. 3 AND 14. 23 C. W. N. 141

**PETROLEUM ACT (VIII of 1899) Ss. 11 and 15 (a) — Possession "Keeping", meaning of — Delivery of petroleum tins on Railway Company's premises intended for sale and distribution, if a "keeping." See (1917) DIG. COL. 677. **SWAMINATHA IYER v. EMPEROR.****

(1917) M. W. N. 720=39 I. C. 995=  
10 Cr. L. R. 12.

## PLEADER AND CLIENT.

**PLEADER — Misconduct—Appearing for both sides in a case—Negligence. See LEG. PRACT. ACT, S. 13 (b). 3 Pat. L. J. 890.**

—Misconduct — What is— Libellous newspaper attack on Judge.

A Pleader by virtue of his *sand* has certain rights and privileges, but he is not a chartered libertine and those rights and privileges carry with them corresponding duties and restraints.

A Pleader is an officer of the Court and is bound to assist the Court in the administration of justice. Criticism which is permissible to a private individual is not permissible to a Pleader. The co operation of Pleader and a Judge would be impossible if the Pleader were attacking the Judge in the public press. Nor would it be possible for the business of the Court to be conducted with dignity, decorum and impartiality when the Pleader is posing in public as the chastiser of the Judge. Such conduct is not only a breach of the Pleader's duty to the Court but must also result in an actual obstruction to the administration of justice.

A letter published by a Pleader, alleging that a certain Judge is indolent and takes credit for cases not tried but compromised, even if written in good faith and even if it does not constitute the offence of libel, amount to misbehaviour under S. 16 of the Sind Courts Act. (*Pratt, J. C., Crouch and Hayward, A. J. C.*) *In re a PLEADER.*

11 S. L. R. 81=44 I. C. 333 (F.B.)

—Professional Misconduct—Acceptance of vakalat from an authorised person. See LEGAL PRACT. ACT. S. 14. 43 I. C. 819.

—Professional Misconduct — Enquiry into to be Kept separate from enquiry into merits of the case. See C. P. CODE, O. 6, R. 14. 40 All. 147.

**PLEADER AND CLIENT — Admissions by pleader, binding on client.**

An admission of fact by the pleader of a party is binding upon his client and the opposite party cannot be arbitrarily deprived of the benefit of the admission. (*Richardson and Beachcroft, JJ.*) **JAHADALI v. AJIMAN-NESSA BIBI** 44 I. C. 18.

—Admissions on questions of law—Not binding on client.

An erroneous admission by a counsel on a point of law does not preclude the party from claiming his legal rights in the appellate court. 18 W. R. 359; 27 C. 156, 168 Ref. (*Mackenzie and Beachcroft, JJ.*) **SECRETARY OF STATE v. SIBAPROSAD JANCA.** 27 C. L. J. 447=  
45 I. C. 983.

—Compromise on behalf of client—No express authority to compromise given by vakalatnamah—Position of pleader.

## PLEADER AND CLIENT.

The position of a pleader is that of an agent in relation to his client and his power is, therefore created entirely by the vakalatnamah given to him by his client.

A pleader has no right to compromise on behalf of his client unless expressly authorised to do so; nor is he empowered to refer a matter to arbitration except by an express authority on that behalf. A vakalatnamah in general terms is wholly insufficient. (*Jwala Prasad, J.*) JAIPAL TEWARY v. TAPESWARI TEWARY. 45 I. C. 521.

——— *Duty of pleader—Acquisition of subject-matter of suit—Pleader for judgment-debtor taking assignment of decree—Duty to re-convey*

While the relation of pleader and client continues, the pleader cannot as against his client acquire absolutely a beneficial interest in or title to the subject matter of the litigation antagonistic to that of his client; if the pleader gains a pecuniary advantage, he must hold it for the benefit of his client. Where therefore the pleader for the judgment-debtors obtains an assignment of decree for Rs. 10,000 on payment of Rs. 5000 the pleader must hold the decree in trust for his clients and, if called upon by his clients to do so, is bound to assign the decree to him. But no court will decree such re-conveyance except on equitable terms. But the assignment to the pleader does not, by itself, extinguish the decree. (*Mockerjee and Walmsley, JJ.*) NAGENDRA BALA DASSI v. DEBENDRA NATH. 22 C. W. N. 491 = 27 C. L. J. 388 = 44 I. C. 13.

**PLEADINGS—Alternative Case—Suit for registration of a sale deed—Claim in the alternative for specific performance of contract of sale by execution of registered conveyance—Maintainability.** See C. P. CODE, O. 1, R. 3. 44 I. C. 361.

——— *Amendment of—Limitation—Suit for declaration of title and confirmation of possession can be converted into one for ejectment—No question of limitation* See C. P. CODE, O. 6, R. 17. 44 I. C. 996.

——— *Amendment altering nature of suit—Not allowed for first time in appeal.* (*Shadi Lal and Le Rossignol, JJ.*) GOPI RAM v. RAM DHAN. 10 P. W. R. 1918 = 44 I. C. 228.

——— *Change of case—Case in appeal—Not raised in ground of appeal—Interference in second appeal.*

A plf. cannot be allowed to make a case that turns on the evidence which differs from the case set up in the plaint. It is not competent to a court of appeal to reverse the decision of the first Court on a point not set up in the plaint before the primary Court or in the grounds of Appellate Court. (*Fletcher and*

## PLEADINGS.

*Newbould, JJ.*) LORENATH DAY v. HARA CHANDRA. 43 I. C. 29.

——— *Change of case—Cause of Action—Subsequent to institution of suit—Relief on, when granted.*

Courts have power, in exceptional circumstances, to grant a decree even in cases where the cause of action arose subsequent to the suit.

It was found that the debt. received the money and that the money became payable immediately after suit, but it was contended that the suit was premature because of the terms of an unregistered mortgage bond between the parties.

*Held*, that a decree should be passed for the plf. without driving him to a fresh suit. (*Seshagiri Iyer and Kumarsawmy Sastri, JJ.*) SUBBARAYA CHETTY v. NACHIAR AMMAL. (1918) M. W. N. 199 = 7 L. W. 403 = 44 I. C. 863.

——— *Change of case—Not to be allowed in appeal.* (*Lindsay, J. C.*) FARKHUND ALI v. MOHAMMAD SAHIB. 44 I. C. 624.

——— *Change of case—Fresh facts elicited during trial—Right to set up new case*

A party to a suit is quite competent to raise a fresh plea during the progress of the suit, if that plea arises out of facts which come to light during the course of the suit, which were not in the knowledge of either party. (*Lindsay, J. C.*) SHEODARSHAN LAL v. ASSESAR SINGH. 5 O. L. J. 179 = 46 I. C. 52.

——— *Change of case, not to be allowed—Rule not inflexible* See (1917) DIG, COL. 980. ISHAN CHANDRA DHUPI v. NISHI CHENDRA DHUPI. 22 C. W. N. 853 = 29 C. L. J. 1 = 41 I. C. 378.

——— *Change of case—Question raised in cross examination of witnesses, without objection—No prejudice—No interference in appeal.*

Where the case put forward in appeal though not specifically raised in the pleadings was definitely put in the cross-examination of one of the debt's witnesses in the trial Court and the debt. did not then object to the cross examination as irrelevant the appellate Court will not reject it as being a new case. (*Fletcher and Huda, JJ.*) RAJALAKSHMI DASIA v. PRODYAT KUMAR TAGORE. 46 I. C. 184.

——— *Change of case—Suit for redemption—Relief on foot of another mortgage not specifically alleged by plf. but admitted by debt. or proved to exist—Relief when granted.* See MORTGAGE, REDEMPTION. (1918) M. W. N. 139.

——— *Claim for large relief—Decree for lesser relief can be granted—Decree for joint*

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possession in a suit for ejectment. *See* C. P. CODE O. 7, R. 7. 44 I. C. 557.

—Decision on grounds not raised in—  
*Impropriety of.*

In a suit for partition of a house it appeared that the house in question was sold by plffs. maternal grandmother and the deed of sale mentioned the deft. as the purchaser. Plff. alleged that the sale was a benami transaction while the deft. contended that he was the real purchaser. The Dt. Judge, without adjudicating upon the contentions of the parties, held that the house had been gifted to the defts. and dismissed the suit:

*Held*, that Dt. Judge was wrong in ignoring the allegations of the parties and deciding the case on a point which found no place in the pleadings. (*Shadi Lal and Wilkerforce, JJ.*) KANHAYA LAL v MITHU LAL. 136 P. W. R. 1918=46 I. C. 646.

—Dismissal on, bad, when there is a possible case on the allegation—Duty of Court to take evidence and decide suit so far as it is sustainable.

Plaintiff was a mortgagee with possession of certain zemindari for a period of five years. His sub tenants were dispossessed, as alleged by him, by the defts. and within six months of the dispossession he brought a suit under S. 9 of the Spec. Rel. Act, for the recovery of possession by declaration of his title and also asked for recovery of damages. The plaint was subsequently amended by striking out the claim for declaration of title. The munsif granted him a decree for possession under S. 9 as prayed, but dismissed the claim for damages as being improper in conjunction with a claim for possession under the said section. Upon appeal the Dt. Judge dismissed the the suit *in toto* because in his opinion upon the plaint as framed no relief could possibly be granted to the plff. *Held*, that the suit being one for possession upon title inasmuch as a claim for damages had been made in the plaint, it could not be dismissed *in toto* but ought to have been remanded for a decision on the merits. (*Tudball and A. Rao, JJ.*) NARAIN DAS v HET SINGH. 40 All. 637=16 A. L. J. 611=46 I. C. 925.

—Inconsistent case—Embarrassment—  
*Duty of Court.*

The rules of pleading do not prohibit a party from alleging two or more inconsistent sets of material facts and from claiming thereunder in the alternative.

A pleading is not embarrassing merely because it puts forward inconsistent sets of facts.

A party to a suit cannot constitute himself the arbiter of what is likely to have been embarrassing or confusing to the trial. That

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is a matter for the Court and must be left to the Court. (*Lindsay, C. J. and Stuart, A. J. C.*) BISHESHUR BAKSH SINGH v. RAJA RAMESHAR BAKSH SINGH. 21 O. C. 1=44 I. C. 368.

—Inconsistent pleas in different suits—  
*Impropriety of.*

It is an elementary rule based on the most obvious grounds of justice, equity and good conscience that parties-litigants could not be allowed to take up inconsistent positions in Court to the detriment of their opponents. (*Mookerjee and Benchcroft, JJ.*) GIRISH CHANDRA BIT v. BEPIN BEHARI KHAN. 27 C. L. J. 535=44 I. C. 159.

—Inconsistent pleas—Party impleaded without objection or on his own motion—Adverse decision—Plea that he was improperly joined if open on appeal.

Where a person is on his own motion impleaded as a party to a mortgage suit, he cannot after an adverse decision is given against him undo its effect by pleading that he is an unnecessary party and that he ought to be discharged from the suit. (*Mitra, A. J. C.*) ADAM KHAN v. DATTARAM. 47 I. C. 536.

—Inconsistent pleas—Suit on mortgage—Denial of execution and plea of execution under undue influence.

The Court should not go into the question of undue influence at all where the deft. denies the execution of the mortgage and the particulars of the alleged undue influence are not given as required by O. 6, R. 4 of the C. P. Code. (*Fletcher and Smither, JJ.*) KAHNI RANASSA CHOWDHURI v. HEM CHARAN KASYA. 47 I. C. 11.

—Limitation—Special period—Plea of, not raised in written statement nor considered by first Court—Appellate Court not entitled to entertain the plea. *See* C. P. CODE, O. 8, R. 2. 28 C. L. J. 216.

—Omission to raise issues on a question of fact—Suit on a mortgage against minor defts. Allegations of proper execution of mortgage in plaint—No denial in W. S.—Decree on mortgage. *See* C. P. CODE, O. 8, R. 5. 35 M. L. J. 372.

—Power of Court to go behind—Religious Endowment—Suit on footing that endowment is private—Court if can go into question of, nature of endowment. *See* C. P. CODE, S. 92. (1918) M. W. N. 595.

POLICE ACT (V OF 1861) S. 10—Police officer carrying on trade without permission of the Inspector-General—Offences under S. 168 I. P. C. *See* PENAL CODE, S. 168. 43 I. C. 440.

## POLICE ACT, S. 17.

—Ss. 17 and 19—*Special constable—Refusal to serve as—Failure to comply with lawful order.*

The failure of a person appointed as a special constable under S. 17 of the Police Act to obey a lawful notice issued to him to attend a police station to receive his belt and to take charge of his appointment amounts to a neglect or refusal to serve as a special constable within the meaning of S. 13 of the Police Act, 23 Cal. 411. dist. (*Chitty and Richardson, J.J.*) MUGA KHAN v EMPEROR.

43 I. C. 251=19 Cr. L. J. 91.

—S. 46—'Threat'—Demand of *mamul* or customary bribe, if an offence.

A demand by a police constable of '*mamul*, (customary payment made to obtain his favour)' is a 'threat' within S. 46 of the Police Act and obtaining such money by threat is an offence under the section. (*Phillips and Krishnan, J.J.*) EMPEROR v LAL BAGE

41 Mad. 465=47 I. C. 666=  
19 Cr. L. J. 942.

POSSESSION—Effect of—Evidence of title and foundation of a right to possession. See EJECTMENT, POSSESSORY TITLE.

43 I. C. 338=19 Cr. L. J. 91.

—Nature of—Vacant site—Symbolical possession—Effect. See LIMITATION ACT, ARTS. 142, 187, 198.

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POWER OF ATTORNEY—Construction—Agent authorised to manage *jagir*—Power to defend suit, and make admissions during trial.

A power of attorney should be strictly construed. A power of attorney authorising a person to look after management of a *jagir* does not empower the agent to defend the owner's title to the *jagir* in a suit. Any admission made by such an agent, in the course of the trial is not binding on the owner. (*Prideaux, A J C.*) NAZAR ALI v ASHRAF ALI.

47 I. C. 528.

—Construction—Power of attorney by two members of a joint Hindu family trading as partners—Death of one—Power still continues. See CONTRACT ACT, S. 253 (10).

(1918) M. W. N. 194.

PRACTICE—Abandonment of plea—Court not bound to require proof—Though defendants, minors. See C. P. CODE, O. 8, R. 5.

35 M. L. J. 372.

—Appeal—Decree amended during pendency of appeal—Copy of amended decree to be filed. See C. P. CODE, O. 41, R. 1 (1).

43 I. C. 772.

—Appeal—New question of law—Plea to be entertained. See APPELLATE COURT.

28 C. L. J. 123.

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—Appeal—Respondent—Right to support decree of court below without filing memo. of objections. See CONTRACT ACT, S. 74.

48 P. W. R. 1918.

—Appeal—Two decrees—common Judgment—Two appeals necessary. See C. P. CODE, C. 41 R. 1.

3 Pat. L. J. 96.

—Appeal—Two decrees in one suit—One appeal to be filed against each decree. See C. P. CODE, O. 41, R. 1.

3 Pat. L. J. 96.

—Appeal under O. 43, R. 1, C. P. C. converted into revision under S. 115. See MADRAS ESTATES LAND ACT, S. 192.

34 M. L. J. 309.

—Appellate Court—Change of case before, not to be allowed.

An appellate court is not entitled to accept and act upon a case made for the first time before it and not made in the trial Court. (*Sanderson C. J. and Tewson J.*) BIRENDRA KISHORE v MAHOMED DOULAT KHAN.

22 C. W. N. 856=43 I. C. 59.

—Appellate Court—Decision of case on point raised in the pleadings but not raised by the issues.

An appellate Court is quite competent to base its decision upon a suit arising out of the parties' pleadings if there is evidence on the record as regards the same, although it is neither expressly taken before the Court nor covered by any of the issues framed in the case. (*Kanhaiya Lal, A. J. C.*) GAUBI SHAN-KAR v. ABBAS BEG.

5 O. L. J. 165=

46 I. C. 12.

—Appellate Court—Discretionary relief—Appellate Court not to substitute its own discretion for that of the first Court. See APPELLATE COURT.

22 C. W. N. 601 (P. G.)

—Consolidation—Appellate Court—Power of—Inherent power—Exercise of discretion in ordering consolidation—C. P. Code, S. 151—No request for consolidation in original Court—Whether consolidation can be ordered by Appellate Court—Land Acquisition Act, Ss. 12, 13 and 20—A single notice under S. 12, (2) and a single objection by the claimant—Splitting up of awards by the Dt. Court—Right of claimant to treat them as a single award.

An appellate court has the inherent power of consolidating appeals before it and the power under S. 151 of the C. P. Code may be invoked for that purpose.

Courts should see whether a case is a fit one for consolidation, as if consolidation is allowed, the Crown will be deprived of the public revenue by the reduction in the court fees payable by the appellants.

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Where only one notice was served on the claimants under S. 12 (2) of the Land Acquisition Act and there was only one objection by them, there would *prima facie* be a single award. The fact that in the arbitration proceedings before the District Court, the award was split up ought not to be allowed to prejudice the right of the appellants to treat the award as one and they would be equitably entitled to consolidation.

Where the splitting of the awards by the referring officer or by the Court may not have been known to the parties or where there was no occasion for the claimants to take any objection at the hearing in the lower court, the claimants can treat the awards as one and appeal against them in one appeal. (*Phillips J*) *VENGU NAIDU v THE DEPUTY COLLECTOR OF MADURA DIVISION*.

34 M. L. J. 279—45 I. C. 648.

Costs—Appeal—Court will interfere with the discretion of the lower Court as to costs when there is misapprehension of facts or violation of established principles—Attorneys personally liable for costs incurred in unnecessary printing of the paper book or in obtaining unnecessary order for amending the memo of appeal.

The appeal Court will interfere with the exercise of discretion by the lower Courts as to costs where there has been misapprehension of facts on the part of the Judge who makes the order of costs and a violation of the principle by throwing upon the plff. the costs of the unsuccessful defendant where the plff. has been guilty of no misconduct.

The court of appeal ordered the costs occasioned by the unnecessary printing of certain matter in the printed paper book of appeal, at the instance of the defendant's attorneys to be paid by the defendant's attorneys personally and not by their clients.

Similarly, the Court of appeal ordered the costs of a Judge's order obtained for the amendment of the memorandum of the appeal by the addition, at the instance of the plff's attorneys, of a very unnecessary paragraph asking for relief in respect of a matter in which relief had already been asked twice in the unamended memorandum to be paid by the plff's attorneys personally. (*Scott, C J and Batchelor, J.*) *LAXMIBAI v. RADHABAI*  
42 Bom. 327—20 Bom L. R. 905—  
47 I. C. 762.

Costs—Security for—Bankruptcy or poverty of plff. not a ground for directing security for costs. See *INSOLVENCY*.  
22 C. W. N. 1018.

Criminal case—Tahsildar—Magistrate conviction by—Application for copy of judgment—Search fee need not be paid—Criminals Rules of Practice R. 138.

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Where a person convicted of an offence by a Tahsildar Magistrate applies for a copy of the judgment, he is not bound to pay eight annas fee along with the application. (*Sadasiva Aiyer and Napier, JJ.*) *ANBALAM (BRAHI IN RE)*.  
35 M. L. J. 401—3 L. W. 558—  
47 I. C. 873—19 Cr L J 973.

Death of party pending suit—Wrong legal representative brought on record—Decision in plaintiffs favour in suit if binding on real legal representative See *RES JUDICATA*.  
23 M L T. 208.

Decree—Amendment of clerical errors and accidental slips—Jurisdiction of Court which passed decree—Pendency of appeal—Effect. See C. P. C., S. 152. 7 L. W. 8.

Decree against minor and others—Decree indivisible—Decree set aside as against minor—Effect on validity of decrees as against others. See C. P. C. OR. 32, R. 8, CL 4.  
4 Pat. L. W. 373.

Evidence—Admissibility—Objection to, not allowed in appeal when evidence admitted by consent in trial Court. See *EVIDENCE*.  
35 M. L. J. 11.

Evidence—Court—No right to limit number of witnesses to be called by a party. See *CR. P. CODE*, S. 11. 22 C. W. N. 408.

Execution—Sale notifying claims to intending bidders without any decisions thereon condemned. See C. P. CODE. O. 21, Rr. 58 AND 68.  
35 M. L. J. 335.

Ex parte case—Duty of pleader to draw attention of Court to authorities against him.

Where an ex parte application is made, it is the duty of the party making the application to call the attention of the Judge not only to the portion of the law or authority in favour of his case but also to the matters that are against him. (*Fletcher and Huda, JJ.*) *ISWAR CHANDRA KAPALI v. ARJAN*.  
45 I. C. 725.

Full Bench—Obiter dictum of, binding on Division Bench, if acted upon for a length of time. See (1917) DIG COL 988; *BIJOY SINGH DUDHURIA v. KRISHNA BEHARI BISWAS*.  
48 Cal. 259—21 C. W. N. 959—41 I. C. 561.

Full Bench—Reference—Power to refuse to answer question not arising in the case—Regular appeals.

Per *Fletcher and Richardson, JJ.*—(*N. R. Chatterjee, J.* dissenting): The rule that the Full Bench, if looking into the case as far as is necessary for the purpose, it should find that the point does not arise, ought to desist from answering it, is not applicable to regular

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appeals. (*Fletcher, Richardson, Teunon, N. R. Chatterjee and Choudhuri, JJ*) MANI LALL SINGH v. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA 45 Cal. 343=22 C. W. N. 1=27 C. L. J. 1=44 I. C. 770.

———High Court—Case heard by a Bench—Judgment delivered by one judge on behalf of his colleague absent on leave—Validity of judgment.

The judgment of one of two Judges composing a Bench read by the other in Court when the former is on leave is a valid judgment (*Sanderson, C. J. Teunon and Walsley, JJ.*) SARAJ RANJAN CHOUDHURY v. PREMCHAND CHOUDHURY. 22 C. W. N. 263=27 C. L. J. 257=43 I. C. 781.

———Interrogatories—Duty of Court to direct party to answer, if questions relevant See C. P. CODE, O. 11 RB 2 C, ETC.

16 A. L. J. 762.

———Interrogatories—Suit for damages for breach of contract irrelevant interrogatories—Court's duty. See C. P. CODE, O. 11 R. 6.

16 A. L. J. 762.

———Issue—Findings recorded with consent of parties by one Judge—Change of Judge—Right of successor to reconsider findings. See PRACTICE, JUDGMENT.

11 Bur. L. T. 97.

———Joint trial—Connected case.

Two applications were made one for setting aside an *ex parte* decree and the other for setting aside the sale held in execution thereof on the ground of fraud. The two applications were heard together by consent of parties.

Held, that there was nothing wrong in hearing the two applications together as the question of fraud was closely interwoven in both. (*Roe and Jwala Prasad, JJ*) MUSSAMMAT SOHAGBATI v. BABU SURENDRA MOHAN SINGH.

4 Pat. L. W. 296=44 I. C. 661.

———Judgment—Change of Judge—Power of successor to reconsider issues found by predecessor with consent of parties.

The judge deciding a case on the conclusion of all the evidence is not bound by the previous decision on certain issues of a judge who has tried a part of the case and such decision can be reconsidered even though it was given by consent of parties. (*Robinson, J.*) OFFICIAL ASSIGNEE v. HAJI MAHOMED HADDY.

11 Bur. L. T. 97=47 I. C. 555.

———Leave to appeal *in forma pauperis*—Privy Council appeals—No power to grant leave. See C. P. CODE O. 44 R. 1.

35 M. L. J. 258.

———Limitation—Admission of appeal after expiry of—*Ex parte* admission subject to

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hearing of respondents objections at the final hearing—Practice of Indian High Courts, disapproved. See LIM. ACT, S. 5.

34 M. L. J. 63.

———Limitation—Plea raised for first time in appeal—Maintainability—Appeal by defendant on ground that whole claim was time barred—Failure to pay stamp duty on portion of claim—Effect.

A defendant appealing on the ground that the suit ought to have been dismissed *in toto* as time barred must appeal on the whole case and pay stamp duty on the whole claim.

Where in an appeal preferred by a defendant he raised for the first time a ground that the whole suit ought to have been dismissed as time barred but did not pay stamp duty on the whole of the claim allowed by the court below, held that though the appellate court was not precluded from considering a plea of limitation raised for the first time in appeal yet the plea must be properly before it and that as in the case before the court the plea was not properly before the appellate Court by reason of the appellant having failed to pay stamp duty on the whole of the claim allowed by the court below, the appellate court could not entertain it. (*Leslie Jones, J.*) HUKAM SINGH v. SAHAB DIN.

14 P. W. R. 1918

=44 I. C. 890.

———Local Inspection by Judge—Examination of witness by Judge—Not improper, if consented to by parties See C. P. CODE, O. 18 R. 18.

4 Pat. L. W. 189.

———Misjoinder of causes—Suit for possession by heir against alienees of suit property from two alienors not bad for misjoinder. (*Leslie Jones.*) LAL CHAND v. MUSST. MANGERI.

59 P. R. 1918=

64 P. W. R. 1918=44 I. C. 549.

———Notice of hearing—Notice to counsel, sufficiency of.

Where notice of the adjourned date of hearing of a petition is given to the counsel, who said at the hearing that he had no instructions and had returned the papers.

Held, that the notice was sufficient. (*Lindsay, J. C.*) BENI MADHO v. KANHAIYA LAL.

43 I. C. 431.

———Patna High court—Calcutta decisions—Value of, as precedents.

The decisions of the Calcutta High Court which until recently exercised jurisdiction in Bihar and Orissa although they do not prevent the High Court from exercising an independent judgment, are entitled to the greatest respect and should not be departed from without cogent reasons. (*Dawson Miller, C. J. and Muttick, J.*) KRISHNA LAL JHA v. NUNDESWAR JHA.

44 I. C. 148.

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———*Patna High Court—Precedents of the Calcutta High Court in matters of procedure*

In a case like this the view of the Calcutta High Court should be accepted, for it is on this view that pleaders have been calculating applications for execution and it would not be fair to turn round suddenly and say that the decision of the Calcutta High Court was wrong. (*Roe and Imam, JJ.* SHAIKH KHODA BAKSH v. BAHADUR ALI. (1918) Pat 130= 3 Pat. L. J. 285=4 Pat. L. W. 323= 45 I. C. 263.

———*Plaint returned by the munsif to be presented to the proper court—Subsequent filing of the suit in sub-court—Appeal against order of munsif—Whether forfeited by filing of the plaint in the sub court.*

Where the District Munsif ordered the return of a plaint and the plaint was afterwards filed in the Subordinate Court and it was returned again, and the plff. appealed against the Munsif's order of the return of the plaint, the plff. does not forfeit his right of appeal by electing to file his plaint in the Subordinate Court (*Oldfield and Sadasiva Aiyar, JJ.*) NARAYAN NAIR v. CHERIA KATHIRI KUTTI. 41 Mad. 721=34 M. L. J. 397=45 I. C. 82.

———*Pleader—Abandonment of point by—Statement in judgment to that effect—Conclusive in the absence of strong evidence Contra. See MORTGAGE, REDEMPTION.* 35 M. L. J. 139 (P. C.)

———*Pleader's fee — Scale of — Plaint returned for pre-entiation to proper Court, after trial of issue as to jurisdiction—Costs.*

A suit was brought in the court of the Subordinate Judge. The deft. raised the plea that the court had no jurisdiction to entertain the suit. An issue being raised it was decided first at the instance of the plff. The plaint was ordered to be returned for presentation to the proper court and the Subordinate Judge gave the deft. calculating the pleader's fee at 5 per cent. Held, on appeal to the High Court, that the pleader's fee had been properly calculated under Rule 21 of the rules for the Subordinate Courts, the decision having been given after contest and on the merits of that contest. (*Tudball and Abdul-Raouf, JJ.*) GAURI SAHAI v. BAHREE 40 All. 615= 16 A. L. J. 426=45 I. C. 935.

———*Pleadings. See also C. P. CODE, O. 6, R. 17.*

———*Pleadings—False case set up by both parties—Second appeal—Duty of High Court to decide on evidence. See SECOND APPEAL.* 45 I. C. 795.

———*Pleadings—Issues—Pre-emption custom on sale—Transaction in the form of a lease—Issues to be decided. See MAHOMEDAN LAW.* 16 A. L. J. 233.

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———*Pleadings—Relief in excess of, not to be granted. See C. P. CODE, O. 7, R. 7.*

2 Pat. L. J. 698

———*Precedent — Duty of Subordinate Courts to follow decisions of superior Courts.*

A Subordinate Court has no option to choose between a decision of the judicial commissioner's Court published or unpublished in the local or any other law reports, and the decisions of any other High Court in India or Burma. (*Stanyon, A J C*) PUHP! RAI v. ANSUYA BAI. 46 I. C. 902.

———*Pre-emption decree—Award of costs—Mode of realisation of — Deduction of amount from price to be paid by pre emptor. See PRE-EMPTION, DECREE FOR.*

98 P. W. R. 1918.

———*Privy Council—Finding of fact—Interference with-rare. See PRIVY COUNCIL.* 21 O. C. 104 (P. C.)

———*Privy Council—Leave to appeal to in forma pauperis—Not to be granted. See C. P. CODE O. 44 R. 1.* 3 Pat. L. J. 179.

———*Probate Proceedings—Proper parties — Persons entitled to prove will if See C. P. CODE, SS. 107 and 151.* 3 Pat. L. J. 409.

———*Procedure — Alienation by Hindu widow—Suit by one of two reversioners for recovery of property from alienee impleading the other reversioner also as party deft.—Latter offering in written statement to pay court fee—If entitled to a share —Procedure in partition suits if applicable. See HINDU LAW, WIDOW, ALIENATION*

35 M. L. J. 153.

———*Procedure—Suit—Hearing—One of plaintiffs alone present and applying for adjournment—Application rejected—Dismissal of suit for default of prosecution—Propriety. See C. P. CODE, S. 2*

4 Pat. L. W. 366.

———*Procedure—Suit by a partnership consisting of some of the members of a joint family against all the members of the joint family—Maintainability of. See LIM. ACT, ARTS. 57, 61 ETC.* 34 M. L. J. 32.

———*Professional Misconduct — Inquiry into to be kept separate from enquiry into the case. See C. P. CODE, O. 6, R. 14.*

40 All. 147.

———*Question of misconduct of pleader arising in the case—What the Courts should do — Decision in deciding the case. See C. P. CODE, O. 6, R. 14.* 16 A. L. J. 64.

———*Redemption—Decree for in suit for ejectment.*

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A Court can in its discretion pass a decree for redemption in a suit in which the plaintiff sues for ejectment. 20 Bom. 193, 35 Bom. 507 foll. (*Prasanna, A. J. C.*) KRISHNAJI HATKAR v. RAONI. 44 I. C. 921.

—Subsequent events—Cause of action arising subsequent to institution of a suit—Decree on the strength of it can be granted. See PLEADINGS. (1918) H. W. N. 199.

—Transfer of appeal—Notice to parties—Omission to give—Disposal of appeal in absence of parties—Restoration of appeal—Duty of Court. See APPEAL, TRANSFER. (1918) Pat. 17.

—Transfer of case—Notice to parties affected—Omission to give notice or to obtain their signatures in order sheet—Effect—Disposal of appeal in absence of parties—Application for restoration—Maintainability.

Where an order of transfer of an appeal is made, notice should be given in every case to the parties or their representatives.

An important order like the transfer of a case from one Court to another should invariably be communicated to the persons concerned and in token of such communication the signatures of the parties or their pleaders should be obtained and when the signature is not obtained the order sheet must show that the information has been furnished.

Where on transfer of an appeal from the District Judge's to the Subordinate Judge's Court, no signature as aforesaid was obtained, nor did the order sheet show that the information was communicated to the parties or their pleaders, the appellant had a very good cause for not appearing when the case was called on. (*Miller C. J., Chapman and Atkinson, JJ.*) RAM SARAI PATTAK v. MAHARAJAH KESHO PRASAD SINGH.

3 Pat. L. J. 213=(1918) Pat. 17=  
4 Pat. L. W. 73=43 I. C. 925.

**PRE-EMPTION** — Benamidar — Suit by, if maintainable

A suit for pre-emption by the plaintiffs, who sue not for themselves alone but for themselves and for other persons, is not maintainable. (*Scott Smith and Leslie Jones, JJ.*) CHHAJU RAM v. NEKI. 17 P. W. R. 1918=43 I. C. 177.

—Custom of — Proof — Wajib-ul-arz., entry in, *prima facie* evidence of custom—Proof of instances unnecessary. See CUSTOM EVIDENCE OF. 43 I. C. 364.

—Decree for—Costs awarded to pre-emptor—Realisation of—Deduction of amount from price to be paid by pre-emptor—Practice  
In a pre-emption decree the pre-emptor decree holder is entitled to deduct the costs allowed to him from the pre-emption price which he is required to pay into the Court.

## PRE-EMPTION.

So where costs were allowed to a successful vendee in the first court but its order was reversed on appeal the pre-emptor is not obliged to apply under S. 114 of the C. P. Code of 1908, for refund of the amount realised by the vendee from the pre-emptive price paid by the pre-emptor in Court but is entitled to get credit and the deposit is to be considered in fact. (*Wulforforce J.*) GIRDHARI LAL v. ATTAR. 96 P. W. R. 1918=47 I. C. 511.

—Decree—Nature of—Expiry of time fixed for payment—Decree final—Extension of time

A decree in a pre-emption case in its very terms becomes a decree in favour of the defendant when the conditions imposed on the plaintiff have not been complied with, and no court has any power to alter the terms of the decree, when it has become final, so as to extend the time allowed for payment. (*Richards C. J. and Tudball J.*) HIRDEY NARAYAN v. ALAM SINGH. 16 A. L. J. 892=43 I. C. 353.

—Landlord and tenant—Encroachment by tenant on land of stranger—*Prima facie* for the benefit of the landlord. See LANDLORD AND TENANT.

(1918) M. W. N. 38.

—Mahomedan law—Shiah school—No right to pre-emption—Entry, vague, in *wajib-ul-arz.*, effect of.

Upon a sale of property by a Shia Mahomedan no right of pre-emption arises when there are more than two co-sharers in such property. 12 All. 229 foll.

*Per Richards, C. J.*—The mere fact that plaintiff produces in proof of his right a vague entry in the *Wajib-ul-arz.* to the effect that in matters of pre-emption the rights were according to faith is no ground for upholding his claim. (*Richards C. J. and Tudball, J.*) SAIYED MUHAMMAD RAZI-UD-DIN v. RAGHUBIR PRASAD. 16 A. L. J. 507=46 I. C. 82.

—Mortgage by conditional sale—Decree for foreclosure—Pre-emption—*Wajib-ul-arz.*—Construction.

In 1895 a mortgage was made and in 1906 a suit was instituted and a decree for foreclosure was obtained. In 1911 the decree was made absolute. Shortly after possession was obtained under it. In 1914 a suit was brought claiming to get possession by virtue of a custom set forth in the *wajib-ul-arz.* The clause relative to pre-emption was as follows. "If a pattidar wishes to transfer his share by sale or mortgage, he should do so first, to another pattidar of the same *thak*, and in case of his refusal, the pattidars of another *thak*, of the village. If the pattidar wants to sell his share to a stranger by entering an excessive and fictitious price, the pattidar having the right of pre-emption shall be entitled to acquire on payment of the price

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awarded by the arbitrators." *Held*, that having regard to the whole context of the *wajib-ul-arz* the "sale" mentioned therein for the purpose of giving rise to a right of pre-emption according to custom meant a voluntary sale and *wajib-ul-arz* did not give him a right of pre-emption under the circumstances under which the mortgagee became the owner of the property. *Held* also that if the *plff.* intended to take advantage of the custom then he should have brought a suit to step into the shoes of the mortgagee as soon as the mortgage was made. 3 All 610 dist. (*Richards, C. J. and Tudball, J.*) SUNDAR KUNWAR v. RAM GHULAM. 40 All. 626= 16 A. L. J. 561=46 I. C. 900.

—Payment of money adjudged by Court  
—Appeal—Effect of payment on. *See* (1917) DIG. COL. 1000: TALTA BAKSH SINGH v. GANGA BAKSH SINGH. 20 O. C. 290=43 I. C. 219.

—Purchase-money—*Plff.* presumed to be ready and willing to pay—Extension of time for payment—Provision in decree—Reasons for.

In a pre-emption suit a *plff.* is presumed to be ready and willing to pay the purchase money whenever he can get possession of the property. If for any special reasons a *plff.* in a pre-emption suit wants to have a more extended time he should instruct his pleader to ask the court to make a special term in the decree and to give the court good reason for giving an extended time (*Richards, C. J. and Tudball, J.*) CRITAN SINGH v. BALDEO SINGH. 16 A. L. J. 506=46 I. C. 75.

—Purchase-money—Proof of—Presumption that consideration recited in sale deed is true.

*Prima facie* the consideration stated in a sale-deed is to be taken as the true consideration in a suit for pre-emption. Where, however the *plff.* shows that the price is a very excessive price, he can shift the onus on the vendee of showing that the consideration stated in the deed was actually given.

A Court is not justified in treating a suit for pre-emption as if it were a suit by a reversioner seeking to set aside a sale-deed made by a Hindu widow by casting on the vendee the onus of proving every detail of the consideration. (*Richards, C. J. and Tudball, J.*) MAKHAN SINGH v. JAHAN KUAR. 16 A. L. J. 533=46 I. C. 97.

—Refusal to purchase, what is, custom—*Wajib-ul-arz*—Property to be sold to co-sharer first, then to stranger.

Where the custom of pre-emption as evidenced by the *wajib-ul-arz* is to the effect that a co-sharer wishing to sell his property must offer it to a co-sharer and if the co-sharer refuses then he may sell it to a

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stranger: in such a case the fact that the co-sharer—vendor offered the property to another co-sharer and the latter declined to purchase on the ground that he had no money or for any other reason was unwilling to purchase would entitle the owner to go to a stranger and to sell it to him and that the owner would not be obliged after he had made a definite agreement with the stranger to return and offer the property a second time to the co-sharer: on the other hand the going to a stranger and making a bargain with him before offering the property to a co-sharer would be acting contrary to the custom. (*Richards, C. J. and Tudball, J.*) SHAMSEER SINGH v. PEARE DUTT. 40 All. 690= 16 A. L. J. 683=46 I. C. 761.

—Right does not exist in the case of involuntary sales—C. P. Code, S. 65, O. 21, R. 92, inconsistent with the such right *See* MALABAR LAW, PRE-EMPTION. 34 M. L. J. 412.

—Right to—Existence of, at date of suit and date of appeal, if essential—Acquisition of fresh right by vendee after decree of first Court—Powers of Appellate Court.

The right of a *plff.* to enforce pre-emption must exist not only at the time of the sale or foreclosure but also at the time of the institution of the suit to enforce that right. If he loses that right after the sale or foreclosure or at any time after the institution of the suit and before a decree for pre-emption can be passed in his favour, he is put out of Court and no relief can be granted to him. But where he obtains a decree anything which may subsequently happen cannot affect the title which he may acquire under the decree by complying with its terms, unless what happens has the effect of invalidating the antecedent title which he held on the date of the sale or foreclosure or on the date of the suit by virtue of which he claimed the pre-emptive right.

Where in a pre-emption suit the vendee is found to have had a defeasible right which becomes absolute by the time the claim for pre-emption comes up for hearing on appeal, the right so perfected can be referred back to a date anterior to the suit so as to defeat the claim for pre-emption. But a right of defence which did not exist at all on the date of the sale or foreclosure or on the date when the suit for pre-emption was filed, cannot be of any consequence, if it becomes available for the first time after a decree for pre-emption is passed in favour of the *plff.* in that suit.

A Court of Appeal need not go beyond considering whether the right of pre-emption claimed by the *plff.* existed at the date of the sale or foreclosure and retained its enforceable character when the suit for pre-emption was filed and till a decree for pre-emption was obtained therein which was the subject of the appeal. (*Stuart and Karhaiya Lal, A. J. C.*) KEHRI SINGH v. DEO KUNWAR. 5 O. L. J. 215=46 I. C. 339.

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———*Right of—Fraudulent transfer with view to defeat right—Mortgage and sale to two brothers*

Persons are entitled to defeat the operation of the law of pre-emption if they can do so by legitimate means but it is not impossible to throw a transaction of transfer into a fraudulent form for the purpose of a claim for pre-emption.

Where a property was mortgaged with possession for a long term to one of two brothers forming a joint family and the mortgage was followed by a sale of the equity of redemption in favour of the other brother

*Held*, that there was really only one transaction thrown into a fraudulent and deceptive form to effect a complete sale and pre-emption of the property could be allowed regardless of the mortgage created on the same. (*Lindsay, J. C.*) **RAM DUT SINGH v. BALKARAN SINGH.** 50 L. J. 87=45 I. C. 231.

———*Right to land lying on outskirts included in municipal limits for certain purposes—Effect of.*

The mere fact that for certain reasons the Government have included a part of an estate within the municipal limits of a city, does not necessarily mean that the locality in question has become a part of the town for purposes of pre-emption.

Where a person buys agricultural land assessed to revenue and becomes one of the *kewat-dars* he must be regarded as an owner of the estate for purposes of pre-emption, no matter whether the area he buys is small and whether he pays only a few annas as revenue; and he does not cease to be such owner merely because he walls off the land and stores the iron. (*Chevis, J.*) **SALAMAT RAI v. KANSHI RAM.** 30 P. L. R. 1918=106 P. W. R. 1918=45 I. C. 837.

———*Right of—Performance of ceremonies—Validity—Conditions.*

Where in a suit for pre-emption by a Hindu, the ceremonies necessary to pre-emption were found to have been performed about a month after the date of the knowledge of the sale and it was suggested that the date of the performance was an equitable question only and that if the ceremonies were performed within a reasonable time they were good ceremonies and should create a right of pre-emption:

*Held*, that a right to pre-emption is based entirely on the Mahomedan Law and it has been accepted by the Hindus in certain districts in consequence of their close contact with Mahomedans in these districts. To create a right of pre-emption it is necessary that the Mahomedan ceremonies should be performed immediately upon the hearing of the sale. (*Chapman and Eoe, J.J.*) **JAGAN BHAGAT v. SHIEKH ARJANI MANDAL.** (1918) Pat. 3=4 Pat. L. W. 345=45 I. C. 255.

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———*Right—Pre-emptor, a co-sharer in the patti in which property sold was situate—Pre-emptor acquiring right by imperfect partition—Right not lost.*

By means of an imperfect partition of a village made in recent years a patti was formed of which plff. became a co-sharer. He claimed a right of pre-emption in respect of a sale of a certain property situate in that patti. The custom of pre-emption was admitted. The *wajib-ul-arz* gave the right to a *hissadar-i-karibi*. *Held*, that the custom being proved, if the plff. could prove that he came within the custom at the time of sale he was entitled to the benefit of the custom and the fact that he was not within the custom prior to partition will not prevent him from subsequently acquiring the right. 3 I. C. 867 not foll. (*Richards, C. J. and Tudball, J.*) **LALTA PRASAD CHAUDHURY v. OKUL PRASAD.**

40 All 617=16 A. L. J. 509=46 I. C. 125.

———*Right to—Recognised sub-division of a survey number—Sale of—Right of pre-emption—Entry in record of rights.*

The recognised sub-division of a survey number is a holding which has separate assessment fixed for it. The officer in charge of the Record of Rights is not such an officer as is authorised either to recognise a sub-division of a survey number or to form two recognised sub-divisions into one Survey number. 14 N. L. R. 51, foll. The plaintiff cannot institute a suit for pre-emption when there has been a sale of such recognised sub-division only. (*Mitra, A. J. C.*) **GADADHAR v. CHUNNILAL.** 14 N. L. R. 55=44 I. C. 541.

———*Right of—Re-sale to vendor before suit. See (1917) DIG. COL. 1001; IMAMI v. ALLAH DIYA.*

24 P. R. 1918=99 P. W. R. 1917=40 I. C. 767.

———*Right to—Right in existence at the date of the decree of the first court—Loss of right after appellate decree—Effect of.*

If at the date of the decree of the first court the pre-emptor plff. has a right to pre-empt, then it is not open to the Appellate Court to reverse the decree on the ground that since the date on which the decree was drawn up the plff. pre-emptor has lost the property which qualified him for the exercise of the right of pre-emption, unless the transaction which has led to the loss of the property can be referred back to an antecedent date so as to show that the plff. pre-emptor had never any title to the property the possession of which qualified him for the exercise of the right of pre-emption 45 I. C. 83, foll. (*Lindsay, J. C.*) **WALI MAHOMED KHAN v. NABI HASAN KHAN.**

50 L. J. 233=46 I. C. 353.

———*Right of—Sale and separate agreement for reconveyance—Pre-emption right in respect of. See DEED, CONSTRUCTION. 74 P. R. 1918.*

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———*Right to accrues on date of sale—Sale to a stranger—Re-sale to vendor, who had ceased to be a co-sharer on the date of re-sale.*

Where after the institution of a right for pre-emption the vendee (a stranger) re-sold the property sought to be pre-empted to the vendor who by selling all the rights he was possessed of had ceased to be a co-sharer at the date of the re-sale, held the pre-emptor was entitled to a decree for pre-emption. (*Richards, C. J. and Tubball, J.*) **TOTA RAM v. GOPAL SINGH.**  
16 A. L. J. 505=46 I. C. 76.

———*Right of—Transaction ostensibly an exchange but in reality a sale—Pre-emption right if exists in such case.*

A pre-emptor is not debarred from showing that a transaction which on the face of it is an exchange is in reality a sale. (*Rattigan, C. J. and Le Rossignol, J.*) **GUL MUHAMMAD v. SABZ ALI KHAN.**  
104 P. R. 1918.

———*Right of—Waiver of by villagers giving general assent to sale.*

In a suit for pre-emption it was found that the intended vendee went to the village in which the land in suit was situate and informed some of the villagers including the plff. that he contemplated purchasing the land and a general assent being given to such purchase, but agreement to purchase was at the time entered into between the vendor and vendee and no offer was made to the pre-emptors after the sale.

Held, that the plffs. had not by their conduct waived their right of pre-emption and they were not debarred from exercising their right. 27 All. 670 appr. (*Shah Din and Scott Smith, JJ.*) **BINDU KHAN v. INDAR NARAIN.**

50 P. R. 1918=19 P. L. R. 1918=  
40 P. W. R. 1918=43 I. C. 1005.

———*Suit for—Entire property sold to be included in—Exception—Distinct interests of vendees.*

The rule that a suit for pre-emption must embrace the entire property sold, unless the plff. is not entitled to claim pre-emption in regard to any portion thereof, is inapplicable where the interests of the vendees, inter se are distinct or where they have since been separated or divided. (*Kanhariya Lal, A. J. C.*) **NAU NEHAL v. DY. COMMISSIONER, UNAO.**  
5 O. L. J. 546=47 I. C. 894.

———*Suit—Limitation—Starting point.*  
See, LIMITATION ACT, ART 10

67 P. L. R. 1918.

———*Suit for—Purchase made by vendee on different date—Suit to pre-empt first sale—Vendee claiming to be co-sharer in virtue of second purchase—Suit not maintainable.*

A vendee becomes a co-sharer of the property purchased by him from the date of his pur-

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chase. Consequently where a vendee purchased shares in a village of two different dates, and a suit was brought in respect of the second sale held, that the suit was not maintainable even though limitation for a suit for pre-emption in respect of the second sale had not expired. (*Richards, C. J. and Tubball, J.*) **CHABRAJ SINGH v. MAHESH NARAIN SINGH.**  
40 All. 572=16 A. L. J. 627=  
46 I. C. 976.

———*Suit for—Refusal to purchase—Inference from conduct—Sale by Court of Wards No bid by plff.—Second sale to the knowledge of plff.—Silence—Effect of*

Certain property, under the management of the Court of Wards, was sold the sale having been previously advertised. The highest bid was Rs. 1,000 and the plff. was present but did not bid. The price was considered inadequate and the property was withdrawn from the sale.

It was advertised for sale for a second time and at the second sale it fetched Rs 950. It was not clear whether the plff. was present at the second sale. In a suit for pre-emption, held that the plff. having known that the property was being sold and having every opportunity to purchase, his absence of protest at the sale being made again and the delay in bringing the suit was tantamount to his refusal to purchase and the suit was not maintainable. (*Richards, C. J. and Tubball, J.*) **CHITRU SINGH v. BHAGWANT SINGH.**

16 A. L. J. 492=46 I. C. 106.

———*Suit for—Right of pre-emption—Interest to which pre-emptor is entitled—Money left with vendee to discharge encumbrances.*

A pre-emptor cannot in his suit for pre-emption claim in reduction of the purchase money such interest to which he may become entitled or for which he may become liable by reason of the failure of the vendee to pay to him and to the other creditors of the vendor moneys which had been left with him out of the sale consideration for discharging encumbrances on the property sold. (*Kanhariya Lal, A. J. C.*) **CHHATARPAL v. HARDEC BAKSH.**  
21 O. C. 269.

———*Talabs—Custom arising on sale—Transaction in the form of a perpetual lease—Issues to be decided. See MAHOMEDAN LAW.*  
16 A. L. J. 233.

———*Trees on land—Easements—Run with the land.*

In a suit for possession of land by pre-emption, the trees standing on the land and all rights of easement appertaining to the land pass with it. (*Mitra, A. J. C.*) **BALOBRAO APPARAO v. ANAD RAO.**

47 I. C. 654.

———*Wajib-ul-Arz—Custom or contract—Interpretation of document.*

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When considering the existence or non-existence of a custom of pre-emption the language of the particular *wajib-ul-arz* ought to be taken into consideration.

Consequently, where the only evidence in proof of a custom of pre-emption was the *wajib-ul-arz* which recorded that when property was bought or mortgaged by a stranger, the co-sharers were entitled to take in the event of sale at sixteen years' purchase and in that of a mortgage at eight, and it then recorded a statement that a person had a right to redeem a mortgage in which he had no interest:—

*Held*, that the entry in the *wajib-ul-arz* on the very face of it disproved the existence of a custom. (*Richards, C. J. and Tudball, J.*) *SURAJBALI SINGH v. MOHAMMAD NASIR*.

16 A. L. J. 879=43 I. C. 220.

—Wajib-ul-arz—Entry in—Construction of

"If any co-sharer wishes to transfer his (landed) property by sale or mortgage, then he can transfer in the first instance to a co-sharer relation according to the gradation of the relationship and in case of refusal, to other co-sharers for a reasonable price. If no co-sharer in the property takes it, then he has the option to transfer it to whomsoever he likes.....If any one makes a transfer in favour of his children or near relation then no one else has a right of pre-emption.

*Held*, that even in cases of a sale in favour of a relation, a nearer relative of the vendor should have a right of pre-emption. (*Richards, C. J. and Tudball, J.*) *GULZAR ALI v. SIADAT HUSAIN*.

43 I. C. 2.

**PRESCRIPTION**—Acquisition of assessment by, against government—Enjoyment for nearly 60 years—Assignment of property by Government to private individual—Effect. See EASEMENTS ACT, S. 15. 34 M. L. J. 396.

**PRESIDENCY SMALL CAUSES COURTS ACT (XVI OF 1882)**, S. 31 (b)—Decree of Presidency Small Cause Court—Transfer to Munsif direct if valid. See (1917) DIG. COL. 1009; *NEDAR NATH MANNA v. JOGUNDRA NATH DAS*.

28 C. L. J. 264=41 I. C. 815.

—S. 38—Full Court—Power to reverse decree on questions of fact. See (1917) DIG. COL. 1004; *SONOO NABAYAN v. DINKAR*.

42 Bom. 86=

19 Bom. L. R. 944=43 I. C. 486.

—S. 41—Suit in ejectment—Property whose annual value at rack rent exceeds Rs. 1,000—Rental of portion of property in actual occupation of tenant less than Rs. 1,000—Jurisdiction to try—Title questions of, when can be gone into.

Where a suit was brought under S. 41 of the Pres. Sm. C. C. Act to eject a tenant in

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occupation of a portion of the house and the annual rental of the entire house exceeded Rs. 1,000 but the annual rental of the actual portion of the house in the occupation of the tenant was much less than Rs. 1,000.

*Held*, that the suit had reference only to the portion of the house in the tenant's possession and that therefore the annual rental of that portion alone determined the jurisdiction of the Court under S. 41 and that the Small Cause Court had jurisdiction to give a decree for ejectment.

Where a Small Cause Court goes into a question of title to enable it to exercise its jurisdiction, its order cannot be set aside as being without jurisdiction. (*Krishnan, J.*) *VENKATARAMA CHETTY In re*.

7 L. W. 610.

## PRES. TOWNS INSOLVENCY ACT, (III OF 1909), S. 7—Order under—Suit to set aside if competent.

No suit lies to set aside an order passed under S. 7 of the Pres. Towns. Act. The proper remedy for the party aggrieved is to appeal against the order. 40 Mad. 1173 foll. (*Wallis, C. J. and Kumaraswami Sastri, J.*) *THE OFFICIAL ASSIGNEE OF MADRAS v. MANGAYARKARASU AMMAL*.

47 I. C. 298.

—Ss. 17 and 51—Adjudication of Insolvency—Vesting of property, priority of—Rival jurisdictions, proceedings in—Balance of convenience.

Two of the creditors of a firm carrying on business at Rangoon and Madras presented a petition on 17-4-17 to the High Court of Madras in its insolvency jurisdiction, for the adjudication of the firm setting out various acts of insolvency alleged to have been committed after the month of March 1917. On 23-4-17 an order of adjudication was made by the High Court. On 10-5-17 the firm was again adjudicated by the Chief Court of Lower Burma in respect of acts of insolvency committed in or about the month of Feb. 17 in Rangoon. On a question being raised as to whether the properties of the insolvent vested in the Official Assignee of Madras to the exclusion of the Official Assignee of Rangoon or vice versa and as to which court should administer the estate.

*Held*: (1) that the adjudication by the Madras High Court was prior to the Rangoon adjudication, the question of priority depending on the actual date of the adjudication and not on the date of the commission of the acts of bankruptcy on which the proceedings were stated.

(2) That the whole property of the insolvents wherever situated in British India having vested in the Official Assignee of Madras on the date of the adjudication at Madras, the subsequent adjudication at Rangoon had nothing to operate upon and no property of

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the insolvents could vest in the Official Assignee of Rangoon until the Madras Insolvency was annulled under S. 22 of the Pres. Towns Insolvency Act;

(3) That as the interests of the general body of creditors required that the estate should be administered in Rangoon, the Madras adjudication should be annulled and the Rangoon Court should be left to act in the matter. 21 Bom. 297 and *Ex parte Geddes: In re Mewan* 19 L. and J. 41 Rel. (*Wallis, C. J. and Seshagiri Aiyar, J.*) OFFICIAL ASSIGNEE OF MADRAS v. OFFICIAL ASSIGNEE OF RANGOON. 35 M. L. J. 533=24 M. L. T. 455=9 L. W. 36.

—S. 17—Insolvency—Adjudication—After acquired property—Cause of action arising subsequent to adjudication—Right of insolvent to sue in his own name. See INSOLVENCY. 22 C. W. N. 1018.

—Ss 17 and 25—Insolvency of judgment-debtor—Absence of protection order—Running of time does not stop. See LIM. ACT, S. 15 AND ART 184. 47 I. C. 798.

—S. 17—Secured creditor—Suit to enforce security—Leave of Court if necessary.

A secured creditor of an insolvent can bring a suit to realise his securities without the leave of the Court under S. 17 of the Pres. Towns Ins. Act. (*Ormond and Prati, J.J.*) D. BADRI DAS v THE CHETTY FIRM OF O A. M. K. 45 I. C. 918.

—Ss. 36, (9) (b) 17, 51 and 55—Fraudulent transfer of property by insolvent—Jurisdiction of Insolvency Court to enquire into and order delivery of property on motion by Official Assignee—Suit to set aside order of Insolvency Court, if lies—Evidence of insolvent if admissible against transferee—Transfer or assignment by insolvent—Good faith—Onus

Under the Pres. Towns Ins. Act the Insolvency Court has on an application by the Official Assignee, jurisdiction under S. 36 to inquire as to whether any sale of property by an insolvent is fraudulent or void and, if so, to make an order for the delivery to the Official Assignee. 45 C. 109 Ref. But any one aggrieved by such an order might bring a regular suit to vindicate his title. 6 C. W. N. 513 Ref.

The examination of an insolvent is not admissible in evidence against persons against whom an order as above is passed under S. 36.

The burden of proof of supporting a purchase from the insolvent of the whole of his assets just prior to the insolvency falls on the person claiming that the purchase can stand. An assignment by an insolvent on the eve of his insolvency can only stand if it can be shown that it was done for the purpose of helping him with funds to carry on the business and that the transaction is genuine *In re Sinclair*,

## PRESS ACT, S. 3.

25 Ch. D 319 Ref. Transactions of this kind will stand good when the properties of the insolvent have been transferred to creditors to secure an existing debt and also advances made to enable the insolvent to carry on the business. (*Greaves, J.*) A F C. SEEHASE *In re*. 22 C. W. N. 335=45 I. C. 196.

—S. 51—Adjudication of insolvency—Rival jurisdictions—Vesting, priority of—Dependent on date of adjudication and not on date of Commission of act of insolvency—Balance of Convenience—Administration of estate in one jurisdiction. See PRES. TOWNS INS ACT, SS. 17 AND 51. 35 M. L. J. 533.

—Ss. 53 (1), 108 and 169—Insolvency—Order of Administration—Attachment by Creditor prior to order—Sale after order—Rights of attaching creditor. See (1917) DIG. COL. 1007. PREM LAL DHAR *In re*. 44 Cal. 1016=43 I. C. 348.

—Sch. II Art. 18—English mortgagees—Not within the section. See CROWN, DEBTS. 22 C. W. N. 793.

PRESS ACT (I OF 1910)—S. 3. (1)—Order of District Magistrate under—Nature of—Revision against,

An order of a District Magistrate under S. 3 (1) of the Press Act is a purely ministerial proceeding and is not open to revision by the Chief Court. (*Rattigan, C. J. and Wilberforce, J.*) GULSAR MUHAMMAD v EMPEROR. 20 P. R. (Cr.) 1918=46 I. C. 516=19 Cr. L. J. 740.

—Ss. 3 (1) and (2) and 23—Order under S. 3 (2) by District magistrate if ultra vires—Requisites of order under S. 3 (1)—Revision of Magistrate's order—Government of India Act, S. 107.

A Press had been in existence since 1889 without a declaration under Act 25 of 1867 but on the passing of Act I of 1910 the necessary declaration was made and an exemption was granted from depositing security. Subsequently the Dt. Magistrate passed an order under the Press Act of 1910 requiring the proprietor to deposit security.

*Held*, that an order under S. 3 (2) of Act I of 1910 could be passed only by a local Government.

Further, as it did not appear on what ground the exemption from depositing security has been originally granted and on what ground the Dt. Magistrate required security to be deposited at a later stage, the order of the Dt. Magistrate was bad and liable to be set aside by the High Court under S. 107 of the Government of India Act, 1915. (*Ras and Sharfuddin, J.J.*) GANESH LAL v EMPEROR. 4 Pat. L. W. 155=44 I. C. 579=19 Cr. L. J. 355.

## PRESS AND REGIS. OF BOOKS ACT.

**PRESS AND REGISTRATION OF BOOKS ACT (XXV of 1867 S. 6—Declaration—Refusal of Dt. Magistrate to authenticate—Revision—Interference.**

A Dt. Magistrate, in acting or purporting to act under S. 6 of the Press and Registration of Books Act cannot be said to exercise jurisdiction as a Court, nor can his proceedings be said to be in any sense judicial and the Chief Court has no power to interfere with his proceedings. 37 I. C. 607, 39 Mad. 1104 and 18 Cr. L. J. 289 foll. (*Rattigan, C. J. and Wilberforce, J.*) **AHAD SHAH v. EMPEROR.** 21 P. R. (Cr.) 1918=27 P. W. R. (CR.) 1918=45 I. C. 525=19 Cr. L. J. 621.

**PRESUMPTION**—Consideration—Deed does not necessarily import consideration. *See* **CONSIDERATION.** 20 Bom. L. R. 177

———Criminal trial—Presumption of innocence, strength of—Conflict with other presumptions. *See* (1917) DIG. COL 1008 **ASHRAF ALI v. EMPEROR.** 21 C. W. N. 1152=19 Cr. L. J. 81=43 I. C. 241

———Deposition—Presumption as to its being read over *See* **PENAL CODE, S. 193.** 28 P. R. (Cr.) 1918.

———*Fraud of agent—Scope of authority—Liability of principal.*

A principal is liable for the fraud of the agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. Authorities on the subject reviewed. (*Drake Brokeman, J. C.*) **HUKAMCHAND v. BENGAL AND NAGPUR RAILWAY CO.** 45 I. C. 856.

———Hindu joint family—Presumption of jointness—Acquisition by one member—No presumption that it is separate property. *See* **HINDU LAW, JOINT FAMILY.** 5 Pat L. W. 122=46 I. C. 255.

———Implied contract—Long continued payment—Contract supported by consideration—Legality of payment—Right and title of recipient. *See* **ABWABS.** 22 C. W. N. 823.

———Inam grant by native ruler—Agrahar-amdar grant of soil and not merely of the Royal share of revenue alone. *See* **MADRAS ESTATES LAND ACT, S. 3 (2) (d).** 41 Mad 1012.

———Joint creditors—Presumption that each of two joint creditors is entitled to half of the debt. *See* **CO-MORTGAGEES.** 44 I. C. 621.

———Judicial Acts—No presumption as to priority of events happening on the same day. *See* **C. P. CODE, S. 73.** 23 M. L. T. 179.

## PRINCIPAL AND AGENT.

———Lakhiraj—Long possession without payment of rent. *See* **B. T. ACT, S. 105.** 22 C. W. N. 396.

———Legitimacy—Inference of, from proof of paternity. *See* **EVIDENCE ACT, Ss. 112 AND 113.** 43 I. C. 478.

———Lost grant—Presumption from ancient and uninterrupted user—Essentials of—Right to be such that it could have been the subject of a grant. *See* **EASEMENTS ACT, Ss. 2 (c) AND 17 (c).** 20 Bom. L. R. 393.

———Notice to quit by post—Presumption in favour of its reaching the addressee. *See* **LANDLORD AND TENANT.** 35 M. L. J. 713=23 C. W. N. 77 (P. C.)

———Notice to quit service on one joint Tenant whether raises presumption of service on others. *See* **LANDLORD AND TENANT.** 35 M. L. J. 713=23 C. W. N. 77 (P. C.)

———Occupancy right—Unoccupied Govt. ryotwari lands—Claim to occupancy right for a long time—Sale and mortgage of holdings by tenants—Permanent right *See* **LANDLORD AND TENANT.** 7 L. W. 194.

———Permanent and heritable grant—Grant for maintenance—No presumption of permanency from uniformity of rate for series of years. *See* **GRANT, CONSTRUCTION.** 43 I. C. 654.

———Permanent tenancy—Evidence of—Ryotwari wasteland—Uniform rent for 50 years—Sale and mortgage of holding by tenants recognised by landlords—Claim of occupancy right by tenants. *See* **LANDLORD AND TENANT.** 7 L. W. 194.

———Sub-lease taken by father in a joint Mitakshara family—Presumption that it is for benefit of family 4 Pat L. W. 109.

**PRINCIPAL AND AGENT—Accounts—Death of agent—Liability or legal representative to account. *See* **ACCOUNTS.** 47 I. C. 371.**

———Agent Retention of principal's money—Liability for interest on—Extent of. *See* **COMPANY, FUND.** (1918) M. W. N. 1.

———Sub-Agent—Agent employing a sub-agent liable to the principal for the sub-agent's fraudulent act committed within the course of employment. *See* (1917) DIG. COL. 1013; **NENSUKHDAS v. BIRDICHAND.** 19 Bom. L. R. 948=43 I. C. 699.

———Suit for account for moneys lent to persons to whom agent was not authorised to lend—Suit for ordinary money account—Limitation. *See* **LIM. ACT, ART. 89.** 41 Mad. 1.

**PRINCIPAL AND SURETY.**

**PRINCIPAL AND SURETY** — *Contribution liability for—Payment of principal's debt.*

The Chairman of a Company under a highly advantageous agreement to himself financed the Company with money borrowed from a third person and at the request of the latter some of the Directors executed a pro-note as sureties, whereby, along with the Chairman, they made themselves jointly liable for the payment of the loan.

*Held*, that the sureties were not liable to contribute to the sum realised by the creditor from the principal. (*Ormond, O. C. J. and Parlett, J.*) **ABDUL BARI CHOWDHURY v. JOAKAN.** 44 I. C. 231.

**PRIORITY**—Suit for possession of, by lessee from usufructuary mortgagee in possession—Lease granted and registered by mortgagee during the pendency of proceedings for compulsory registration of mortgage—Right of lessee to recover possession without paying off the mortgage. *See* OCCUPANCY HOLDING, SUIT FOR POSSESSION. 16 A. L. J. 137

**PRIVATE DEFENCE**—*Right of private defence of property—Possession with accused—Attempt by complainant to remove crop—Resistance—Whether justifiable—Penal Code, Ss. 147 and 148.*

Where the accused was found to be in possession of land and the complainant's party by use of force attempted to cut the crop grown thereupon by the accused, the latter were justified by right of private defence of property in resisting the complainant.

Right of private defence extends to S. 141 and subsequent sections just as much as it extends to any other offences punishable under the Penal Code.

• Where a person, in possession of property sees an actual invasion of his right to that property if that invasion amounts to an offence under the Code, he is entitled to assert it by force and to collect for that purpose such numbers and arms as may be absolutely necessary for this purpose provided that there is no time to have recourse to the protection of the police authorities. 35 C. 368 and 35 Cal. 984 dist. and comm. on. (*Roe and Imam, JJ.*) **FOUZDAR RAI v. EMPEROR.**

3 Pat. L. J. 419=4 Pat. L. W. 111=  
(1918) Pat. 254= 19 Cr. L. J. 241=  
44 I. C. 33.

———Right of—Tenant in possession of holding—Portion of land under water—Landlord giving a lease of fishing rights to a stranger—Disturbance of possession—Obstruction by tenant whether unlawful. *See* PENAL CODE, S. 147.

5 Pat. L. W. 101.

**PRIVILEGE**—Communication between Vakil and client *See* EVIDENCE ACT, S. 126.

16 A. L. J. 879.

**PROBATE.**

**PRIVY COUNCIL**—Appeals to—Consolidation of—Powers of High Court. *See* C. P. CODE, O. 45, R. 4 AND S. 151. 3 Pat. L. J. 446.

———Appeal—Execution of decree in the subordinate Judge's Court—Whether Subordinate Judge has jurisdiction to stay execution—Exercise of—Powers of revision where no second appeal lies—C. P. Code, O. 45, R. 13—Court, meaning of. *See* (1917, DIG. COL. 1015: **RAM BAHADUR v. THAKUR SRI SRI RADHA KRISHNA CHANDERJI.** (1917) Pat. 285= 3 Pat. L. J. 40=3 Pat. L. W. 222= 42 I. C. 835.

———Appeal from remand order maintaining ability. *See* CR. P. CODE, S. 109. (1918) Pat. 1.

———Appeal to—Leave to appeal in *forma pauperis*—Jurisdiction of High Court to grant—C. P. Code O. 44, R. 1 applicability of *See* C. P. CODE, O. 44, R. 1. 35 M. L. J. 258.

———Criminal appeals—Erroneous admission of evidence not affecting substantial justice—Cr. P. Code, S. 172. *See* (1917) DIG. COL. 1016. **DAL SINGH v. EMPEROR.**

44 Cal. 876=21 C. W. N. 818=  
33 M. L. J. 385=(1917) M. W. N. 522=  
6 L. W. 71=26 C. L. J. 13=  
15 A. L. J. 475=1 Pat. L. W. 661=  
19 Bom. L. R. 510=13 N. L. R. 100=  
39 I. C. 311=9 Cr. L. R. 461=  
44 I. A. 137=11 Bur. L. T. 54 (P. C.)

———Finding of fact—Interference with—Finding of Appellate Court in reversal of that of trial Court—Practice.

An appellant who asks the Board to upset a carefully considered finding on a question of fact arrived at by Judges fully conversant with habits and practices of the country takes a heavy burden on himself.

Their Lordships of the Privy Council refused to displace a carefully reasoned judgment of the Judicial Commissioner's Court on a question of fact which commended itself of their view of the case, merely in order to restore a judgment of the Subordinate Judge, which did not rest on the favour with which he regarded the witnesses but on a speculation of his own as to probabilities. (*Lord Sumner.*) **JURAWAN LAL v. BALDEO SINGH.**

21 O. C. 104=48 I. C. 225 (P. C.)

———Practice—Point not urged in High Court against decision of first court if, will be entertained. *See* MORTGAGE, REDEMPTION. 22 C. W. N. 866.

**PROBATE**—Application for—Delay, if a ground for refusal—Will natural and in accordance with tenor of life of testator—Genuineness, inference as to. *See* (1917) DIG. COL. 1017; **MAKUNDA NAND v. BHOLANATH NANDA.** (1917) Pat. 85=43 I. C. 195.

## PROBATE.

—Delay in application for—Careful scrutiny of evidence—Satisfactory explanation for delay—Probate not to be refused. See WILL PROBATE. 22 C. W. N. 424.

—Grant in respect of part of Estate—Compromise of probate proceedings—Binding nature on minors—Equitable Estoppel. See LETTERS OF ADMINISTRATION. 3 Pat. L. J. 415.

—Refusal of, on the ground that will is "inefficient"—Improper.

Probate of a will cannot be refused on the ground simply that it is what lawyers in ancient time called "inefficient." That doctrine does not apply to India. (Fletcher and N. R. Chatterjee, JJ.) RAMMAL DAS KOCH v. KARAL KOLI KOCHINI. 22 C. W. N. 315=43 I. C. 208.

—Revocation of—Non service of Citation—Legatee under earlier will without having obtained probate of the same—Locus standi to apply for revocation of probate of later will. See WILL AND PROBATE. 22 C. W. N. 564.

PROB. AND ADMN. ACT (V OF 1881), S. 5—Deposited in a court of competent jurisdiction meaning of—Property, authenticated copy, what is.

S. 5 of the Prob. and Admn. Act does not require that the will should remain in Court for all time, after it has been once deposited. It is quite sufficient if the will had in fact been deposited in a foreign court of competent jurisdiction and that the Court had before it the original will at the time it made a judicial pronouncement on the validity of the will. The copy of the will, required by S. 5 of the Act does not necessarily mean a copy authenticated under the seal of the foreign court: a copy authenticated by the notarial seal of a notary as provided for by the judicial process of a foreign court is a properly authenticated copy within the meaning of the section. (Fletcher and Huda, JJ.) SUSHILABALA DAS v. ANUKUL CHANDRA CHOUHDURY. 22 C. W. N. 713=44 I. C. 166.

—S. 6—Probate—Delay in application for—No ground for refusal, where delay satisfactorily explained. See WILL, PROBATE. 22 C. W. N. 424.

—Ss. 8 and 9—Probate—Grant of, to some executors without citation upon others—Remedy of other executors.

Where a Probate has been granted to some of the executors appointed by a will without citation upon the others calling upon them to accept or renounce their executorships S. 9 of the Prob. and Admn. Act becomes applicable to the case and the other executors can, on application for Probate, obtain it unless they

## PROBATE AND ADMN. ACT, S. 34

are debarred under S. 9 of the Act. (Ternon and Newbould, JJ.) PEARI LAL DAS v. BEPIN BEHARI DAS. 45 I. C. 336.

—Ss. 13, 23 and 41—Letters of administration—Grant of to sister—Adopted son.

Letters of administration might be granted to a sister though an adopted son is put forward and his title is in dispute Letters of Admn. cannot be granted to a minor. (Fox, C. J. and Ormond, J.) MA SHAN MA BYU v. MA CHIT SAW. 10 Bur. L. T. 184=44 I. C. 138.

—S. 23—Letters of administration, grant of—Contest between sister and adopted daughter—Validity of adoption disputed—Procedure.

Where the full sister and an alleged adopted daughter of the deceased whose adoption was disputed applied for Letters of Administration to the estate of the deceased.

Held, that inasmuch as in the event of the adoption being established the sister would not under the Buddhist Law be entitled to any share in the estate, the Court would be justified in going into the question of adoption. (Twomey and Ormond, JJ.) AUNG MA KHING v. MI AH BON. 11 Bur. L. T. 65=9 L. B. R. 163=45 I. C. 737.

—S. 23—Letters of administration—Rival applicants—Procedure.

Where rival applicants apply for the Letters of Administration one of whom is admittedly entitled to a share in the estate under S. 23 of the Prob. and Admn. Act and the status of the others is disputed, the Court should grant Letters of Administration to the heir whose status is admitted. (Twomey, C. J. and Ormond, J.) SHWE YIN v. MA ON. 45 I. C. 935.

—Ss. 23 and 41—Objection of proceeding only to determine representation of estate—Question of adoption, if can be gone into

The object of of proceedings under the Prob. and Admn. Act is to determine the question of representation of the deceased for the purpose of administering the estate, and not to determine question of inheritance. The Court should not enter into questions of adoption in such proceedings. (Fox, C. J. and Ormond, J.) MA SHAN MA BYU v. MA CHIN TAW. 10 Bur. L. T. 184=44 I. C. 138.

—S. 34—Administrator pendente lite—Position and powers of—Power of probate Court to direct administrator pendente lite to advance to widow contesting will money for conduct of case.

The position of an administrator pendente lite in Probate proceedings is closely analogous to that of a Receiver in a partition suit and S. 34 of the Prob. and Admn. Act give sample power to the Court to direct the administrator pendente lite to do such acts as may be

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necessary in the interests of the several parties to the proceedings.

The Court made an order directing the administrator *pendente lite* to pay the widow contesting the will, a sufficient sum for the maintenance of herself and her minor sons and for the proper conduct of their defence in the Probate proceedings. (*Teunon and Newbould, JJ.*) **GOUR MONI DASSI v. BORADA KANTA JANA.** 44 I. C. 657

—S. 50—Probate—Grant in respect of part of Estate—Validity—Compromise of probate proceedings—Binding nature of minors Equitable-Estoppel. See **LETTERS OF ADMINISTRATION**, 3 Pat. L. J. 415.

—Ss. 62 and 85—Application for letters of administration with will annexed—Duty of court—Discretion.

An application for Letters of Administration with the Will annexed stands on the same footing as an application for Probate and the Court is bound to grant the Letters unless it finds that the Will was not executed by the testator or that he was not of a disposing mind at the time of making it, or that the Will was not his own voluntary act. (*Scott Smith, J.*) **BABU MISRA v. UMER PERSHAD.** 110 P. W. R. 1918=45 I. C. 974.

—Ss. 76 and 98—Scope of—Accounts, Submission of by executor to Court—Order for future half yearly accounts.

Ss. 76 and 98 of the Prob. and Admn. Act contemplate the submission of an initial inventory and one final account after the completion of the administration. Orders purporting to fix the capital of the trust and providing for future administration of trust and making provisions for effecting repairs and submitting half yearly accounts are outside the scope of Ss. 76 and 98 of the Act. 9 S. L. R. 134 foll. (*Crouch and Hayward, A. J. C.*) **NOTANDAS v. KISHNIBAI.** 12 S. L. R. 27=47 I. C. 750.

—S. 98—Executor not accountable—Duty to exhibit accounts to Court.

A provision in a will that the executors shall not be liable to render accounts does not exempt them from the obligation of exhibiting to the Court of Probate the accounts of the estate required by S. 98 of the Prob. and Admn. Act. But the Probate Court in such a case has no concern with the accounts of management by the executors (*Teunon and Newbould, JJ.*) **PEARL LAL DAS v. BEPIN BEHARI DAS.** 45 I. C. 336.

—S. 98 (1)—Order directing executor to furnish accounts annually.

An order directing an executor to furnish accounts annually is not in accordance with the

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provisions of S. 98 (1) of the Probate and Administration Act. (*Teunon and Newbould, JJ.*) **JAGAT DURLAV MAZUMDAR v. INDU BHUSAN MAZUMAR.** 44 I. C. 58.

—S. 128—Specific legacy mesne profits—Delay in accounting by executor—Interest on arrears of income.

Where a will bequeathed specific property absolutely to the plff. then a child, and provided that the executors should deliver possession of the property on her marriage, the property becomes the plff's on the testator's death and she is entitled to all the income from that date in the absence of any provision in the will to the contrary.

An executor who has been guilty of delay in accounting is not to be charged with interest on arrears of income unpaid by him. (*Abdur Rahim and Oldfield, JJ.*) **GOWRI v. NARMA MUCHINATTENYA.** 23 M. L. T. 353=7 L. W. 513=45 I. C. 664.

**PROBATE PROCEEDINGS**—Parties—Possibility of interest enough to enable person to intervene—Head of an endowment entitled to a legacy under the will—Right to intervene as respondent on appeal. See **C. P. CODE, SS. 107 AND 151.** 3 Pat. L. J. 409.

**PROMISSORY NOTE**—Execution of by trustee of a charity—Personal liability. See **NEG. INST. ACT, SS. 26, 27 AND 28.** 35 M. L. J. 90.

—Executor—Debt under not borrowed *bona fide* in course of due administration—Creditor's rights—Right of direct recourse against estate—Right to be subrogated to executor's rights—Suit on promissory note—Right to subrogation if and when can be allowed in—Necessary allegations in plaint—Promissory note by executor, trustee, guardian or agent—Executant when personally liable under, and when not—Promissory note for debt—Suit on debt—Maintainability—Debt and Note contemporaneous—Effect—Practice—Pleadings—Prayer for larger relief—Lesser relief to which plff. found entitled when will be granted and when not. See (1917) **DIG. COL. 1021: AMMALU AMMAL v. NAMAGIRI AMMAL.** 33 M. L. J. 631=22 M. L. T. 391=(1918) **M. W. N. 110=6 L. W. 722=42 I. C. 760.**

—Joint promisee benami for one of the promissors—Right of suit.

Where two persons executed a promissory note to the plff. benami for one of themselves the promissors and the plff. brought a suit to recover the amount.—

Held that the promisee of a note of which he is in part the promisor cannot maintain the suit and therefore the plff. who is his benamidar also cannot maintain the suit.

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A benamidar cannot be in a better position than the real owner. (*Aiying and Sesh guri Aiyar, J.J.*) RAMAN CHETTY v. PASUPATHY. AIYAR. 24 M. L. T. 502=49 I. C. 41.

—Right to sue on note in favour of person as trustee payee subsequently succeeded by another as trustee—subsequent trustees right of to sue without endorsement or assignment—Trusts Act, S. 75—Principle of—Applicability See (1917) DIG. COL. 1024; RAMA NATHAN CHETTY v. KATHA VELAN.

41 Mad. 353=33 M. L. J. 627=22 M. L. T. 453=(1917) M. W. N. 843=6 L. W. 753=42 I. C. 934

—Stamp—Promissory note executed in foreign territory but with stamp of British India—Suit on promissory note in British Court, maintainable. See STAMP ACT, S. 85. 20 Bom. L. R. 464

—Suit on—Conditional decree on furnishing indemnity—Propriety of.

Plff. sold a piece of land to the deft and obtained from the latter a promissory note luring the pendency of the suit by a third person challenging the sale the plff. sued the third deft. on the promissory note. The first Court gave plff. a decree conditional on his indemnifying the deft. in case the latter lost the property purchased by him.

Held, that the condition attached to the decree was just and proper and that the Court had power to pass such a decree. (*Spencer and Srinivasa Iyengar, J.J.*) PARAMASIVAN PILLAI v. SUBAYYA PILLAI. 43 I. C. 551.

—Transfer of whole of balance due under—Validity See NEG. INSTR. ACT, S. 56. 5 P. W. R. 1918.

PROVINCIAL INSOLVENCY ACT (III OF 1907)—Procedure under—Summary procedure for discovering properties of insolvent not available—Remedy of creditor if insolvent conceals his property—Suit by receiver—English and Indian Law—Bankruptcy Act, S. 27. See PROV. INS. ACT, SS. 18 AND 43. 22 C. W. N. 702

—Receiver—Position of—Power of Judge to order—Receiver to enquire and report on the title of the insolvent to disputed property—Receiver's Act purely administrative. See PROV. INS. ACT, S. 18 (3). 22 C. W. N. 700.

—Ss. 2, 43 (2) and 46—Subordinate Judge invested with jurisdiction declining to take action under S. 43 (2) against insolvent—Whether appeal lies to Dt. Judge against order under S. 46—Creditor if an aggrieved person.

The appellant was adjudicated an insolvent by a Subordinate Judge invested with jurisdiction under the proviso to S. 43 of the Prov. Ins.

## PROV. INSOLVENCY ACT, S. 6.

Act and thereafter certain creditors of the insolvent made applications before the Subordinate Judge to the effect that the insolvent had concealed certain properties and prayed examining witnesses on both sides, and that he should be punished under S. 43 (2). The Sub Judge after hearing the creditors and the insolvent rejected the applications. There upon some of the creditors applied to the Dt. Judge who, after examining witnesses on both sides sentenced the insolvent to three months rigorous imprisonment.

Held, per Teunon, J.—The orders made by the Sub Judge while he was as Sessions Judge of the case could be interfered with by the Dt. Court only under the provisions of S. 46 which in the matters therein dealt with subordinates all other Courts to the Dt. Court or under the powers conferred by the C. P. Code in regard to Civil suits as provided in S. 47.

That no appeal lay against the Sub Judge declining to take action against the insolvent under S. 43 (2) 40 Mad. 633 foll.

Per Newbould, J.—The word 'Court' in S. 43 of the Act does not mean the Court of original jurisdiction only and the Dt. Judge's order in this case was original and not an appellate order. 40 Mad. 630 dist. (*Teunon and Newbould J.J.*) DIGENDRA CHANDRA BASAK v. RAMANI MOHAN GOSWAMI, 22 C. W. N. 958 =48 I. C. 333.

—Ss. 5, 15 and 16—Application to be adjudicated insolvent—Rejected as premature—Order illegal. See (1917) DIG. COL. 1025; NET RAM v. BHAGIRATHI LAL. 40 All. 75=15 A. L. J. 885=43 I. C. 160.

—Ss. 6, 46 (4) and 47—Period of limitation fixed by Act for petitions and Appeals—General provisions of Limit Act—applicability—Limit Act, Ss. 5, 25 and 29—"Affect the period of limitation", meaning of—Necessity for legislative interference. See (1917) DIG. COL. 1026; LINGAYYA v. CHINNA NARAYANA. 41 Mad. 169=

33 M. L. J. 566=7 L. W. 443=44 I. C. 805 (F. B.)

—Ss. 8, 15 and 16—Petition for insolvency petitioner examined and evidence taken—Case, adjourned—Absence of petitioner adjourned date—Dismissal for want of prosecution, legality.

On a debtor's petition of insolvency presented under S. 6 (3) of the Prov. Ins. Act, the duty laid upon the Court after completing the necessary enquiries is to come to the decision on the various matters spoken of in S. 15 and either to dismiss the petition or to make an order of adjudication. There is no warrant in the Act for dismissing such a petition for want of prosecution if the debtor does not appear on a subsequent date when the Court on a previous date had examined

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the petitioner and taken some evidence. (*Banerjee and Piggott, JJ*) LACHMI NARAIN DUBE v. KISHUN LAL. 40 All 665= 16 A. L. J. 703=46 I. C. 733.

—S. 6 (3)—Order refusing adjudication on the ground petitioner was able to pay his own debts and was trying to cheat his creditors—Irregularity—Revision.

Where a person arrested in execution of a decree filed an application to be declared insolvent stating that his assets were only half of his liabilities but the Judge dismissed the application on the ground that he was able to pay his debts and that the application was made really to defraud his creditors.

Held, that as the application complied with clauses (a) and (b) of sub-section (3) of S. 6 of the Prov. Ins. Act the Lower Courts acted with material irregularity in dismissing it. (*Broadway, J.*) MEHR SINGH v. DAYANAND COLLEGE, LAHORE. 27 P. R. 1918. =49 P. W. R. 1918=44 I. C. 850.

—Ss. 15 and 16—Debtor's petition—Order of adjudication—Duty of court—Rejection of petition—Grounds of.

On a debtor's petition to be declared an insolvent, held that the court had no power to reject the petition on the ground that petitioner had transferred his houses to his son (*Shah Din, A. C. J.*) RAM RAKHA MAL v. NAZAR MAL. 52 P. R. 1918=46 I. C. 435.

—S. 16—Application for attachment of salary of insolvent—Rejection of application on ground that salary not sufficient for his maintenance—Legality—C. P. Code, S. 60.

When an appropriation of the income of an insolvent is made for the benefit of the creditors the Court usually acts on the principle of giving to the creditors the surplus after allowing sufficient portion thereof for his proper maintenance of the insolvent according to his position in life. The statute law of this country fixes this amount by S. 60 of the C. P. Code, read with S. 16, sub-section (2) of the Prov. Ins. Act. Consequently an order, rejecting a creditor's application praying for an attachment of half the salary of an insolvent on the mere ground that his pay is not large enough to allow half of it being attached, is illegal. 18 C. W. N. 1052 roll (*Rafiq, J.*) DEVI PRASAD v. J. A. H. LEWIS. 16 A. L. J. 107=43 I. C. 984.

—S. 16—Attachment after adjudication of insolvency—Validity of—No order vesting property in receiver—Effect of. See MONEY HAD AND RECEIVED. 35 M. L. J. 531.

—S. 16—Undischarged insolvent—Right to sue—Permission of Official Assignee—Effect—Right in respect of property acquired after adjudication but before intervention of Official Assignee.

## PROV. INSOLVENCY ACT, S. 16.

A person who is an undischarged insolvent at the date of suit has no right to sue, even if the Official Receiver's permission is given. Then property becomes vested in the Official Receiver. Under S. 16 of the Provincial Insolvency Act the insolvent is *ipso facto* divested of the same, and has no vested interest until restored after administration.

*Obiter*.—The right to sue in respect of property acquired after adjudication and before the intervention of the Official Receiver appears to be for the protection of third parties dealing with him *bona fide* and for value. (*Ayling and Phillips, JJ.*) SUBBARAYA CHETTIAR v. PAPATHI AMMAL. (1918) M. W. N. 289=7 L. W. 516=43 I. C. 239.

—S. 16 (2)—Insolvency petition by debtor—Order of Court directing debtor of insolvent to pay money into court without adjudication.

Where a debtor presents a petition for adjudication as an insolvent, the Court has no power without making an order for adjudication or appointing a receiver, to order a debtor of the insolvent to pay into Court any money which he owes to the insolvent. (*Stonnyon, A. J. C.*) GANPAT WANJARI v. AMRIT. 44 I. C. 537.

—Ss. 16 (2) AND (4)—Insolvency—Undischarged Bankrupt—Cause of action arising subsequent to adjudication—Right to sue in respect of. See INSOLVENCY.

22 C. W. N. 1018

—S. 16 (2)—Leave of court not obtained prior to institution—Bar—Leave after institution whether can be granted—Pending, meaning of—Insolvency termination of.

S. 16 (2) of Prov. Insolv. Act is a bar to a suit for which leave of the Insolvency Court has not been obtained prior to its institution. Leave cannot be given after institution of suit. An insolvency proceeding is not terminated when the insolvent has not appeared to claim his discharge and the record has been sent to the record room. A legal proceeding is pending as soon as commenced and until it is concluded *i.e.*, so long as the original court can make an order in the matters in issue or to be dealt with thereon. (*Pratt, J. C. and Trough, A. J. C.*) JIVANJI MAMOOJI v. GHULAM RUSSAN. 12 S. L. R. 20=47 I. C. 771.

—S. 16 (2)—Receiver—Suit in money claim against person adjudged insolvent—Receiver not a necessary party. See INSOLVENCY, RECEIVER. 46 I. C. 385.

—Ss. 16 (6) and 36—Transfer by person adjudged insolvent—Date of adjudication—Relation back to presentation of petition by creditor to adjudge transferred insolvent.

## PROV. INSOLVENCY ACT, S. 18.

A voluntary transfer by a person adjudged insolvent more than two years after the date of the transfer but on a petition presented by a creditor of the transferor within two months of such transfer, can be avoided by the receiver of the insolvent's estate under S. 36 of the Prov. Ins. Act. Having regard to S. 16 (6) of the Act the adjudication as insolvent referred to in S. 36 has to be treated as made on the date of the presentation of the petition in which the insolvency proceedings originated.

The provisions of the English and the Indian Law compared. (*Oldfield and Sadasiva Aiyar, JJ.*) SANKARANARAYANA AIYAR v. ALAGIRI AIYAR. 35 M. L. J. 296=

24 M. L. T. 149=(1918) M. W. N. 487=  
8 L. W. 281.

—S 18—Decree obtained by insolvent before bankruptcy—Attachment of decree-holder before insolvency—Whether decree-holder, can execute decree—Effect of—Vesting order. See (1917) DIG. COL. 1032. DAMBAR SINGH v. MUNAWAR ALI KHAN.

40 All. 86=15 A. L. J. 877=43 I. C. 129.

—Ss. 18 and 43—Procedure under—Summary procedure for discovering properties of insolvent—Remedy of creditor if insolvent conceals property—English and Indian Law—Bankruptcy Act, S. 27.

The Prov. Insol. Act contains no section corresponding to S. 27 of the Bankruptcy Act. An Insolvency Court has, therefore, no jurisdiction to hold summary proceedings for the purpose of summoning before it and examining persons in order to discover whether any person of the insolvent's property has been concealed by him by having vested it in a benamidar and thereby directing the benamidar to transfer to the Official Receiver the property so vested in him.

When a scheduled creditor in an insolvency proceeding has a *prima facie* case that a portion of the insolvent's property has been concealed by the insolvent by having vested it in a benamidar, his remedy is to apply to the Court to direct the official receiver to institute a suit against the benamidar to recover the property in question on condition that the creditor so applying shall put the Official Receiver in funds and properly indemnify him against the costs in the suit. (*Fletcher and N. R. Chatterjee, JJ.*) JOY CHANDEA DAS v. MAHOMED AMIR. 22 C. W. N. 702=

44 I. C. 143.

—Ss 18 and 47—Sale by receiver of stranger's property as that of insolvent's—Purchaser obstructed by owner from taking possession—Application by purchaser under O. 21, Br. 97 and 98 to Insolvency Court—Order of Insolvency Court for delivery—Validity.

Where property of a stranger was sold by the Official Receiver as belonging to the insolvent,

## PROV. INSOLVENCY ACT, S. 18.

and the purchaser being obstructed, in taking possession, applied under O. 21, Br. 97 and 98 of the C. P. Code and the Court passed an order for delivery.

Held, the order of the Insolvency Court was without jurisdiction and S. 18, cl. (3) and S. 47 of the Prov. Insolvency Act had no application to such a case and the rules of the C. P. Code relating to the sale of property in execution of a decree do not apply (*Bakewell and Krishnan, JJ.*) NADDIPATI PERAMMA v. GANDRAPU KRISHNAYYA.

24 M. L. T. 166=(1918) M. W. N. 479=  
8 L. W. 136=47 I. C. 308.

—S. 18 (3)—Property alleged to be held by stranger, benami for insolvent, if may be recovered without suit—Judge's power to order inquiry by receiver.

Where a creditor of an insolvent alleged that certain Govt. promissory notes were being held by the insolvent's brother benami for the insolvent and the insolvent's brother denied that the insolvent had any title to the Govt. promissory notes and alleged that they were his own property; and the Judge called for a report on the matter from the Receiver.

Held, that it was open to the Judge to direct the Receiver to enquire and report to him for his own information.

On receipt of such report, it was for the Judge to consider whether, upon the facts before him, he should direct the Receiver to bring a suit in order that the question of title may be decided, or whether the case is so clear (that is to say, the title is not really in dispute) that it can be dealt with in the insolvency without the necessity of a suit. If the question of title be seriously in dispute the Judge should direct the Receiver to bring a suit to have the question determined. (*Walmsley and Greaves, JJ.*) SATYA KUMAR MUKHERJEE v. THE MANAGER, BENARES BANK LTD.

22 C. W. N. 700=46 I. C. 335.

—Ss 18 (3) and 20—Transfer by insolvent alleged to be benami—Judge if may dispossess transferee without suit—Judge power of, to order receiver to report on bona fides of transfer—Direction to creditors to put receiver in funds

Where a transfer, by an adjudicated insolvent within 8 years of his insolvency was impeached by his creditors as *benami*, the Judge ordered the Receiver appointed to take over the insolvent's properties to enquire and report, and the Receiver after holding an enquiry of a judicial character submitted his report, which however the Judge did not accept but directed the enquiry to be reported in Court.

Held, that the duties of an ordinary Receiver under S. 20 of the Act are executive in their character and the Receiver is not a Judicial

## PROV. INSOLVENCY ACT, S. 20.

Officer and has no jurisdiction to make anything in the nature of a judicial enquiry.

When the *benami* character of the title is admitted or when the veil is transparent, and the insolvent is in substantial beneficial possession, the Court may order the delivery of the property to the Receiver. But where the alleged Benamidar is in possession claiming adversely to the insolvent, then any claim made by the Receiver or the creditor that the property is really the property of the insolvent can only be enforced by suit in the Regular Courts.

The Court may direct an administrative enquiry by the Receiver for the purpose of informing his mind and deciding what action should be taken, and if in the result he is of opinion that a suit should be brought, he should make the order on terms requiring the creditor at whose instance the suit is directed to put the Receiver in funds and indemnify him against the costs of the suit. (*Richardson and Wainsley, JJ.*) NILMONI CHOWDHURY v DURG CHARAN CHOWDHURY

22 C. W. N. 704=46 I. C. 377.

———S. 20—Receiver—Position of—Duties of receiver merely executive—Receiver not a judicial officer—Report on validity of transfer by insolvent, merely administrative. See PROV. INS. ACT, S. 18 (3). 22 C. W. N. 704= also 22 C. W. N. 700= also 22 C. W. N. 702.

———Ss. 20 and 47—Sale by Official Receiver of property alleged to be insolvents—Property in possession of third person—Obstruction—Dt. Judge's power to order delivery of possession after summary enquiry—Official Receiver—Status and powers of. See (1917) DIG. COL. 1084; GUNTAPALLI NARASIMAYYA v. VEEBARAGHAVALU.

41 Mad. 440=(1917) M. W. N. 857= 6 L. W. 694=42 I. C. 525.

———S. 20 (d)—Receiver—Power of, to continue suit instituted in forma pauperis

Where a person obtains leave to sue in forma pauperis in a suit commenced before his insolvency is entitled to continue the suit as the insolvent might have done. (*Richards, C. J. and Banerji, J.*) MAHOMED ZAKI v. THE MUNICIPAL BOARD OF MAINFURI.

16 A. L. J. 437=47 I. C. 577.

———S. 22—Application under, nature of. See (1916) DIG. COL. 1215; PITA RAM v. JHUGHAB SINGH.

39 All. 626=15 A. L. J. 661=43 I. C. 573.

———S. 22—Insolvency—Property taken by receiver as insolvent's—Objection by third person claiming title—Suit by third person maintainable disallowed.

Where in a suit a plff. does not complain of any act of the Receiver in insolvency, but

## PROV. INSOLVENCY ACT, S. 24.

complains that the court executing the decree held by a certain person against certain insolvents, disallowed her objection and decided that the property attached belonged to the insolvents and not to her, *held* that the suit is not barred by S. 22 of the Prov. Ins. Act. (*Richards, C. J. and Banerji, J.*) MOHNI v. BAIJ NATH 40 All. 582=16 A. L. J. 456= 46 I. C. 394.

———S. 22—Official Receiver—Contract of sale by—Jurisdiction of District Judge to stop completion of—C. P. C., O. 21, R. 90—Applicability to such a case.

O. 21, R. 90 of the C. P. Code has no application to a contract of sale entered into by a Receiver under the Prov. Ins. Act. The District Court can interfere with such a contract only under S. 22 of the Prov. Ins. Act on an application made within 21 days of the contract. The District Judge may in the exercise of his powers of supervision over the Receiver direct him not to complete the sale. (*Sadasiva Iyer and Bakewell, JJ.*) AVANASHI CHETTI v. MUTHUKARUPPA CHETTI.

23 M. L. T. 319=7 L. W. 406= (1918) M. W. N. 345=44 I. C. 885.

———S. 22—"Person aggrieved," meaning of—Application under—Limitation.

Where a Receiver in Insolvency at the instance of a creditor attaches and takes possession of property as the property of the insolvent, a third person claiming to be the 'owner,' of the property becomes 'aggrieved' within the meaning of S. 22 of the Prov. Ins. Act so that an application by him under that section should be made within 21 days from the date of the act of the Receiver in taking possession. (*Teunon and Newbould, JJ.*) CHARU CHANDRA BHATTACHARJEE v. HEM CHANDRA MOOKERJEE.

47 I. C. 62.

———S. 23—Attachment of property—Judgment-debtor subsequently adjudicated insolvent—Attachment inoperative—Private party, no locus standi to maintain appeal.

After an adjudication in an insolvency, an attachment of property though made before the adjudication, ceases to have any effect, and the property of the insolvent vests in the Receiver who is the person to maintain all proceedings.

Where no Receiver is actually appointed the Court is the Receiver under S. 23 of the Prov. Ins. Act. (*Richards and Banerjee, JJ.*) GOBNID DAS v. KARAN SINGH.

40 All. 197=16 A. L. J. 32= 43 I. C. 672.

———Ss. 24, 26, 36 and 52—Official receiver, framing of schedules by—Enquiry in, nature of—Order of receiver whether judicial and final creditor's name entered in schedule—Subsequent application by receiver to court to expunge name—Power of court.

## PROV. INSOLVENCY ACT, S. 26.

An Official Receiver under the Prov. Ins. Act in framing a schedule of creditors does not decide judicially or finally upon contested claims.

Where an Official Receiver passed an order upon the claim of a creditor of an insolvent to rank as a secured creditor under a mortgage which was disputed by another creditor, the action of the Receiver amounted only to an entry of the name of the creditor in the schedule framed under S. 24 of the Act. Subsequently the Receiver applied to the Court to expunge the name from schedule. *Held*:—The Court was not precluded from entertaining an application by the Receiver under Ss. 26 and 36 of the Act, to expunge the name of the creditor from the schedule. (*Oldfield and Bakewell, JJ.*) KHADIRSHAW MARIEAIR v. THE OFFICIAL RECEIVER, TINNEVELLY.

41 Mad. 30=  
45 I. C. 67.

—S. 26 (2)—Application under—Applicability of rule of limitation in S. 22. See PROV. INSOLVENCY ACT, S. 46 (4).

35 M. L. J. 531.

—Ss. 34, 35 and 47—Insolvency court—Jurisdiction—Injunction if and when can be granted—Injunction as regards persons not parties to insolvency proceedings—Validity—S. 47—Effect—Ss. 34 and 35—"Assets realised"—Meaning.

A instituted a suit against R in August 1916 and on the 25th September 1916, attached, in anticipation, of judgment, a certain sum of money in the hands of the District Board which was due to R. On the 12th April 1917, R filed an insolvency petition before the Dt. Judge. On the 2nd June 1917, A got his decree and on the 6th the executing Court issued a precept to the Dt. Board to pay to the decree-holder the amount in deposit to the Credit of R. On the 17th R. made an application to the Dt. Judge asking for an injunction directing the Dt. Board to stop payment. The injunction was issued.

(1) that the case was not affected by Ss. 34 and 35 of the Prov. Ins. Act as there had been no adjudication of insolvency and no receiver had been appointed.

(2) that from the 2nd June the amount in dispute became the decree-holder's money and the Dt. Board were merely trustees on his behalf. 16 I. C. 84 dist.

(3) that in this case the assets were realised within the meaning of S. 34 of the Prov. Ins. Act. (*Mullick and Thornhill, JJ.*) RAM SUNDER RAI v. RAM DHEYAN RAM.

3 Pat. L. J. 456=5 Pat. L. W. 280=  
(1918) Pat. 302=46 I. C. 224.

—S. 36—Adjudged insolvent—Transfer by person—Date of adjudication relation back to presentation of petition. See PROV. INSOL. ACT, S. 16 (6).

35 M. L. J. 296.

## PROV. INSOLVENCY ACT, S. 36.

—S. 36—Annulment of transfer—Notice to transferee essential—Notice to prove debt, insufficient.

When a question arises whether a transfer should or should not be annulled under S. 36 of the Prov. Ins. Act it is requisite that the transferee should have proper notice that proceedings are contemplated under that section and a proper opportunity to put his case before the Court.

The question of proof of a debt under the Prov. Ins. Act is different from the question of annulling a mortgage under section 36. (*Richardson and Benchcroft, JJ.*) JUGALPADA DUTT v. GANESH CHANDRA PAL.

44 I. C. 168.

—S. 36—Decision of Insolvency Court as to invalidity of transfer, when final.

Under the Prov. Ins. Act the Insolvency Court has no jurisdiction finally to decide claims to the insolvent's properties based on transfers made by the insolvent more than two years before his adjudication. (*Toumon and Newbould, JJ.*) AMINA KHATUN v. NAFAR CHANDRA PAL CHOWDHURY

45 I. C. 180.

—Ss. 36 and 37—Mortgage of insolvent's property—Bona fide transfer for valuable consideration.

The receiver of an insolvent's estate declared a mortgage by the insolvent void and fraudulent under Ss. 36 and 37 of the Prov. Ins. Act. The insolvent had absconded immediately after the execution and registration of the mortgage.

*Held*, that the mortgagee not being a previous creditor, S. 37 of the Prov. Ins. Act had no applicability to the case; and that under S. 36 of the Act the mortgagee was entitled to show that he was a bona fide incumbrancer for valuable consideration. (*Scott-Smith, J.*) GIRDHARI LAL v. SARAB KISHEN.

138 P. W. R. 1918=46 I. C. 667.

—S. 36—Transfer impugned by creditors—Onus of supporting transfer on alienee—Tests of a real transfer—Benami.

In a case arising under S. 36 of the Prov. Insolv. Act the burden of proving that the transaction impugned was carried out in good faith and for valuable consideration is on the transferee.

Antecedent debt might constitute a good consideration for a conveyance impugned under S. 36 of the Prov. Ins. Act.

With regard to the question whether a sale is a benami or a real transaction, the fact that the transactions relating to the property sold were carried out in the name of the transferee is not conclusive. Though the question of actual possession is in some cases a test and an important test, yet where the property transferred is a house and the transferor is the husband of the transferee, much importance

## PROV. INSOLVENCY ACT, S. 36.

can be attached to the fact of actual possession inasmuch as the husband might after the sale not unnaturally live in the house which he has transferred to his wife.

The question whether a transfer challenged under the provisions of S. 36 of the Prov. Ins. Act. was in good faith, involves as an important element the value for which the properties were sold.

An insolvent had transferred certain property to his wife in lieu of dower within two years before his adjudication. He continued in possession of the property along with his wife, but it was found that the dower debt was genuine and that the value of the property transferred was not incommensurate with the amount of the debt.

*Held* that the transaction could not be impugned under S. 36 of the Prov. Ins. Act. (*Richardson and Beachcroft, JJ.*) BASIRUDDIN THANADAR v. MOKIMA BIBI.

22 C. W. N. 709=44 I. C. 915.

—S. 36—Voluntary transfer—Transfer to wife within two years—Property available, for creditors.

A transfer by an insolvent of a portion of his property within two years prior to his insolvency, to his wife, not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, is *ipso facto* void as against the official receiver and the property comprised in that transfer is liable to be distributed amongst the general body of creditors (*Fletcher and Shamsul, Huda, JJ.*) BHUT NATH CHATTERJEA v. BIRAJ MOHINI DEBI.

28 C. L. J. 536=49 I. C. 87.

—S. 43 (2) — Offence under what amounts to — Failure to include right to equity of redemption when not an offence.

An insolvent who omits to include in his schedule of properties his right to the equity of redemption in certain properties mortgaged by him to others will not be held guilty of an offence under S. 43 if the court thought the omission was due to the insolvent's *bona fide* belief that he had to include only those properties which were in his actual physical possession. (*Chevis, J.*) WADBHA SINGH v. EMPEROR.

2 P. W. R. (Or.) 1918=44 I. C. 128=19 Cr. L. J. 272.

—Ss 43 (2), and 46—Subordinate invested with jurisdiction declining to take action under S. 43 (2) against insolvent. Appeal against order—Whether creditor if an aggrieved person within the meaning of the section. See PROV. INSOL. ACT, SS. 3, 43 (2) AND 46.

22 C. W. N. 953

—S. 43 (2) (b)—Fraudulent concealment of property—Nature of proceedings under—Framing of charge, if necessary.

## PROV. INSOLVENCY ACT, S. 46.

In a proceeding under S. 43 (2) of the Prov. Ins. Act it is not essential that there should be a definite charge, finding and a conviction as a foundation for a sentence under the said provisions. All that the law requires is that the principles underlying a criminal trial should be observed in essentials.

Where an insolvent who was being proceeded against under S. 43 (2) of the Prov. Ins. Act was informed of the nature of the proceedings, the offence with which he was charged and of its consequence.

*Held*, that the essentials of a criminal trial were complied with. (*Findlay, O. A. J. C.*) GANPATY v. CHIMNAJI.

45 I. C. 675=19 Cr. L. J. 627.

—S. 46—Appeal under—Limitation—Limitation Act. S. 5—Applicability to such appeal.

S. 5 of the Limitation Act applies to an appeal filed under S. 46 of the Provincial Insolvency Act. (*Scott Smith, J.*) WARYAM SINGH v. WADHAVA.

89 P. R. 1918=87 P. L. R. 1918=88 P. W. R. 1918=46 I. C. 588.

—S. 46—Decision of Insolvency Court on validity of transfer by insolvent—Not final except in cases provided by S. 36—Decision liable to be challenged in Civil Courts. See PROV. INS. ACT, S. 36.

45 I. C. 180.

—Ss. 46 and 47—Memorandum of objection—Right to file in appeal under Insolvency Act. See C. P. CODE, O. 41, R. 22.

36 M. L. J. 236.

—S. 46 (4)—Limitation—Mode of computation—General Clauses Act (X of 1896-7) Ss. 9 and 10—Date on which Act appealed against is done to be excluded—Last day for appealing being dies non should be excluded—Limitation—Prov. Insol. Act, S. 26, cl. (2)—Application under—Whether barred after 21 days.

S. 46, cl. (4) of the Prov. Insol. Act merely declares that 90 days shall be the period of limitation for appeals to the High Court without specifying the method of computing the period.

The principle of S. 9 of the General Clauses Act must be applied to appeals under the Prov. Insol. Act and the day on which the Act appealed against is done is to be excluded.

In appeals under the Prov. Insol. Act if the last day for preferring an appeal is *dies non* that day must be excluded under S. 10 of the General Clauses Act.

The 21 days rule of limitation in S. 22 of the Prov. Insol. Act does not apply to an application to the court to take action under S. 26 Cl. (2) (*Spencer and Krishna, JJ.*) CHAVADI

## PROV. SMALL CAUSES COURTS ACT.

RAMASAMIA PILLAI v. VENKATESWARA  
AIYAR. 42 Mad. 13=35 M. L.J. 531=  
48 I. C. 952

PROVINCIAL SMALL CAUSES COURTS  
ACT (IX OF 1887) Ss. 15 and 16—Portion of  
claim not cognisable by Small Cause Court  
—Suit maintainable in the ordinary Court  
See PROV. SM. C. C. ACT ART. 13.

41 Mad. 521

—S. 16—Small Cause suit—Not triable  
by Chief Court—C. P. Code. S. 15 and O. 87.  
See (1917) DIG. COL. 1046; WOR LEE LONE  
v. RAHMAM.

10 Bur. L. T. 166=9 L. B. R. 69=  
42 I. C. 839.

—Ss. 23 and 35—Small Cause suit—  
Transfer of, to Court of Munsif not having  
Small Cause powers—No appeal from decision  
of Munsif. See C. P. CODE, S. 34 (4).

16 A. L. J. 548.

—Ss. 23 and 25—Small Cause suit—  
Transfer to original side—Decree—Appeal  
from, if competent.

A suit for damages for misappropriation of a  
jack tree was instituted by a landlord against  
his tenant on the Small Cause side of a Mun-  
sif's Court. The Munsif transferred the suit  
to his ordinary jurisdiction, on the ground  
that it involved questions of custom and title  
to immoveable property, and after taking evi-  
dence under the ordinary procedure made a  
decree in favour of the plaintiff.

Held, that though the procedure which the  
Munsif followed in transferring the suit to  
his ordinary jurisdiction was not strictly in  
conformity with the language of S. 23 of the  
Prov. Small Cause Courts Act, yet his order  
was one under it, so that his decision was a  
decision by a Court having jurisdiction to  
determine questions of title and was open to  
appeal. (Teunon and Newbould, JJ.) ANHAY-  
ASWARI DEBI v. HATU SHIEKH.

45 I. C. 645.

—S. 25—'Case decided', meaning of—  
Grant of leave to withdraw without giving  
reasons—Revision—Interference under S. 10 of  
the Govt. of India Act.

Quare: Whether a suit which has been  
allowed to be withdrawn with liberty to sue  
afresh is a case "decided" within S. 25 of the  
Prov. Sm. C. C. Act. The High Court will  
interfere under S. 107 of the Govt. of India Act  
in a case where leave to withdraw has been  
given without adequate reason. (Hamier, C.  
J. and Sharfuddin, J.) LUCHI RAI v.  
RAGHUBIR DUBE.

2 Pat. L. J. 682=  
43 I. C. 455.

—S. 25—Decided, meaning of—Jurisdic-  
tion—Suit for compensation for breach of  
contract—Revision issue as to whether suit

## PROV. SMALL CAUSES COURTS ACT, ART. 1

property instituted and decided—Whether case  
decided.

A suit for compensation for breach of a  
contract was brought in the Court of Small  
Causes at Agra. The defendant pleaded (1) that  
the suit did not lie at Agra, the contract hav-  
ing been broken at Allahabad; (2) that there  
was no breach of contract on the part of  
the defendant. On the first issue as to  
jurisdiction the Court took evidence and held  
that the suit had been properly instituted at  
Agra. Upon an application in revision, held  
that no revision lay as the case had not been  
disposed of within the meaning of S. 25 of  
the Prov. Sm. C. C. Act. (A. Raoof, J.)  
MAKHAH LAL v. CHUNNI LAL.

16 A. L. J. 777=47 I. C. 610.

—S. 25 and ART. 41—Jurisdiction—  
Suit for contribution out of satisfaction of a  
joint debt.

A Mahomedhan died leaving two brothers, a  
sister and a daughter as his heirs, and also  
certain property. He also left debts due by him  
to one J. Each of the heirs was entitled,  
to shares in the property according to the  
Mahomedhan Law. The daughter having  
purchased the shares of the sister and of the  
brothers, her share was augmented to 8/10 and  
the other brother's share was 2/10 in the prop-  
erty. The daughter paid off the debts due to  
J., and then brought a suit in the Small Cause  
Court against the brother for contribution,  
the brother being liable for 2/10 of the debt  
proportionately to his share:—Held, that the  
suit was cognizable by the Small Cause Court  
and Art. 41 to the Small Cause Courts Act did  
not exempt it from the cognizance of the Court  
(Richards C.J. and Tudball, J.) MAHOMED ALI  
v. FAMIZ UNNISSA BIBI. 16 A. L. J. 787=  
47 I. C. 842.

—S. 25—Revision—Interference—  
Jurisdiction—Question of limitation.

The High Court exercising jurisdiction under  
S. 25 of Act IX of 1887 is not precluded from  
interfering with an erroneous decision on ques-  
tion of limitation. (Lindsay, J. C.) MADHO  
SINGH v. BADIL SINGH, 21 O. C. 139=  
46 I. C. 804.

—Sch. II Art. 1—Suit for recovery of  
profession tax illegally levied—Cognizable by  
Small Cause Court.

The Punjab Govt. imposed a profession tax  
in a notified area on a munshi who paid it  
under protest and brought a suit on the Small  
Cause side for recovery of the same: Held that  
the suit was not one concerning an act purport-  
ing to be done by any person by order of the  
Local Govt. and was not, therefore, excluded  
from the jurisdiction of a Court of Small  
Causes. (Scott Smith, J.) COMMITTEE OF THE  
NOTIFIED AREA, UNA v. CATAR BEHARI  
NABAIN. 74 P. L. R. 1918=74 P. W. R.  
1918=44 I. C. 910.

## PROV. SMALL CAUSES COURTS ACT, A. 7.

—**Art. 7**—Suit for apportionment of rent of immoveable property—Suit if of a Small Cause nature. See (1917) DIG. COL. 1048; VEMA RANGIAH CHETTY v. VAJRAVELU MUDALIAR. 41 Mad. 370=

33 M. L. J. 618=3 L. W. 80=40 I. C. 655=43 I. C. 78.

—**Art. 8**—*Mutharfa*—Ground rent or house rent—Suit for, if cognizable by Small Cause Court.

Whether rent is ground rent or house rent depends upon the contract between the lessor and the lessee. If a lessee takes a parcel of land and then builds a house upon it, the rent that he pays is a ground rent. If the lessor builds the house and then lets house and land together the rent is a house-rent.

A suit for the former is not cognizable by a Small Cause Court; a suit for the latter whether regarded as a suit for rent or for a tax is cognizable by a Small Cause Court. An objection to jurisdiction must be decided by the Court itself. (Roe, J.) EARNEST MYLNE v. NATHU SUNDI. 4 Pat. L. W. 218=

44 I. C. 387.

—**Art. 8**—*Rent*, meaning of—Fishery—Payment for—Suit to recover if cognizable by Small Cause Court.

There is no definition of rent in the Small Cause Courts Act. It is therefore, to be taken in the ordinary sense as including compensation paid to the owner of immoveable property for its use and occupation.

A suit for the recovery of the amount agreed to be paid to the plff. by the defts. in consideration of their being allowed to catch fish in the village river is, therefore not cognizable by a Small Cause Court. (Mitra, A. J. C.) SITARAM v. PETIA.

14 N. L. R. 35=43 I. C. 962.

—**Art. 13**—*Haggs Dues*—Suit for—*Wajib-ul arz*—Landlord and tenant—Jurisdiction of Small Cause Court.

A Suit instituted by a Zamindar in the Court of Small Causes to realise from his tenant, an oilman the price of the quantity of the oil of which the latter was bound to render to him under the provisions of the *wajib-ul arz* is not cognizable by such Court under Art. 13 of the Prov. Sm. C. C. Act. (A. Raoof, J.) BALDEVA v. PANNA LAL.

40 All. 663=16 A. L. J. 644=46 I. C. 563.

—**Art. 13**—*Hereditary archaka*—Suit to recover dues of his office—Small Cause Court—Jurisdiction—Portion of claim not cognizable by Small Cause Court—Effect.

A suit to recover an amount alleged to be due to a hereditary archaka as the dues of his office falls under Art. 18 of the schedule to the Prov. Small Cause Courts Act. If any portion of

## PROV. SMALL CAUSES COURTS ACT, A. 31.

the claim is not cognisable by a Small Cause Court the whole claim ought to be brought in the regular Court. (Sadasiva Iyer and Bakewell, JJ.) BHARADWAJA MUDALIAR v. ARUNACHELA GURUKKAL.

41 Mad. 528=23 M. L. T. 288=7 L. W. 524=45 I. C. 414.

—**Art. 15**—Suit for recovery of consideration for a mortgage—Not cognizable by a Small Cause Court.

A suit for the recovery of part of the consideration that remained unpaid for a usufructuary mortgage is a suit for specific performance; and such a suit is not cognizable by a Court of Small Causes. (Abdur Rahim and Bakewell, JJ.) RAJAGOPALA IYER v. SHEIK DAWOOD ROWTHER. 34 N. L. J. 342. =45 I. C. 161.

—**Art. 31**—*Rent of House paid to one person*—Suit by another to recover share—Money had and received—Jurisdiction question not raised in court below—Revision—High Court—Interference.

A nephew sued his uncle in the Court of Small Causes for his half share of the rent of a house which the latter had realised from the tenant of the house. It appeared that the entire rent used to be paid to the uncle. No question of jurisdiction was raised. The Court tried the suit and gave the plff. a decree for the amount claimed: *Held*, that the suit was one for money had and received and the Court of Small Causes had jurisdiction to try it. *Held*, also that the question as to the Court's jurisdiction not having been raised by either party and the Court having tried the case and it being doubtful whether the suit was not one for money had and received, the High Court refused to interfere in the exercise of its discretion as justice had been done. (Ryves, J.) SUKH LAL v. NANNOON PRASAD.

40 All. 666=16 A. L. J. 679=46 I. C. 647.

—**Art. 31**—Suit for definite sum alleging other transactions for which right to sue was reserved—Small Cause Court—Jurisdiction.

In a suit to recover a definite sum of money, alleged to have been paid by plff. at deft's. request, to remove an attachment plff. also alleged that there were other transactions between himself and deft. but that he reserved his right to sue for the same separately. The Munsif holding on the plaint allegations themselves, that the suit must be deemed to be one for accounts and that the Small Causes Court had no jurisdiction, returned the plaint for presentation to the proper Court. On Revision. *Held*, that the suit was not one for accounts.

The fact that plff. states that there were other transactions in respect of which he reserves his right to sue separately will not alter the nature of the suit.

## PROV. SMALL CAUSES COURTS ACT, A. 31.

## PUB. DEMANDS RECOVERY ACT, S. 10.

The mere fact that accounts have to be looked into in order to ascertain the correctness or otherwise of the amount claimed by the plff. would not render the suit one for accounts under Art. 31 of the Prov. Small Causes Courts Act. (*Kumaraswami Sastri, J.*) **UKKANDAN NAYAR v SANKARA VARMA RAJA.**

24 M. L. T. 453=(1918) M. W. N. 717=  
48 I. C. 94.

—Art. 31—*Suit for accounts—Nature of suit for recovery of ascertained sum being profits of property wrongfully received by deft.*

Where under an arrangement between the plff. and the deft. profits from immoveable property were received by the deft. and wrongfully retained by him. Held, that the plff's. suit for an ascertained sum so wrongfully retained was maintainable in a Court of Small Causes.

A suit for an ascertained sum is not excluded from the cognizance of a Court Small Causes under Art. 31 of the second schedule to the Prov. Small Cause Courts Act by reason of the deft. raising a plea of accounts. Every case in which accounts may have to be looked into is not a suit for accounts. The question whether a suit is cognizable by a court of Small Causes or not must be determined by reference to the plaint and not the written statement for otherwise the defts. in every case would be able to oust the jurisdiction of the Small Cause Court by a plea of accounts. (*Roe and Imam, J.J.*) **RAJIVA NARAYAN v. KIRAT NARAYAN SINGH.**

3 Pat. L. J. 423=  
(1918) Pat. 55=4 Pat. L. W. 70=  
43 I. C. 755

—Art. 31—*Suit for mesne profits from trespasser on a grove—Execution—Jurisdiction of Small Cause Court.*

A suit for the recovery of the mesne profits from which the plff. has been wrongfully dispossessed is not a suit of a small cause nature and the Small Cause Court cannot take cognizance of such a suit. (1891) A. W. N. 10 dist. 11 A. L. J. 388 foll. (*Rafiq, J.*) **DRIG PAL SINGH v. KUNJAL.**

40 All. 142=  
16 A. L. J. 55=44 I. C. 689.

—Art. 35 (1)—*Applicability—Damage to wall—Diversion of water course—Suit for Damages—Jurisdiction.*

A claim for damages caused to the wall of the plff. by the deft's. diversion of his own water-course is not a suit falling within the scope of Art. 35 cl. (i) of the Schedule to the Small Cause Courts Act. (*Lindsay, J. C.*) **JAGDAT v. JAGMOHAN.**

21 O. G. 138=  
46 I. C. 804.

—Art. 35 cl. (ii)—*Amending Act (VI of 1914)—Suit for value of paddy wrongfully and forcibly taken away, if lies in the Small Cause Court.*

A suit to recover the value of paddy alleged to have been wrongfully and forcibly

cut and taken away by the deft. from the possession of the plff. is not cognizable by a Court of Small Causes. (*Teunon and Newould, J.J.*) **LALU SARDAR v. OHEDALI MRIOHA.**

45 I. C. 15.

—Art 35 (2)—*Suit for compensation for removal of trees and crops—Jurisdiction—Question of jurisdiction not urged in defence—Decree if should be set aside on review—Objection if may be waived. See (1917) DIG. COL. 1051; RAM PRASAD PARAMANICK v. SRI CHARAN MANDAL.*

21 C. W. N. 1109=27 C. L. J. 594=  
41 I. C. 276.

—Art 38—*Jurisdiction—Suit to recover arrears of maintenance of child under agreement. See (1917) DIG. COL. 1051. MAUNG PO MYAING v. MA PAN MYAING.*

10 Bur. L. T. 239=38 I. C. 209.

—Art. 41—*Contribution, suit for, cognizable by Small Cause Court.*

A suit for contribution is not exempted from the cognizance of a Court of Small Causes. (*Stuart and Kankaiya Lal, A. J. C.*) **BHAGWATI PRASAD SINGH v. MAHOMED ABDUL HASAN KHAN.**

5 O. L. J. 109=45 I. C. 236.

—Art 41—*Suit for contribution out of satisfaction of a joint debt—Jurisdiction. See PROV. SMALL CAUSE COURTS ACT, S. 25.*

16 A. L. J. 787.

—Art 41—*Suit for Contribution—Maintenance decree against three persons—Liability of other two on default of the former—Suit to recover amount paid by the former—Jurisdiction of Small Cause Court.*

A decree for maintenance was passed in favour of a certain lady against three brothers and under some arrangement one of the three brothers alone was made liable for the payment of the amount, and neither the property on which the maintenance was charged nor the other two brothers were to be made liable unless the first man made default in complying with the decree. The first brother having paid the maintenance brought a suit against the other two brothers to recover a sum below Rs. 500 Held, that the suit was not under the peculiar circumstances, one for contribution and it was cognizable by a Court of Small Causes, hence no second appeal lay. (*Know, J.*) **ANT RAM v. MITHAN LAL.**

40 All. 135=16 A. L. J. 42=  
45 I. C. 569.

**PUBLIC DEMANDS RECOVERY ACT (I OF 1895) Ss. 10 and 31—Notice—Proper Notice—Service, onus.**

Service of notice under S. 10 of the Public Demands Recovery Act must be effected in strict conformity with that section.

## PUBLIC POLICY.

Where service of notice is effected by fixing it on the outer door of the judgment debtor's house, the onus is clearly upon the defendant relying on the notice to show that there was proper service as required by the law. 12 Cal. 603, 5 C.L.J. 55 foll. (*Chatterjea and Richardson, JJ.*) NEMAI CHARAN DE v. THE SECRETARY OF STATE FOR INDIA. 45 Cal. 496—46 I. C. 741.

**PUBLIC POLICY**—Custom—Succession—Rule opposed to public policy—Validity—Brothel-keeper succeeding to nauchis. See CUSTOM. 75 P. R. 1918.

**PUBLIC PROSECUTOR**—Appeal against acquittal—Superintendent and Remembrancer of legal affairs, if public prosecutor within the meaning of S. 417 Cr. P. Code. See CR. P. CODE, S. 417. 23 C. W. N. 96.

**PUBLIC ROAD**—Right to pass along a public street accompanied by music party by a masjid—Whether natural use—Suit for declaration. Maintainability. See SP. REL. ACT, S. 42. 20 Bom. L. R. 667.

**PUBLIC STREET**—Right of section of the public to go in procession—Threatened obstruction—Suit for injunction—Special damage—Proof of. See HIGHWAY. 44 I. C. 334.

**PUBLIC WAY**—Existence of, through private field—Immemorial user—Evidence of dedication. See HIGHWAY. 14 N. L. R. 788.

—Obstruction—Village—Special damage—If need be proved—Resjudicata. Suit for declaration of a public right of way—Dismissal of, as disclosing no cause of action—Reserving plff's right to bring fresh suit—Second suit whether barred.

Where in a suit by the plff. for the declaration of a public right of way, alleging special damage, it appeared that a previous suit for a similar declaration had been dismissed on the ground that the plaint did not disclose any cause of action (there being no allegation that plff. had suffered special damage) but in dismissing the suit the Court had expressly stated that the plff. was not debarred from beginning a fresh suit properly framed;

Held that the second suit was not barred by resjudicata.

Proof by the plff. that he and his servants had been compelled to go by a longer route and thereby incur additional expense was sufficient proof of special damage.

Infringement of a pathway in which plff. had got a right with other villagers by reason of a grant implied from long user does not require proof of special damage to give the plff. a cause of action. (*Fletcher and Huda, JJ.*) HARIHAR DAS v. CHANDRA KUMAR GOHA. 23 C. W. N. 81—49 I. C. 79.

## PUNJ. ALIENATION OF LAND ACT, S. 10.

**PUNJAB ALIENATION OF LAND ACT (XIII OF 1900) S. 10**—Condition intended to operate by way of conditional sale—Whether interest continues to be payable after expiry of term of mortgage and is a charge upon the property.

Deed of mortgage provided that the principal money together with interest at Rs. 29-0 per cent. per mensem was to be paid within one year and that on default the transaction was to be deemed to be a sale. It further stipulated that interest was to be payable from year to year, and in the event of non-payment every year the debtor would be liable to pay compound interest.

Held, that the stipulation as to conditional sale was null and void under S. 10 of the Alienation of Land Act, and it was immaterial whether the mortgagor was or was not member of an agricultural tribe that it was clear from the terms of the mortgage deed that the parties contemplated that interest should be payable after the expiry of the periods fixed for redemption and that there was no reason why the plaintiff (mortgagor) should get his property back without discharging his obligation.

Held, also, that under the terms of the deed including the clause prohibiting the borrower from transferring the mortgaged property until redemption, it was not intended that the interest should not constitute a charge upon the property, 19 All. 39 (P. C.) and 5 P. R. 1916, rel. (*Shadi Lal, J.*) ALLAH DIN v. FATEH DIN 31 P. R. 1918—27 P. L. R. 1918—54 P. W. R. 1918—45 I. C. 101.

—S. 10—Conditional sale—Suit for possession as owner after expiry of year of grace—Compromise embodying a new contract or mortgage with clause of conditional sale in default of payment of instalments—Decree in accordance with compromise—Validity of clause of conditional Sale

In 1906 the mortgagee under a mortgage of 1903, by way of conditional sale, took the usual foreclosure proceedings under Regulation XVII of 1896 and after expiry of the year of grace sued his mortgagor for possession of the mortgaged land as owner. The debt entrusted the regularity of the foreclosure proceedings and the parties eventually entered into a compromise under which the debt was to be entitled to redeem the mortgage on payment of Rs. 400 by annual instalments of Rs. 80 and in the event of default in payment of these consecutive instalments the land was to be considered sold to the plff. The Court was requested to pass a decree in terms of the compromise which was done. The instalments were, however, paid according to the compromise, and the mortgagee applied for possession of the land in execution of the decree and possession was delivered to him. A year later the mortgagor brought the present suit for redemption of the land on payment of Rs. 400.

**PUNJ. ALIENATION OF LAND ACT, § 16. PUNJAB LAND REVENUE ACT, § 45.**

*Held.* that the deed of compromise embodied a new contract of mortgage which superseded the original contract of 1898 (*Shah Din and Scott Smith, JJ.*) **DEBI SAHAI v. RAMJI LAL.** 56 P. R. 1918=46 I. C. 460.

—S. 16—Sale of mortgage debt apart from the security in execution of decree

The sale of a mortgage debt in execution of a decree would carry with it the security and as the provisions of S. 16 of the Punjab Alienation of Land Act prevent the sale of the mortgage's rights in the land, the sale of the debt was equally inadmissible 26 Bom. 805 ref. (*Rattigan, C. J. and Chevis, J.*) **LAL CHAND v. ALLAH DAD.** 16 P. R. 1918=16 P. L. R. 1918=37 P. W. R. 1918=44 I. C. 528.

**PUNJAB COURTS ACT (III OF 1914)—Defective certificate—Second Appeal—Maintainability.**

A second appeal cannot be admitted on the strength of a certificate which is not in accordance with the provisions of S. 41 (3) of the Punjab Courts Act, III of 1914. (*Shah Din, J.*) **YAD RANI v. MANBARI.**

4 P. W. R. 1918=44 I. C. 87.

—S. 41 (3)—Certificate—Necessity—Question of onus probandi on point of custom if and when question of law requiring certificate.

The question of onus probandi in a custom case is not a pure question of law, unconnected with custom; on the other hand, it is not under all circumstances a question relating to the validity or the existence of a custom, except in so far as, in proving or disproving the validity or the existence of a custom a party to a suit may be held to be entitled to an initial presumption in his favor on the strength of a generally accepted rule of custom as laid down by the judicial decisions or otherwise. (*Shah Din, C. J. and Le Rossignol, J.*) **MUSSUMMAT BHARI v. KHANAM.**

7 P. R. 1918=44 I. C. 162.

—S. 41 (3)—Certificate under—Application for—Rejection—Second appeal—Maintainability See. (1917) DIG. COL. 1056; **MUSSAMMAT CHINTI v. ISHAR.**

100 P. R. 1917=171 P. W. R. 1917=43 I. C. 299.

—Ss. 41 (3) and 44—Erroneous order of Dt. Judge refusing certificate—Revision.

When an application for a certificate under S. 41 (3) of the Punj. Courts Act is refused by the Dt. Judge on the erroneous ground that no question of custom arose, a revision to the Chief Court from the order of refusal lies on the ground that the Dt. Court has failed to exercise the jurisdiction vested in him. 86 P. L. R. 1915 foll. 6 P. R. 1917 dist. (*Scott Smith, J.*) **SARUP SINGH v. MT. JOWAHRI.** 19 P. R. 1918=44 I. C. 732.

—S. 44—Revision—Case decided—Meaning—Remand order—Revision against—Maintainability.

It is under very exceptional circumstances that the Chief Court will interfere in the exercise of its original jurisdiction with interlocutory orders.

The appellate court having reversed judgment of the Judge on a preliminary point is under no legal obligation to remand the case for re-direction. (*Shah Din, J.*) **GOPI MAL v. ISHAR DAS.** 58 P. L. R. 1918=134 P. W. R. 1918=46 I. C. 584.

—S. 44—Revision—Interference—Grounds—Erroneous decision of law—Limitation Act, Art. 88—Suit by Commission agent against principal—Limitation

A suit by a commission agent against his principal is governed by Art. 88 of the Lim. Act.

A case falls within the purview of S. 44 of the Punjab Courts Act when it can be shown that a suit has been erroneously held to be either within time or barred by limitation owing to the application to it of an article of the Limitation Act which cannot apply to the facts. 39 Cal. 473 ref.

The contention of the respondents had no force that the relationship in question terminated when the goods were sent by the plffs. to the defendants and a demand was made by plffs. for price of the goods supplied. 90 I. C. 731 ref. (*Rattigan, C. J.*) **THE FIRM OF SARB DIAL ISHAR DAS v. DEVI DITTA MAL.**

59 P. L. R. 1918=46 I. C. 541.

**PUNJAB GOVERNMENT NOTIFICATION NO. 92, DATED 23rd February 1883** applies to Special Magistrates of first class appointed under S. 14, Cr. P. Code. (*Rattigan, C. J. and Scott Smith, J.*) **HIRA LAL v. EMPEROR.**

7 P. R. (Cr.) 1918=43 P. L. R. 1918=4 P. W. R. (Cr.) 1918=44 I. C. 326=

19 Cr. L. J. 310.

**PUNJAB LAND REVENUE ACT (XVII OF 1877) S. 36 (1) (2)—Power of officer ordering mutation as to transfer or making over possession—Mutation effect on existing possession. See (1917) DIG. COL. 1058; **ANUP KUAR v. ABDUL AZIZ.** 4 P. W. R. (Rev.) 1917=43 I. C. 216=44 I. C. 117=19 Cr. L. J. 261.**

—Ss. 45, 48 and 153 (1)—Jurisdiction—Civil and Revenue Courts—Suit by Jagirdar for declaration of right to receive rent in kind.

The plff., Mahant of dharmasala, sued for a declaration that he as Jagirdar or assignee of land revenue, was entitled to receive the revenue in kind out of the landlord's share of the produce which had to be paid by the tenants to the proprietors, but which, as a matter of fact, had always been paid to him by the cultivators in the shape of one-fourth of produce.

## PUNJAB LAND REVENUE ACT, S. 117.

*Held*, that the suit involved the question as to whether in the village concerned the land revenue should be paid to the *Jagirdar* in cash or in kind, and this being a question, which under S. 48 of the Land Rev. Act, can be decided only by the Local Govt., no civil court can exercise jurisdiction in respect of it. Vide S. 158 (1) of the Act.

*Held*, also that the fact that the present suit was one for a declaration did not give the Civil Courts jurisdiction to entertain it, notwithstanding the provisions of S. 45 of the Act. (*Shah Din and Chevis, J.J.*) *JIWAN DAS v. PIRAN DITTA*. 110 P. R. 1918=48 I. C. 384.

—S. 117—*Partition proceedings before Revenue officer as to measure of parties' rights in the Shamilat—Decision in—Effect—Subsequent civil suit—Maintainability—Res judicata.*

*Held*, that the question raised in this suit, viz., whether the shamilat should be partitioned in accordance with ancestral shares or *hasab rasad khewat*, is not *res judicata* by reason of the decision on this point by the Revenue officer in partition proceedings the officer not having decided it in accordance with the procedure laid down in S. 117 of Punjab Land Rev. Act. (*Rattigan, C. J. and Le Rossignol, J.*) *FAIZ BAKSH v. NIAMAT KHAN*. 105 P. R. 1918=43 I. C. 365.

—S. 144—Co-sharer—Division of produce by Revenue Officer—Compulsory nature of proceeding—Punjab Ten. Act, Ss. 12, 17, 18 and 19. See (1917) DIG. COL. 1059, *MURAD BIBI v. KHADIM*. 9 P. R. (Rev.) 1917=43 I. C. 495.

—S. 158 (2)—*Suit for declaration of right to partition—Jurisdiction of Civil Court.*

A Civil Court has jurisdiction to entertain and decide a suit for a declaration that the plaintiff is entitled to have certain land partitioned. It would be a question solely for the Revenue Authorities to decide whether partition should or should not be allowed. (*Rattigan, C. J.*) *DIALI v. KALA SINGH*. 46 I. C. 11.

PUNJAB LAWS ACT, (IV of 1872), S. 5—Custom in derogation of law—Family custom—Peculiar mode of succession—No presumption in favour of. See CUSTOM, PROOF OF. 34 M. L. J. 48.

PUNJAB LIMITATION ACT (I of 1900) Art. 2—*Limitation Act, Art. 141—Applicability—Reversioner—Suit for recovery of ancestral land after death of alienor's widow—Limitation.*

A suit by reversioners for recovery of ancestral land after the death of the alienor's widows is not governed by the Punjab Limitation Act, but by Art. 141 of the Limitation

## PUNJAB MUNICIPAL ACT, S. 121.

Act, notwithstanding that the alienor died after the former Act came into force. (*Broadway, J.*) *GANESHA RAM v. PANJU*. 95 P. R. 1918=47 I. C. 977.

PUNJAB MUNICIPAL ACT (III OF 1911), Ss. 13 (a), 175 and 219—*Street—Obstruction, removal of—Latrine on a Street standing for 65 years—Conviction for keeping, if sustainable*

Unless it is proved by the Municipal Committee that the site on which the projection or obstruction stands is part of a "street" within the meaning of S. 13 (a) of the Act, S. 175 of the Act will not justify the Municipal Committee in calling upon a person to remove a latrine.

Where, therefore, the petitioner was convicted under S. 219 of the Punjab Municipal Act and ordered to demolish a latrine situated in a street close to the house and it appeared that the latrine had been in existence for 65 years, during which time the Municipal Committee treated it as private property

*Held*, that the conviction could not stand, (*Schh Din, J.*) *SHAHAB-UD-DIN v. EMPEROR*. 60 P. L. R. 1918= 51 P. W. R. (Cr.) 1818= 44 I. C. 46= 19 Cr. L. J. 254.

—Ss. 82 and 242—*Levy of profession tax on Di. munsif, if legal—Jurisdiction of Civil Court to determine legality of tax.*

The power conferred by a Special Act on a local authority to impose particular tax for a particular purpose in a special manner does not oust the jurisdiction of the Civil Courts to give relief against an illegality committed by that body under cover of statutory powers.

A Civil Court has jurisdiction to determine the question whether the imposition of a tax is illegal and *ultra vires* and to give relief if a tax has been levied from a person who is not liable to pay the same.

The Punjab Government imposed a profession tax in the Una Notified Area and assessed the plaintiff, Munsif, to pay the tax. In a suit for recovery of the tax so paid, *held*, that the Munsif could not be said to follow a profession in the popular sense of the term and the Government could not have intended that he should be liable to pay a profession tax. (*Scott Smith, J.*) *THE COMMITTEE OF NOTIFIED AREA, UNA v. BHATAR BEHARI NABAIN*. 74 P. L. R. 1918=74 P. W. R. 1918= 44 I. C. 910.

—S. 121—*Order under—Jurisdiction of Civil Court to question propriety of.*

A Civil Court has no jurisdiction to interfere with a Municipal Committee's order under S. 121 of the Punjab Municipal Act in the absence of a finding that an action of the Committee is wanton without any jurisdiction or is tainted with *mala fides*. (*Le Rossignol, J.*) *THE MUNICIPAL COMMITTEE ROHTAK v. KARIMUDDIN*. 135 P. W. R. 1918= 46 I. C. 871.

## PUNJAB MUNICIPAL ACT, S. 153.

—S. 153—*Brothel—Meaning—Complaint of offence under section—Summary trial without previous notice to accused—Legality.*

The house of a public prostitute does not become a brothel within the meaning of S. 153 of the Punjab Municipal Act merely because she carries on her trade of prostitution therein.

An order directing under S. 153 of the Punjab Municipal Act III of 1911 to discontinue the use of a certain house as brothel cannot be tried summarily under S. 260 of Cr. P. Code as no offence is committed when the complaint is filed. (*Shah Din, J.*) *MT. KANKU v. MATARA DAS.*

85 P. L. R. 1918=12 P. W. R. (Cr.) 19, 8=  
45 I. C. 113=19 Cr. L. J. 449.

PUNJAB PRE-EMPTION ACT (I OF 1913) S. 3 (3)—*Village—Meaning.*

Mahatpur in Tahsil Nakodar of the Jullundur Dist. is a village for the purposes of the Punjab Pre-emption Act. (*Shadi Lal, J.*) *RAM KISHEN v. GANGA RAM.*

65 P. W. R. 1918=46 I. C. 173.

—Ss. 19 and 20—*Notice to pre-emptor—Omission to specify property or its value—Pre-emptor's failure to reply—Suit for pre-emption.*

In a suit for pre-emption, it appeared that the vendor on 12-6-1913 applied to the Court stating that he proposed to sell certain property and that notices be issued to the persons entitled to pre-empt under S. 19 of Punjab Pre-emption Act. The Court issued the notices without mentioning the actual property to be sold or of the price at which it was to be sold. The notices were served on 16-6-1913 and the 1st of July was fixed for the appearance of the persons to whom they were issued. On that date plffs. appeared and protested that the notice has not given him all the requisite information. Thereupon the Court handed over to him for perusal the original application of the vendor and on the same day he filed certain pleas with regard to the price, etc. The hearing was adjourned to several dates and finally to the 12th of November. On that date the Court recorded an order to the effect that none of the parties were present, that the three months' limitation had expired and that the proceedings should, therefore, be filed. On the 19th June 1914 the vendor sold the land and the plff. instituted his suit in June 1915.

*Held*, that under the circumstances there was sufficient notice of the sale given to the plff. within the meaning and for the purposes of S. 19 of the Pre-emption Act but that on the other hand the plff. had failed to prove that he had complied with the provisions of S. 20; and that the right of pre-emption had been extinguished before the suit was instituted and the plff. was, therefore, not entitled to any

## PUNJAB REGULATION XVII OF 1806.

relief. (*Rattigan, C. J.*) *JESA RAM v. MEHR CHAND.*  
104 P. W. R. 1918=  
45 I. C. 935.

—S. 30—*Applicability—Sale including share in the Shamlat—Suit for pre-emption in respect of—Limitation. See LIMITATION ACT, ART. 10.*  
68 P. R. 1918.

PUNJAB REDEMPTION OF MORTGAGES ACT (II OF 1913)—*Proceeding under—Nature—Collector's order—Effect on rights of parties. S. 12—Suit under—Nature of—Mahomedan minor.—De facto guardian of—Mortgagee from—Suit to, under, S. 12 to establish rights under mortgage—Right to remain in possession even in case of invalidity of mortgage provided minor is under duty to restore benefits.*

Proceedings under Act. II 1913 are summary and in a disputed case neither party should be prejudiced by the Collector's Act when the matter is later on submitted to the decision of the Civil Courts. A suit under S. 12 of the Act is merely declaratory.

In a suit under S. 12 by a usufructuary mortgagee of the property of a Mahomedan minor from his *de facto* guardian for a declaration of the validity of his mortgage, *held* that as the minor must before he recovers possession restore the benefits he has derived under the mortgage would be entitled to remain in possession even in case of the invalidity of this mortgage provided the minor is under a duty to restore some benefits. (*Le Rossignol, J.*) *SARDAR v. KAURA RAM.*

36 P. R. 1918=7 P. W. R. 1918=  
44 I. C. 213.

—Ss. 12, 6 (a) and (b) and 11.—*Order directing redemption on payment of certain sum—Suit for declaration that there is further charge on land maintainability of—Sp. Rel. Act, S. 42 See. (1917) DIG. COL. 1063. BALWANT RAI v. CHERU.*

85 P. R. 1917=  
5 P. L. R. 1918=157 P. W. R. 1917=  
39 I. C. 451.

## PUNJAB REGULATION (XVII OF 1806)

Ss. 7 and 8—*Notice of foreclosure—Seal of Dt. Judge illegible—Ambiguity in Specification of the date of the mortgage.*

The mere fact that part of the seal of the Dt. Judge are not legible is not a fatal defect in a notice of foreclosure served under Ss. 7 and 8 of Regulation XVII of 1806.

Nor is an ambiguity in the specification of the mortgage deed fatal, where it is such that it would not have led to any misconception on the part of mortgagor.

Nor is an omission of words describing the property mortgaged, fatal where it could not have caused any misunderstanding. (*Scott Smith, J.*) *RAGHU NATH v. RUKNA.*

80 P. L. R. 1918=82 P. W. R. 1918=  
45 I. C. 179.

## PUNJAB REGULATION XVII OF 1936.

—S. 8—*Mortgage by conditional sale—Foreclosure notice—omission of reference to shamlat*

A foreclosure notice under Reg. XVII of 1903 is defective if it specifies only a part of the mortgaged land by omitting to refer to the shamlat and such a notice cannot be held to be valid as regards the part of the mortgaged land specified therein and invalid only as regards the other part. 109 P. R. 1901 foll (*Chavis and Leslie Jones, JJ.*) KARM ILAHI v. BINDHRA BAN.

17 P. R. 1918=

18 P. L. R. 1618=39 P. W. R. 1918=  
44 I. C. 540.

**PUNJAB TENANCY ACT (XIV OF 1887).**  
Ss. 4, 14, 50, 51, 77 (3) and (g)—Tenant—Suit for compensation brought more than a year after dispossession—Jurisdiction—Civil and Revenue Courts. See JURISDICTION, CIVIL AND REVENUE COURT 90 P. R. 1918.

—S. 4 (6) 'Landlord' meaning of—Sale of occupancy rights to mortgagee with possession of proprietary rights—Presumption.

The term 'landlord,' as defined in S. 4 (6) of the Punjab Tenancy Act includes a mortgagee in possession.

Where therefore, plff. sued for possession by pre-emption of certain land sold by an occupancy tenant to the mortgagees with possession of the proprietary rights.

Held, that the suit did not lie inasmuch as the sale must be held to have been made in favour of the landlord (*Martineau, J.*) NANAK v. BHAGWAN SINGH. 149 P. W. R. 1918=  
47 I. C. 3.

—S. 8—Occupancy right under—Decree for—Condition—Promise not to eject tenant—Effect.

A claim to occupancy right under S. 8 of the Punjab Tenancy Act may properly be decreed in a case in which there has been a promise never to eject the tenant. Such a promise may be express or be proved by facts indicative of the intentions of the parties.

Where in a case arising in the Dehra Tashil of the Kang District it was established that the applicant's family had been cultivating continuously for three generations and for fifty four years at a favourable cash rent, having originally provided its own implements for the cultivation, and having settled on the land some time after the commencement of the tenancy but not less than 26 years, before the date on which the question arose held that there was evidence of a promise not to eject applicant's family and that occupancy rights under S. 8 ought to be decreed to applicant. (*Maynard, F. C.*) KIRPA v. TIRHU.

5 P. R. (Rev.) 1918=4 P. W. R. (Rev.)  
1918=46 I. C. 571.

## PUNJAB TENANCY ACT, S. 59.

—S. 13—Commutation—Mortgagee with possession not entitled to commute rent into cash.

A mortgagee with possession though technically the landlord for the time being cannot under S. 13 of Tenancy Act, commute produce rent into cash rent so as to bind the mortgagor after the mortgage has been paid off (*Maynard, F. C.*) SANWAN SINGH v. BUTA. 3 P. R. (Rev.) 1918=46 I. C. 8.

—Ss 14 and 77 (3) (n) 'Landlord'—Meaning—Jurisdiction—Civil and Revenue Courts—Suit for mesne profits for period when plaintiff was not in possession though not entitled to it.

The land of which mesne profits is claimed was leased by H. D. Mahant on 21.11.10 to B. D. deft. for 4 years. On 16.8.13 the plff. and others got a decree for removal of H. D. Mahant and for cancellation of certain alienations effected by him. On 17.8.15 the present plff. sued B. S. and others for possession of lands of which they had obtained possession from H. D. Mahant. On 30.11.15 he obtained a decree, it being held that he was appointed Mahant on 18.8.12. Plff. instituted the present suit for mesne profits on 23.2.16 and subsequently obtained possession from B. S. under the decree of 30.11.15.

Held, following 82 P. R. 1894 and 1 P. R. (Rev.) 1893 that plff. though not in possession was since August 12 the landlord in respect of deft. B. S. within the meaning of S. 14 of the Punjab Tenancy Act and that the suit was consequently triable by the Revenue Court, under S. 77 (3) of that Act. 145 P. R. 1898 not foll (*Shah Din and Scott Smith, JJ.*) MAHANT RATTAN DAS v. BATTAN SINGH. 53 P. R. 1918=43 I. C. 437.

—S. 19—Appraisalment—Consent of landlord or tenant unnecessary—Refusal of tenant to accept appraisalment—Effect of—Failure of Revenue officer to confirm or vary appraisalment—Evidentiary value of appraisalment.

The consent of neither landlord nor tenant is necessary for the validity of appraisalment proceedings under Chap. II of the Punjab Tenancy Act.

The refusal by a tenant to accept the result of an appraisalment is not an adequate reason for declining to confirm it under S. 19 (2) of the Punjab Tenancy Act.

The failure by a Revenue Officer to give effect to the direction contained in S. 19 (2) of the Punjab Tenancy Act, which requires him to make an order either confirming or varying an appraisalment, does not affect the admissibility or the value of the evidence contained in the appraisalment record. (*Maynard F. C.*) MULK SHAH v. NATHU. 4 P. R. (Rev.) 1918=  
1 P. W. R. (Rev.) 1918=45 I. C. 980.

—S. 59—Occupancy rights—Succession to—Onus—Entry in settlement record—Presumption of correctness.

## PUNJAB TENANCY ACT, S. 59.

M son of K claimed certain occupancy land as heir of one S. In the summary Settlement of 1863 one K, was entered as an *asami* of certain land in the same village, but K's name did not appear in the Regular Settlement of 1860 and S, the uncle of the plff., was found to be in possession of certain land which he stated he had reclaimed from *baujar* within the previous 15 years and was granted occupancy rights therein. On the death of S, the land was mutated in the name of his widow, the landlord allowing her to remain in possession for her life-time :

*Held*, that inasmuch as it was not proved that the land entered in the name of S, was the same as that entered in the name of K, it could not be presumed to be the same :

And that a presumption of correctness attached to the entry in the Regular Settlement of 1860 and that S having at that time been declared as having personally acquired occupancy rights in the land in suit, K having no part or share in bringing the land under the cultivation, the plff's. suit was not maintainable. (*Scott Smith, J.*) HAYAT MUHAMMAD v. MAHMUD.

107 P. W. R. 1918=48 I. C. 938

—S. 59—Occupancy tenancy — Joint tenants—Record assigning definite shares—Right of survivorship.

The right of a landlord to claim the extinction of an occupancy right when there are joint tenants does not arise on the death of one of them, as they collectively constitute a single tenant and the right continues to exist in the survivor or survivors.

The fact that the occupancy tenants are recorded as having defined shares in the tenancy does not make any difference and does not affect the right of survivorship. (*Scott-Smith, J.*) UDMI v. MUNSHI.

95 P. W. R. 1918=45 I. C. 574.

—S. 77—Proviso—Suit for possession—Jurisdiction of Civil and Revenue Courts.

The plffs. in their plaint asserted that the defts. were mere trespassers and the defts. in their written statement contended that the plffs. had no rights whatsoever in the land but on examination by court the plffs. urged that the defts. were their tenants at will and the defts. pleaded that they were occupancy tenants of certain persons. The plaint was returned for presentation to the Revenue Court.

*Held*, that the order was right, for it is impossible in a case of this kind for the civil court to ignore the plea put forward by the defts. having regard to Act III of 1912 (*Raitigan, G. J.*) ATA ULLAH KHAN v. UMAR DIN. 68 P. L. R. 1918=171 P. W. R. 1918=47 I. C. 894.

—S. 77 (3) — Jurisdiction — Revenue Courts. *See*. 53 P. R. 1918.

## PUNJAB TENANCY ACT, S. 77 (3).

—S. 77 (3) (a)—Suit for possession by heirs of deceased occupancy tenant—Deft. in possession claiming under gift—Jurisdiction of Civil or revenue court.

Plff. sued for possession of certain land held by a deceased occupancy tenant. Deft. alleged that the land was gifted to him by S. during his life-time. The plaint stated that the deft. claimed to be in possession by virtue of a gift but that S. had no power to make a gift.

*Held*, that under the circumstances, the suit was cognizable by a Revenue Court under S. 77 (3) (a) of the Punjab Tenancy Act (*Broadway, J.*) AHMAD DIN v. KISHORE CHAND. 141 P. W. R. 1918=46 I. C. 882.

—S. 77 (3) (d)—Jurisdiction—Civil and Revenue courts—Suit by proprietors on death of occupancy—Tenant's widow to recover holding from collateral of deceased tenant.

On the death of one A. S. an occupancy tenant his widow succeeded and on her death mutation was effected in favour of one J. S. who entered into possession. The proprietors then brought the present suits on the allegation that the occupancy holding had been acquired by the father of J. S. and that the land had not been occupied by the common ancestor of A. S. and A. S.

*Held*, that the suits did not fall within S. 77 (3) (d) of the B. T. Act and were cognizable by a civil and not by a Revenue Court. 22 P. R. 1894 ref. 111 P. R. 1916 dist. (*Shah Din J.*) GRULAM v. JOWALA SINGH.

103 P. R. 1918=43 I. C. 363.

—Ss 77 (3) Proviso (1) and 100 (3)—Jurisdiction—Civil or Revenue Court—Suit for possession by occupancy tenant—Proof of occupancy rights—Duty of Court

Plff. sued for possession of certain lands as an occupancy tenant thereof under S. 8 of the Tenancy Act, alleging dispossession by the deft. landlord. Deft. had applied for a notice of ejectment to be served upon the plff. who was a tenant under him, and upon this plff. had filed a suit in the Revenue Court contesting his liability to ejectment on the ground that he was an occupancy tenant. This suit was dismissed on the ground that plff. had failed to establish occupancy rights.

*Held*, that although the suit was for possession of the land comprised in the tenancy, yet in order to succeed therein the plff. had to establish a claim to a right of occupancy and as that was a matter which could be determined only by a Revenue Court under S. 77 (3) (d) of the Punjab Tenancy Act, it was the duty of the Civil Court in which the suit was instituted to act under the proviso to S. 77 of the Tenancy Act and return the plaint for presentation to the Collector.

As the plff. had been prejudiced by the mistake as to the jurisdiction the Chief Court would not pass an order under S. 100 (9) of

**PURDANASHIN LADY.**

the Tenancy Act. (*Scott Smith, J.*) **PARMAN v. GHANTHU**. 147 P. W. R. 1918=46 I. C. 811.

**PURDANASHIN LADY**—*Deed Execution by purdanashin lady—Essentials for, validity of—Proof—Onus.*

Where a deed of endowment was executed by a purdanashin lady the evidence showed that the deed was explained to her and she thoroughly understood it and signed it after execution not under duress or undue influence but from her free and independent will. The disposition of the property was a most natural disposition and besides her strength of will and business capacity she had independent outside advice coming from members of her own family who were interested in the promotion of the objects she had at heart.

*Held*, that the deed of endowment was a valid and a legal disposition. (*Starck, A. J. C. and Kinnhaia Lal, A. J. C.*) **GANGA BUKSH SINGH v. GOKUL PRASHAD**. 44 I. C. 645.

—*Examination on commission—Previous appearance in criminal case—C. P. Code of 1908, S. 182. See 1917 DIG. COL. 1063: BALAKESHWARI DEBEE v. JNANANDA BANERJEE.* 45 Cal. 697=22 C. W. N. 197=26 C. L. J. 319=41 I. C. 610.

—*Deed—Execution by—Independent advice, proof of—Rule requiring, if absolute—Donee standing in a fiduciary character—Onus of proving knowledge on donee.*

*Sanderson, C. J.*—There is no absolute rule of law that a purdanashin lady must have independent advice. The possession of independent advice or the absence of it is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue or whether the grantor thoroughly comprehended and deliberately of her own free will carried out the transaction. If she did, the issue is solved, and the transaction is upheld, but if on a review of the facts which include the nature of the thing done and the training and habit of mind of the grantor as well on the proximate circumstances affecting the execution, the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result that the deed ought to stand.

*Mookerjee, J.*—Where the person seeking to hold a purdanashin lady to the terms of her deed is one who stood towards her in a fiduciary character or in some relation of personal confidence, the Court will act with great caution and will presume confidence put and influence exerted. Where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arms length, the Court will require the confidence and influence to be proved intrinsically.

**RAILWAYS ACT, S. 72.**

A Court will not be inclined to set aside a deed by a purdanashin lady, where the lady is proved to have been of business habits, to have been literate and to have possessed capacity to judge for herself. (*Sanderson, C. J. Woodroffe and Mookerjee, J.*) **M A R I A M BIBI v. SHAIKH MAHOMED IBRAHIM**. 28 C. L. J. 306 48 I. C. 561.

—*Will—Execution—Nature of proof—Question of special incapacity not raised in the first Court when allowed on appeal—Hindu Law—Widow—Acquisitions out of income of properties granted for maintenance—Nature of estate See (1917) DIG. COL. 1069 SRI VKRAMA DEO v. SRI SRI SRI VIKRAMA DEO.* 33. M. L. J. 665—(1918) M. W. N. 69=43 I. C. 679.

**RAILWAY**—Carriage of goods—Delivery of goods, when complete—Tests of. *See CARRIER.* 44 I. C. 401.

—*Carrier—Liability to re-weigh and give certificate of mortgage—Refuse to take delivery—Damage to goods after refusal—Liability for. See CARRIER.* 22 C. W. N. 902=45 I. C. 933

**RAILWAYS ACT (IX OF 1890) Ss. 72 (2) and 76—Risk-note Form B—Consignee of goods covered by this risk-note can make railway administration liable for the loss thereof—Proof of negligence—Onus—Contract Act Ss. 151, 152 and 161.**

Where goods were consigned to a Railway Company for carriage at a reduced rate of freight and the senders executed a Risk Note in form "B" and several bags forming part of the consignment were missing and could not be delivered to the consignee.

*Held*, that in a suit for compensation for the missing bags the Deft. Railway Company would not be liable if the plff. failed to prove that the loss was due to the wilful neglect of the Railway Administration or to theft by, or to the wilful neglect of, its servants. 16 C. W. N. 766 foll.

*Held*, also that such a case would be guided by the terms of the special contract embodied in the Risk Note Form "B" and not by Ss. 151, 152 and 161 of the Contract Act or the other provisions of the Indian Railways Act. (*Richardson and Beachcroft, J.*) **THE EAST INDIAN RAILWAY CO. LTD v. KANAK BEHARI HALDAR**. 22 C. W. N. 622. =41 I. C. 691.

—*S 75—Damages Negligent misdelivery of goods—Liability of Ry Co., extent of value—Loss meaning of.*

The term 'value of the articles' in S. 75 of the Railways Act means intrinsic or market value, the price for which they would reasonably sell at the time in the market as well as

## RAILWAYS ACT, S. 75.

the value in the market, independent of any circumstances peculiar to the plaintiff.

The loss for which a Railway Company is protected from liability by S. 75 of the Railways Act must be loss to the Railway Company itself and it must be loss which occurs while the goods are in the custody of the Company in their capacity as carriers and cannot apply to a loss to the owner. Negligent misdelivery of goods to a person other than the owner is not such a loss as is contemplated by S. 75 of the Railways Act.

Plff. delivered 24 account books to the deft. Railway Company for carriage to Nagpur where they arrived safely but were negligently delivered to some person other than the consignee. The intrinsic value of the books was below Rs. 100 but the plff. sued the deft. Company for Rs. 25,000 for the loss of the books.

*Held*, that the defts' liability was not saved by S. 75 of the Railways Act, inasmuch as (a) the intrinsic value of the books was below Rs. 100, and (b) the loss occurred while the books were in the custody of the deft. Company as carriers, but after their arrival at their destination. (*Rajji, J.*) RAMCHANDRA JAGANNATH v. G. I. P. RAILWAY CO.

20 Bom. L. R. 591=44 I. C. 401.

[This was subject to an appeal before Scott C. J. and Macleod J. who reversed the same. See 21 Bom. L. R. 6.]

—Ss. 76 and 72 (2)—Loss of goods covered by Risk note B—Liability of Railway Co. to consignee—Proof of wilful negligence or theft by railway—Onus on consignee. See RAILWAYS ACT, SS. 72 (2) AND 76.

22 C. W. N. 622.

—S. 77—Railway—Misdelivery suit for damages—Notice of claim for compensation essential—Delivery of goods by Railway Company without getting back the Railway receipts—Negligence—Transfer of receipts by holder for value—Liability of Railway Company.

Certain goods were consigned by G to his own order to a particular station of the deft. Railway Co. G had pledged the railway receipts to the Bank of Madras but it was intended that, S should pay the Bank, and get the Railway receipts assigned to him and then take delivery of the goods. S managed to get possession of the goods from the Railway Co. without production of the railway receipts but paid the Bank two or three days after and obtained the Railway receipts. Instead of returning the railway receipts to the Railway Co., S obtained advances from the plff. against the railway receipts which were taken to represent that the goods were still in the course of transit. In a suit by the plff. as endorsee of the railway receipts against the deft. Railway Co., for damages for misdelivery.

## RAILWAYS ACT, S. 120.

*Held*, dismissing the suit, that it was barred by limitation because the notice prescribed by S. 77 of the Railways Act had not been given to the deft. within 6 months for the delivery of the goods by the Railway Co. to S. who on payment to the Bank was the person lawfully entitled to them; that the action of the Railway Co. in delivering the goods to S. without getting back the railway receipts did not constitute any breach of the duty which they owed to the public at large or to the mercantile community in particular; and that even if the Railway Co., were under such a duty, their omission was not the proximate cause of the fraud practised by S. on the plff. and the consequent loss sustained by him. (*Wallis, C. J. and Spencer, J.*) THE MADRAS AND SOUTHERN MAHARATTA RAILWAY CO., LTD. v. HARIDASS BANMALI DAS 41 Mad. 871=38 M. L. J. 35=24 M. L. T. 38=8 L. W. 340=49 I. C. 69.

—S. 80—Railway Company—Suit for loss for destruction to goods entrusted to—Onus of proof—Risk note—Effect of.

In a suit against a Railway Company for compensation for the loss, destruction etc., of goods entrusted to them for transit, the plffs. ordinarily need prove only the loss. The Railway Company may then either show that the loss occurred in circumstances which exempted a bailee from responsibility for the loss, or they may rely upon a special contract which exempt them from liability.

When a risk note which in a special contract exempts the Railway Company from all liability except in certain specified cases, then the plffs. can succeed only if they establish that their case comes within those exceptions.

Under S. 80 of the Railways Act no suit will lie against a Railway Company to whom the goods were not entrusted unless it is shown that the loss occurred while the goods were in their possession. In no case can a decree be passed against both the Companies. (*Mitra, A. J. C.*) AGENT G. I. P. RAILWAY CO. v. KARAYLAL. 14 N. L. R. 122=43 I. C. 294.

—Ss. 108, 121 and 128—Assault by servant of railway company on a passenger who pulled communication chain and stopped the train—Arrest of passenger—Acts unauthorised—Tort—Railway Company not liable. See TORT. 20 Bom. L. R. 126.

—S. 120—Scope of—Person, meaning of—Railway official if punishable, or offence under section.

The word 'person' in S. 120 of the Railways Act includes Railway officials and the section applies to acts mentioned therein, even if they are committed by Railway servants. (*Abdur Rahim and Nopier, JJ.*) CUFFLEY v. MOHAMMAD IBRAHIM SAHIB. 44 I. C. 329. =19 Cr. L. J. 213.

**RAILWAYS ACT, S. 122.**

—S. 122—*Unlawful entry on Railway and refusal to leave—Essence of offence.*

Unlawful entry constitutes the basis of the offence under both the clauses of S. 122 of the Railways Act. If the entry was lawful, refusal to leave on being desired to do so would not make the original entry unlawful, nor would it make a person guilty under cl. (2) which is but an aggravated form of the offence under clause (1) (*Chitty and Smither, JJ.*) KUMUD KANTA CHAKRABARTY v. EMPEROR. 22 C. W. N. 575.

47 I. C. 74=19 Cr. L. J. 878.

**RAILWAY COMPANY—Loss of goods carried under Risk Note B—Suit for damages—Plaint not setting up case of loss by wilful negligence—Company pleading non-liability because of loss not being due to its wilful negligence—No evidence for plaintiff in support of case of wilful negligence—Finding as to wilful negligence on Company's evidence alone—Validity—Interference in Second Appeal—Practice.**

In a suit for recovery of damages from a Railway Company for loss of goods carried by it under Risk Note B. the plaint simply stated that the Company undertook to carry goods and failed to deliver them. In its written statement, the company pleaded that it was not liable because it was protected by a risk note and (2) the goods had been lost owing to a running train robbery. No evidence was adduced by plaintiff to show that the goods were lost by the wilful negligence of the Company. The Company produced evidence to show that they were not lost by its wilful negligence. On the evidence adduced by the Company itself and on that evidence alone, the Courts below came to the conclusion that the goods were lost by the wilful negligence of the Company. In second appeal, it was contended for the company that the Courts below ought not to have gone into the question of wilful negligence because it was not set up by plaintiff in his plaint and he did not adduce any evidence in support of such a case. *Held*, that in the circumstances of the case, the Courts below acted properly in going into the question and that there being evidence, though only of the defendant to support the finding of the Courts below their finding would not be interfered with in second appeal. (*Roe and Imam, JJ.*) EAST INDIA RAILWAY CO. v. JAGO RAM.

(1918) Pat. 178=4 Pat. L. W. 369=  
45 I. C. 197.

**RAILWAY RECEIPTS—Delivery of goods by Railway Co., without getting back receipts—Negligence transfer of receipts by holder for value—Liability of Railway Co. See RAILWAYS ACT, S. 77**

35 M. L. J. 35=  
24 M. L. T. 38.

**RATEABLE DISTRIBUTION—Decree against same judgment debtor by two courts of differ-**

**RECEIVER.**

ent grades—Sale by inferior court—Distribution—Procedure. See C. P. CODE, S. 78.

27 C. L. J. 145.

**RATING — Tax — Assessment of—Principles which should guide Courts in. See TAX.**

20 Bom. L. R. 639.

**RECEIVER—Appointed by Court, prosecution without sanction of Court, See C. P. CODE, S. 195.**

22 C. W. N. 910.

—Appointment—Grounds—Insolvency of administrator if a good ground. See C. P. C. Or. 40 R. 1.

11 Bur. L. T. 127.

—Appointment of Receiver to do all things necessary for the preservation of the assets of the firm—Whether receiver has authority to make an acknowledgment. See LIM. ACT, S. 19, EXPL. II AND S. 21.

35 M. L. J. 571.

—Execution of mortgage decree—Appointment of receiver, in the absence of provision in the final decree—Power of Court. See EXECUTION.

43 I. C. 22.

—Leave to sue—Application for—Not to be refused, except for cogent reasons—No statutory provision for leave to sue being given—Inherent power. See C. P. CODE, S. 115.

(1918) Pat. 337=47 I. C. 719.

—Mortgage decree—Execution—No power to appoint receiver in the absence of provision in final decree. See C. P. CODE, O. 40 R. 1.

43 I. C. 22.

—Mortgage suit—Floating charge—Suit to enforce—Appointment of receiver without taking evidence—Propriety of.

The debt, mortgaged to the plff. by a document in the English form certain premises, and the good-will and the stock in-trade in the business carried on therein were pledged by way of a floating charge to secure the money that would become due from the mortgagor to the mortgagee. The mortgage contained a proviso that at no time during the continuance of the security would the mortgagor permit the stock in-trade to fall below a certain value. Default having been made in the payment of the interest, the floating charge matured, and the mortgagee instituted a suit to enforce the floating charge and applied to the Court for the appointment of a Receiver in order to preserve the stock in-trade and to prevent the assets including all the actionable claims relating to the business from being lost to the mortgagee. The Court, without taking any evidence, appointed a Receiver after offering to allow the mortgagor to remain in possession on giving proper security. *Held*, that the appointment was valid and proper. (*Fletcher and Smither JJ.*) HARDWARIMULL DIBICHAND v. LACHMANDAS PURAKOHAND, 46 I. C. 399.

## RECEIVER.

----- Mortgage Suit — Simple mortgage — Appointment of receiver incompetent. *See* C. P. CODE, O. 40, R. 1. 43 I. C. 533.

----- Possession of — Nature of whether he can set up adverse title — *Res judicata* — First suit for partition — Second Suit for possession of certain items if barred.

The possession of the Receiver although in a sense the possession of the Court is also the possession of all the parties to the suit according to their title. During the continuance of the Receivership it is incompetent for the receiver to set up a title in himself adverse to that of the parties. 12 A. C. 230, 246 foll. Even if the receiver is discharged he would still hold the property on behalf of the rightful owner. Distinction between possession and discontinuance of possession pointed out.

When there was a first suit for partition on plaintiff's general title or on the basis of an arbitration and a second suit was brought to recover specific items on the basis of a partition already effected. *Held*, there was no *res judicata* (*Wallis, C. J. and Spencer, J.*) KUPPU-SWAMY CHETTI v. KUSALA RAMIAH.

(1913) M. W. N. 683 = 24 M. L. T. 424  
= 8 L. W. 551 = 49 I. C. 89.

**RECORD OF RIGHTS** — Entry in — Meaning of entry "darmaani haqdar ke taraff se adae ke lak lagau" — Presumption as to survey entry — Judgment based merely on — Validity.

The entry in the record-of-rights "darmaani haqdar ke taraff se adae ke lak lagau" refers to the actual rental which is paid by the intermediate tenure-holder, and not what might be payable upon assessment. An entry in the record-of-rights merely raises a presumption as to its correctness, and a Court must show by its judgment that it had considered evidence in the record and then come to a distinct finding whether the evidence had or had not rebutted that presumption. (*Imam, J.*) DURGA PRASAD v. RAJA HARIBH PRASAD. 4 Pat. L. W. 448 = 45 I. C. 916.

----- Entry in — Presumption as to correctness of, even in the absence of statutory sanction — Berar.

Though the Revenue record in Berar is not supported by the statutory presumption like the Record-of-Rights in the Central Provinces, an entry in the Record-of-Rights does raise a presumption of the truth of the facts therein stated. The presumption arising from possession of ownership, is weakened considerably if the person in possession fails to explain an adverse entry and is unable to state the origin of the possession by virtue of which he claims an adverse title to the recorded holder. (*Starkyan, A. J. C.*) RAGHOBA v. PALHOBA.

45 I. C. 217.

## RECORD OF RIGHTS.

----- Entry in — Presumption of correctness — Bengal Estates Partition Act. *See* (1917) DIG. COL. 104; BALDEO SAHAG v. BRAJNANDAN SAHAY. 3 Pat. L. W. 266 = (1918) Pat. 16 = 43 I. C. 359.

----- Entry in — Presumption of correctness of — Rebuttal of — Second appeal — Finding of fact.

In the record-of-rights the debts were stated to be settled raiyats with liability to have their rents assessed. In a suit by the landlord for rent on declaration of title of the first Court found that the suit was barred by limitation and adverse possession from an assertion of the debt's right during the publication of the record of rights. The Lower Appellate Court reversed this finding and held that the presumption as to the correctness of the record was not rebutted:

*Held*, that the Lower Appellate Court was entitled on the question of fact to hold that the mere fact that this adverse claim had been made, was not sufficient to show that the finally published record was wrong and this finding was not liable to be challenged in 2nd appeal. (*Fletcher and Richardson, J.J.*) GOUR CHANDRA CHUCKERBUTTY v. BIBENDRA KISHORE MANIKYA. 22 C. W. N. 449.  
= 45 I. C. 65.

----- Entry in — Protected gaontia — Entry of youngest son of last gaontia in record of rights — Entry, proof only of possession. *See* C. P. LAND REV. ACT, SS. 65 (a), 132 AND 152 (a). 3 Pat. L. J. 229.

----- Entry in — Suit for correction of, barred by limitation — Suit for other relief impeaching correctness of — Record of rights maintainability of.

A claim is not necessarily barred merely by reason of the fact that the Record-of-rights contains entries which, if produced in evidence and unrebutted, would be fatal to the relief claimed.

The fact that a claim for a declaration that a certain entry in the Record-of-rights is wrong is barred by limitation, would not prevent the Court from determining that the survey entry is wrong provided it is essential for the main or consequential relief claimed by the plaintiff. (*Müller, G. J. and Jwala Prasad, J.*) UTTIM SAHU v. ANJANI. 45 I. C. 229.

----- Suit for alteration in second of two records-of-rights — Maintainability — Limitation — Limitation Act Art. 120 — Bengal Tenancy Act (VIII of 1886) — Ss. 106, 111 A — Effect.

Where there are two consecutive finally published Record-of-rights it is competent to a party aggrieved by the second Record-of-rights to ask for a declaration in respect of the second record-of-rights without displacing any prejudicial entries in the first record-of-rights.

## RECOUPMENT.

A person who has acquired a title by adverse possession is not bound to sue for a declaration that he has required such title.

In the record-of-rights finally published in 1889, the debts. were shown as being in possession of land some of which the plff. had purchased from the lakherajdar and to some of which he had acquired prescriptive title which was perfected in 1897. The plff. however remained in possession but did not sue for a declaration of his title. In the record-of-rights finally published in 1906 the debts., were again shown as being in possession of the land. On the 11th January 1907 the plff. instituted the present suit for a declaration that the entry in the record of rights of 1906 was incorrect. It was pleaded that the suit, so far as it concerned the land purchased from the lakherajdar, not having been brought within six years of the publication of the record-of-rights of 1889, and so far as it concerned the remainder of the land, not having been brought within six years of 1897, was barred by limitation. *Held*, that the suit was within time. (*Miller, C.J. and Mullick, J.*) SHIEKH LATAFAT HUSAIN v. KUMAR KALIKANATH SINGH. 3 Pat. L. J. 361=4 Pat. L. W. 303=(1918) Pat 225=45 I. C. 432.

**RECOUPMENT**—Principle of. See CALCUTTA IMPROVEMENTS ACT, Ss. 41 (a), 42 (a), AND 78. 27 C. L. J. 1.

**REFORMATORY SCHOOLS ACT (VIII of 1897)**—Applicability of, to the Punjab—Cr. P. Code S. 399 repeal of Youthful offender under S. 804 I. P. C. if comes within the Act.

The Reformatory Schools Act, 1897, having been extended to the Punjab, S. 399 Cr. P. Code stands repealed youthful convict under S. 804 I. P. C. is not liable to be dealt with under the Reformatory Schools Act. (*Le Rossignol, J.*) EMPEROR v. NUR MAHOMED. 17 P. R. (Cr.) 1918=91 P. L. R. 1918 25 P. W. R. (Cr.) 1918=47 I. C. 433=19 Cr. L. T. 917.

**REGISTRATION ACT, (XX OF 1866)**, Ss. 2 (7) and 17 (1) (d)—Agreement to lease and mortgage — Combination of -- Registration, unnecessary. See SP. REL. ACT, S. 21 (a). 35 M. L. J. 489.

—Ss. 17, 41 and 42—Compromise decree—Registration if necessary.

Even under the Registration Act of 1866 a compromise decree though unregistered was effective to confer rights to property. (*Ayling and Seshagiri Iyer, JJ.*) RAYARAPPA NAMBIAR v. KOYOTAN CHABLE VEETIL. 35 M. L. J. 81=24 M. L. T. 28=8 L. W. 154=45 I. C. 489.

**REGISTRATION ACT (XVI of 1908) S. 17 (1)**—Compromise affecting land—Recital of, in

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petition to the court—Registration unnecessary. See C. P. CODE, O. 23, RB. 1 AND 3. 46 I. C. 913.

—S. 17 (1) (b)—Agency to transfer immoveable property of more than Rs. 100 in value—Registration unnecessary.

There is nothing in the T. P. Act or in the Registration Act to show that an agent to transfer an interest in immoveable property worth more than Rs. 100 in value must be empowered by a registered document. (*Parlett and Ormond, JJ.*) MA MO v. MAHOMED BACKER HAMADANEE. 43 I. C. 536.

—S. 17 (1) (b)—Equitable mortgage—Letter from mortgagor to equitable mortgagee showing object of mortgage, if requires registration.

A letter addressed by the mortgagor of an equitable mortgage to the mortgagee, showing for what purpose he had deposited the title-deeds, is not a document requiring registration under the provisions of the Registration Act as a mortgage. (*Fletcher and Huda, JJ.*) HARIPADA SADUKHAN v. ANATH NATH DEY. 22 C. W. N. 758=44 I. C. 211.

—Ss. 17 (1) (b) and 49—Partition—Map and chitta showing allotments on partition if require registration.

A map and a chitta put in to prove that that land in dispute was allotted in a partition to a certain person, cannot be said to be instruments falling within the purview of S. 17 of the Registration Act and thus requiring registration. (*Chitty and Walmsley, JJ.*) BRINDABAN CHANDRA DE v. KRISHNA MOHAN DE. 47 I. C. 159.

—S. 17 (1) (b)—Release—Agreement to forego right to sue for a declaration that a document executed by a Hindu widow is not binding on the reversioner—Document not compulsorily registrable.

Certain reversioners executed an agreement whereby they agreed to forego their right to sue for a declaration that a deed of gift executed by a widow in favour of certain persons was not binding after her death: *Held*, that the document did not convey any right, title or interest nor did it purport or operate to extinguish any right etc., and therefore was not compulsorily registrable within the meaning of S. 17 of the Registration Act. (*Tudbal and Rajiq, JJ.*) MUSSAMMAT BHANA v. GUMAN SINGH. 40 All. 384=16 A. L. J. 191=44 I. C. 629.

—S. 17 (1) (b) (2) and (xi)—Relinquishment of moneys due under a mortgage—Registration necessary for—Acknowledgment—Receipt for payment.

An agreement in writing by a mortgagee whereby he relinquishes a sum of more than Rs. 100 out of the mortgage money, requires

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registration to make it admissible in evidence and it could not be relied on as acknowledgment or receipt within the meaning of S. 17 cl. xi of the Registration Act. 35 All 48; 26 Cal. 707; 4 Bom 235 41 Cal. 493, 35 All. 262; 42 Cal. 545 dist. (*Abdur Rahim and Napsir, JJ.*) LAKHSMANNA SETTI v. CHENCHURAMAYA. 34 M. L. J. 79—(1918) M. W. N. 262  
= 7 L. W. 229—44 I. C. 132.

———S. 17 (1) (b)—Transfer of Property Act—S. 54—Mortgage debt—Transfer—Registered instrument—Necessity. See T. P. ACT S. 54.  
27 C. L. J. 453.

———S. 17. (1) (c)—Receipt for delivery of possession of land allowed on prior portion—Registration if necessary.

A document, which is in terms merely a receipt for possession of some land allotted to one of the parties is a partition which had already been effected by Panchas, is not within S. 17 (1) (c) of the Registration Act. (*Drake Brockman, A. J. C.*) FAKIRA v. TULSIRAM.  
45 I. C. 854.

———S. 17 (1) (d)—Compromise beyond scope of suit—Arrangement evidencing agreement to lease—Necessity for registration—Inadmissibility otherwise. See REGN. ACT S. 17 (2) (vi).  
4 Pat. L. W. 247.

———S. 17 (1) (d)—Document varying the rent reserved in a registered lease—Registration, necessity for.

A document which embodies a contract for variation of rent payable in respect of a lease is in essence a lease, and is compulsorily registrable. If it is not registered in accordance with law, it is not only admissible in evidence, it does not even constitute a valid and operative contract between the parties. (*Mookerjee and Walmsley, JJ.*) BOGHAMOWER v. RAM LAKHAN MISSEK.  
27 C. L. J. 107—41 I. C. 804.

———S. 17 (2) (b)—Acknowledgment of a Partition—Compulsory Registration. See (1917) DIG. COL. 1081; BABU-LAL v. HARI BAKSH, 13 P. R. 1918—122 P. W. R. 1917—41 I. C. 479.

———S. 17 2 (vi)—Award—Document signed by parties as well as by panchas—Admissibility without registration.

A dispute between brothers with regard to immoveable property worth more than Rs. 100 was settled by means of a document which was signed by all the brothers as well as six other persons described as *punches*. It appeared that the parties had assented to the opinion of the *punches*. One of the brothers who was dispossessed from the lands that fell to his share sued for possession.

Held, that the document settling the dispute was an award and did not require registration. (*Leslie Jones, J.*) KHAZAN CHAND v. HAMIR CHAND.  
46 I. C. 685.

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———Ss. 17 (2) (vi) and 49—Award filed in court by parties and accepted, if requires registration.

Where the parties to a suit filed under S. 375 old Code an award which was apparently accepted and acted upon by the Court, but there was no evidence that the award had been embodied in a decree as the records had been destroyed.

Held, that the award having been acted upon by the Court does not require registration. 20 All 171 foll. and 36 Mad 46 dist. (*Wallis, C. J. and Phillips, J.*) VARADIAH NAIDU v. THIPPIAH NAIDU. (1918) M. W. N.  
134—8 L. W. 379—43 I. C. 697.

———S. 17 (2) (vi)—Compromise—Adjustment of matters beyond the scope of the suit—Registration if compulsory—Duty of court in drawing up decree on fact of a compromise.

Documents in the nature of affidavits, petitions and pleadings which are filed in the course of a proper judicial proceedings are admissible in evidence without the necessity of registration.

A compromise which is referred to and is incorporated in an order of the Court or is filed by way of petition in the proceedings is within the protection of Sub-S. (2) (vi) of S. 17 of the Registration Act 1908, and does, not require registration even where it effects an alteration in a registered document.

Per *Chapman, J.*—In order to bring a case within sub-S. (2) (vi) it is permissible to look not only to the order of the court but also at the pleadings which resulted in that order.

Where a suit is properly compromised but the adjustment consists partly of an agreement relating to matters outside the scope of the suit, if the entire compromise is laid before the court is invited in consequence to dispose of the suit, and the court does dispose of the suit accordingly, then the agreement is exempt from registration although the decree deals only with the subject matter of the suit and does not deal with portion of the compromise which lies outside the suit.

The duty of the court with regard to a compromise which deals with matters directly within the scope of the suit is to accept the compromise and record it, and prepare a decree in accordance with it. When the compromise contains matter outside the scope of the suit the court must record the entire compromise and draw up a decree giving the parties the right to execute the decree in respect of the matters which properly fall within the scope of the action, leaving it to the parties to enforce by whatever means they choose that portion of the compromise which refers to matters outside the scope of the suit. 30 Mad. 478 ref. (*Chapman, Atkinson and Imam, JJ.*) CHARU CHANDRA MITRA v. SAMBHU NATH PANDEY.  
(1918) Pat. 193—3 Pat. L. J. 255—  
4 Pat. L. W. 293—46 I. C. 385.

## REGISTRATION ACT, S. 17.

—S. 17 (2) (vi)—*Compromise embodied in proceedings of Court—Registration unnecessary.*

Where a compromise entered into by parties to a suit is embodied in the proceedings of the Court, it does not require registration.

In a suit to recover possession of certain land the deft. pleaded that the plff. had served him with a notice of ejectment and he had brought a suit to contest the notice, whereupon the parties reached a compromise whereby the plff. ceded the land in dispute to the deft. and the deft. withdrew the suit in the Revenue Court.

*Held*, that the compromise did not require registration and secondary evidence of its contents was admissible. (*Le Rossignol and Wilberforce, JJ.*) GULAB v. BADHAWA.

45 I. C. 331.

—S. 17 (2) (vi)—*Compromise—Inclusion of properties not comprised in suit—Decree—Admissibility of, in evidence, without registration.*

A suit for partition was compromised on the terms that each deft. admitted the plff's right to certain portions of the claim made by him, in consideration of the plff's admitting the claim of each of the defts. for certain property which each such deft. desired to retain. The compromise was incorporated in the decree. *Held*, that the compromise did not require to be registered even though it dealt with property not included in the suit.

Such a decree, although not registered, is evidence of an agreement between the parties under which lands have been allotted to each. 22 Mad. 508 and 36 Cal. 193 ref.

Par *Jwala Prasad, J.*—The words "so far as it relates to the suit" in O. 83, R. 8 of the C. P. Code show that all the terms which form the consideration for the adjustment of the matter in dispute, whether they form the subject-matter of the suit or not, become related to the suit and can be embodied in the decree. 80 Mad. 478 and 20 All. 78 ref. (*Chapman and Jwala Prasad, JJ.*) KARU MIAN v. TEO MIAN.

3 Pat. L. J. 43  
=43 I. C. 282.

—S. 17 (2) (vi)—*Compromise—Money Claim—Compromise creating hypothecation in suit for money—Necessity for registration.*

A suit to recover money on a hatchitta was compromised, the compromise petition providing that a decree should be passed in favour of the plff. The deft. also hypothecated certain immoveable properties to secure the payment of the decretal amount:

*Held*, that as the mortgage was altogether outside the scope of the money suit and was given by the deft. and not by any judicial decision of the Court, the document creating it required registration under the provisions of

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the Registration Act. (*Fletcher and Huda, JJ.*) GOSTA BEHARI DE v. GOSTA BEHARI LUMANTA.

46 I. C. 243.

—S. 17 (2) (vi)—*Compromise petition filed in Criminal Court—Agreement to give up possession of lands specified in.*

An agreement to give up possession of certain land contained in a petition of compromise filed in a criminal case does not require registration to make it admissible in evidence. (*Fletcher and Newbold, JJ.*) KHUDI BIBI v. ABDUL MAJID.

43 I. C. 26.

—S. 17 (2) (vi) and (1) (d)—*Compromise in prior litigation regarding variation of terms of a lease—Compromise not incorporated in decree—Registration, necessity for.*

A compromise entered into between landlord and tenant but not incorporated in the decree of Court which on a fair construction of its terms appeared to be a lease and not merely an agreement to create a lease requires to be registered under S. 17 (1) (d) of the Regn. Act and is inadmissible in evidence without registration. (*Imam, J.*) SRIKISHEN LAL v. SHEOBALAK GOPE. 4 Pat. L. W. 247=44 I. C. 638.

—S. 17 (2) (xi)—*Relinquishment of moneys due under a mortgage—Not an acknowledgment nor a receipt for payment—Inadmissible in evidence without registration. See REGISTRATION ACT, S. 17 (1) (b) 2 (xi).*

34 M. L. J. 79.

—S. 21—*Document presented for registration without map—Registration validity, of.*

The registration of a document without the map referred to therein is ineffective. 18 Cal 556 Rel (*Maung Kin, J.*) CAMPBELL v. MAUNG PO NYEIN.

43 I. C. 455.

—Ss 24 and 35—*Deed—Partial registration—Validity. See HINDU LAW, PARTITION.*

23 M. L. T. 307.

—Ss 28 and 29—*Registration in the office of the Registrar within whose jurisdiction transferor had no property—Absence of fraud—Registration valid.*

In the absence of fraud on the part of the transferee between the transferor and the transferee, the mere fact that the transferor had no title only to the property which would give jurisdiction to the office where the document was registered would not be a bar to the Registrar's jurisdiction. (*Roe and Jwala Prasad JJ.*) MUSSAMMAT RAMDEI v. CHANDBABALI BIBI.

4 Pat. L. W. 237=44 I. C. 399.

—S. 28—*Registration—Validity—Jurisdiction of registering officer—Property included in mortgage deed within the jurisdiction of registering officer—Vendor having no title to it—Fraud—Validity of Registration.*

## REGISTRATION ACT, S. 28.

Where in a mortgage deed certain immovable property was included which actually existed within jurisdiction of the registering officer but the mortgagor had no title thereto, and the deed was duly registered, held that the registration was not vitiated by the fact of the mortgagor's want of title when there was no knowledge on the part of the mortgagee and no collusion between the mortgagor and the mortgagee. (*Piggat and Walsh, JJ.*) PAHLADI LAL v. MUSAMMAT LABATTI.

16 A. L. J. 871=48 I. C. 200.

—S. 28—Registration in wrong district—Inclusion of property not intended to be conveyed, to effect registration—Validity. See (1917) DIG. COL 108; RAMA NAIK v. NAGAMUTHU NACHIAE.

22 M. L. T. 516=  
7 L. W. 33=43 I. C. 515.

—Sa. 32, 33, 35, 71 and 73—Scope of—Scheme of the Registration Act as regards presentation of documents. See REGN. ACT, SS. 75, 83, ETC.

16 A. L. J. 213.

—S. 35—Denial of execution—Illiterate vendor protesting that he did not sell the *shamilat* inserted in the deed.

Where an illiterate vendor as soon as the purport of the deed of sale is explained to him protests that he had not sold the *shamilat*, such protest amounts to a denial of execution and the Sub-Registrar should refuse registration. (*Le Rossignol, J.*) WAZIRA v. MUHAMMADI.

37 P. R. 1918=  
66 P. W. R. 1918=45 I. C. 161.

—Ss. 35 cl. (3) and 87—Admission of execution by one of several executants—Registration irregular.

The registration of a document on the admission of execution by one of several executants is irregular.

*Quere* whether the irregularity may be cured by S. 87 of the Registration Act. (*Jwala Prasad, J.*) SHEIKH WAZIR ALI v. MUSSAMMAT MAHIMUNNESSA.

4 Pat. L. W. 72=  
43 I. C. 777.

—S. 47—Registration—Date from which document takes effect—Rival titles. See (1917) DIG. COL. 1084. RAJANI NATH DAS v. OFAJUEDI MOLLA.

22 C. W. N. 318=37 I. C. 817.

—S. 49—Lease inadmissible to prove terms—Evidence of relationship of landlord and tenant.

Though a certain lease may be inadmissible in proof of its terms as being unregistered, it may still be used to prove the relationship of landlord and tenant. (*Stangon, A. J. C.*) RAGHOB v. PALHOB.

45 I. C. 217.

—S. 49—Moveables and immovables—Documents creating charge on—Admissibility as regards moveables.

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Where a document creating a charge over moveables and immovables is not registered, it will only deprive the promisee of his right in the immovable properties and will not affect his rights in the moveable property. 32 M. 410. ref. (*Ayling and Seshagiri Aiyar, JJ.*) PUSAPATI VENKATAPATHIRAJU v. VENKATA SUBHADRAYAMMA.

47 I. C. 563.

—S. 49—Unregistered deed of gift—Admissibility in evidence for collateral purpose i. e. for purpose of proving nature of possession.

An unregistered deed of gift which is inadmissible in evidence for want of registration is inadmissible even for a collateral purpose, e. g. for the purpose of proving that the donee took possession and began to hold adversely the property from the date of gift. (*Shah Din, C. J.*) SURJAN DAS v. GANDA MAL.

13 P. W. R. 1918=44 I. C. 889.

—S. 49—Unregistered document—Collateral purposes—Admissibility in evidence.

In support of a claim for dower *plff.* produced an unregistered deed of sale executed on the date of her marriage by her father-in-law purporting to convey to her certain house properties in lieu of Rs. 1,000 fixed as dower.

Held, that the unregistered deed was admissible in evidence to prove the collateral purposes (1) of the amount of dower and (2) that the father-in-law bound himself to pay that sum. (*Broadway, J.*) MUHAMMAD BAKSH v. MUSSAMMAT AMIR BEGAM.

23 P. R. 1918=44 I. C. 837.

—S. 49—Unregistered mortgage—Loss of document—Admissibility not affecting land—secondary evidence to prove oral agreement.

Secondary evidence of a lost unregistered document affecting an interest in an immovable property and therefore required to be registered is not admissible in evidence of any transaction affecting such property. But such evidence is admissible to prove the document so far as it evidences an oral agreement not affecting the land or any interest in land. (*Ormond, O. C. J.*) MAPANU v. MA SEWE TINT.

44 I. C. 91.

—S. 49—Unregistered *solenamah*—Admissibility of to prove admission.

An admission as to the possession of a piece of land made by a party in a *solenamah*, filed for the purpose of compromising certain criminal proceedings which rose out of a dispute regarding possession of land, is admissible as evidence against the party making it even though the *solenamah* was not registered. (*Fletcher and Huda, JJ.*) GADADHAR GOSWAMI v. NEDHIRAM MODAK.

46 I. C. 332.

## REGISTRATION ACT, S. 50.

—S. 50—Registration Act (XIX of 1843) S. 2—Unregistered sale-deed accompanied by delivery of possession—Subsequent registered sale—Priority.

A prior unregistered sale deed, which is not compulsorily registrable and which is accompanied by delivery of possession, is not invalidated by a subsequent registered sale-deed of the same property either under S. 2 of the Registration Act of 1908 or under S. 50 of the Registration Act of 1843. The person claiming under the prior unregistered deed must not only prove the deed but also the delivery of possession.

A title which has once vested by virtue of a deed if it be unregistered cannot be divested by a subsequent registered document. (*Jwala Prasad, J.*) *ASGAR ALI v. DOST MUHAMMAD*  
44, I C. 384

—S. 50 (1)—Suit for specific performance of contract to sell—Subsequent purchaser under registered sale deed—Matter governed by S. 27 of the Sp. Rel. Act only. See SP. REL. ACT, S. 27 (b).

14 N. L. R. 27.

—Ss. 74, 75 and 82—Registration of document—Nature of enquiry—Result of enquiry before Criminal Court under S. 84, if can form the basis of order.

It is the intention of the Registration Act that the enquiry made under S. 74 should be a summary one, and that the real enquiry as to the genuine character of the document should be made in a suit brought under S. 39 of the Sp. Rel. Act.

A Criminal Court has full jurisdiction to enquire into the fact of execution of a document, when the party denying execution is present before it as an accused under S. 84 of the Registration Act and the result of that enquiry can be taken into consideration by the Registrar when making an enquiry under S. 74 of the Act. (*Roe and Coutts, J.J.*) *SYED AZHAR HUSSAIN v. SAYLAL MARWARI*.

46 I. C. 878.

—Ss. 75, 83, 32, 33, 71 and 73—Scope of—Mortgage—Registration—Presentation by person duly authorised—Failure of mortgagor to appear—Refusal to register—Death of mortgagor—Application for registration by his representative—Order for registry by Registrar—Presentation of document with certificate of registrar and a covering letter—Validity of.

Certain persons executed a mortgage deed in favour of P. on November 20, 1911. Before the deed could be registered P fell ill, and on February 3, 1912 a special power-of-attorney as required by S. 33 of the Registration Act was executed in favour of N authorising him to present the document for registration on behalf of P. On February 5, 1912, N acting under the power of attorney presented it for

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registration before the Sub-Registrar. On February 8, 1912 P. died. The mortgagors having failed to appear to admit execution, the Sub-Registrar refused to register the document. Thereupon the widow of P acting as the natural guardian of P's sons who were minors applied to the Registrar to have the document registered, and on June 28, 1912, a certificate was granted by the Registrar ordering the same to be registered. On July 23, 1912 (within thirty days of certificate) the Collector as the manager of the Court of Wards which in the meantime assumed the superintendence of the estate of the minors) sent the document by a messenger with a covering letter accompanied by the Registrar's certificate to the Sub-Registrar for registration and it was duly registered. On a suit being brought on the document, it was objected *inter alia*, that the document had not been validly registered:—

*Held*, that under S. 75 (2) of the Act the document had been duly presented when on 23rd July 1912, the Registering Officer received it under cover of an official letter from the Collector of Moradabad, no matter who the messenger might have been who carried the document in question: *held*, also when the Sub-Registrar endorsed due authentication on the power-of-attorney on the 3rd February 1912, and the mortgage deed was presented for registration on the 5th February by the person holding such power-of-attorney there was no defect in the presentation.

In the provision about presentation in S. 75 the language is imperative and that distinguishes cases under the section from cases under Ss. 33, 32 and 34 of the Act.

Per *Walsh J.*—Parts. VI and XII (of the Registration Act) deal with fully different circumstances and contemplates a totally different situation. Part VI is a collection of sections dealing solely with "of presenting documents for registration." Part XII is also self contained and deals with a situation created by what is called "of refusal to register" and a case of refusal to register and another kind of presentation in consequence thereof has to be dealt with. Consequently it would be totally superfluous particularly to the legislature if one were to hold that the provisions in S. 75 superimpose upon the solemn proceeding and final decision, a duty upon the person who desired merely to carry out the order of the Registrar, of performing the strict formalities which are necessary before the registration by the Registrar has taken place. What takes place after the Registrar's order as provided by section 75 is pure machinery. Any form of presentation if it is supported by an application, which takes place on the part of the presenter and is noted on the order in his favour, is sufficient. If some other form of presentation is intended the mistake is merely a defect in procedure which is covered by S. 87. (*Piggott and*

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*Walsh, JJ.* COLLECTOR OF MORADABAD v. MAQBUL-UL-RAHMAN. 40 All 434=  
16 A. J. L. 313=45 I. C. 37.

—S. 77—Suit to enforce registration—  
Procedure.

Before a plf. can institute a suit under S. 77 of the Registration Act to enforce registration of a document he must follow strictly the procedure prescribed by the Act for obtaining registration of documents. (*Meekherjee and Beacheroff, JJ.*) NASIRUDDIN NIDDA v. SIDHOO MIA. 27 C. L. J. 538=  
44 I. C. 361.

—S. 84—Enquiry under—Factum of execution of document—Result of enquiry—Registrar. if entitled to act upon. See REGN. ACT, SS. 74, 75 AND 84. 46 I. C. 878.

—S. 87—Registration of document on admission of execution by one of several executors, invalid. See REGISTRATION ACT, SS. 85 CL. (3) AND 87. 4 Pat L. W. 72.

—S. 90—Rajinama—Kabuliyat—Registration not necessary, in cases governed by Bom. Land Revenue Code, SS. 74 and 76. See BOM LAND REV. CODE. SS. 74 AND 76. 20 Bom L. R. 358.

RELEASE—Oral—Validity of—Inference from conduct—Writing unnecessary.

A surrender of relinquishment of a lease does not require to be in writing but can be inferred from the acts of the parties. (1864) W. R. 270 (*Fletcher and Huda JJ.*) ELIAS MEYER v. MANORANJAN BAGCLI. 122 C. W. N. 441=44 I. C. 297.

RELIGIOUS ENDOWMENT—See also C. P. CODE, S. 92. Hindu Law, Mahomedan Law and Public Trust.

—Dedication — Proof of—Evidence of enjoyment and user of income of the properties.

Where there was no clear proof of dedication in a village but it was found that for more than 200 years the village had been incorporated with a particular asthan had been held by its mahant from time to time and had been treated as part of the asthan property.

Held, that under these circumstances, a dedication either by the mahant to whom the village had been originally granted or by one of the persons who succeeded him might be presumed. (*Stuart and Kanhaiya Lal, A. J. C.*) BASDEO BAN v. RAM SARAN. 50 L. J. 38=45 I. C. 292.

—Dedication — Property granted to a priest and his heirs—Absolute property of grantee.

## RELIGIOUS ENDOWMENT.

A grant of property under a deed made to a priest of a temple and his heirs for his services in connection therewith is not grant in favour of the idol of the temple and the grantees are competent as their private property. (*Piggott and Walsh, JJ.*) BANARSEE DAS v. SHEODHARSHAN DAS SHASTRI. 16 A. L. J. 394=45 I. C. 451.

—Dedication—Will — Appointment of vars to carry on charities at certain temples—Complete dedication — Vagueness and indefiniteness of object.

A Hindu testator by his will appointed his brother's son as his vars to conduct charities at Tiruvadanthai, Tirukkadamalai and Tirupathi with the help of his properties. The mode of conducting the charity was specified to be the giving of thaligais (meals) in the temples on the tirunakshatram day, but no special allotments were made for the purpose. When the will was registered before the Registrar the testator stated that he intended by the will to bequeath properties to charities. In a subsequent suit against the testator for a declaration that part of the properties disposed of by the will did not belong to him solely, the testator stated that he acquired properties for charity and intended to make a testamentary disposition in that behalf. In a suit instituted under S. 92 of C. P. Code for removal of the vars aforesaid, from trusteeship and for a scheme.

Held that the dedication was definite and not void for vagueness or uncertainty. 23 Bom. 725, 30 Mad 540 and 17 M. L. J. 379, dist; that the mention of the word 'vars' in the will did not make him the sole owner of the properties subject to the carrying out of the directions relating to charity but constituted him trustee for the charities. 24 Bom. 420; 30 All. 84; 3 M. L. T. 144 dist. 37 Mad. 199, 19 C. L. J. 369 and 12 A. L. J. 345 foll. (*Abdur Rahim and Seshagiri Aiyar, JJ.*) MUTHUKRISHNA NAICKER v. RAMACHANDRA NAICKER. 47 I. C. 811.

—Mahant — Alienation of property justified only on ground of necessity.

Where a tenure is in the nature of a trust for a charitable purpose, the trustee or mahant has no right to transfer the same except for legal necessity. (*Stuart and Kanhaiya Lal A J. C.*) BASDEO BAN v. RAM SARAN. 50 L. J. 38=45 I. C. 292.

—Mahant of—Power of — Alienation Acquisitions with income of asthal—Accretion to asthal.

The mahant of a Hindu asthal or math holds the property in trust for the institution itself. He can only alienate it in case of necessity.

Acquisitions with the income of an asthal are subject to the same trust as the original property.

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In the absence of a necessity which would render the debts contracted by him binding on the institution, a mahant has no power to alienate its properties for the purpose of discharging those debts and if the aasthan was not liable for such debts, his successor is entitled to have the sale set aside. (*Mr Ameer Ali*) **BASUDEO ROY v. MAHANTH JUGAL KISHWAR DAS** 5 Pat. L. W. 57=  
 35 M. L. J. 5=22 C. W. N. 841=  
 28 C. L. J. 476=24 M. L. T. 305=  
 20 Bom. L. R. 1038=  
 16 A. L. J. 601=8 L. W. 130=  
 (1918) M. W. N. 431=45 I. C. 818 (P. C.)

— *Manager of temple—Lease of temple property—Validity—Conditions—Berar Inam Rules Rule 14 (2)—Applicability—Temporary alienation or lease—Sanction of Deputy Commissioner.*

A lease by a Hindu Manager of a temple is not valid unless (1) the money was borrowed for the purposes of the temple, (2) the loan was justified by an existing necessity and (3) the lease was one which a prudent owner would be justified in making.

Rule 14 (2) of the Berar Inam Rules relates to a permanent alienation such as a gift or exchange, and does not apply to a temporary alienation or lease. Therefore such a temporary alienation does not require the sanction of the Deputy Commissioner. (*Mitra A. J. C.*) **NARSINGHDAS v. ALADADKHAN.**

14 N. L. R. 12=33 I. C. 334,

— *Mosque—Waqf—Appointment of successor—Endowments committee at Chittagong—Regulation XIX of 1810.*

The Mahomedan Endowments Committee at Chittagong is a statutory body and its recognition, where such recognition is necessary, of a person as the true and rightful *mutwalli* of a mosque, to which Regulation XIX of 1810 applied before its repeal by Act XX of 1863, is authoritative. (*Richardson and Walmsley, JJ.*) **SULTAN AHMED v. ABDUL GANI.**

45 I. C. 581.

— *Mutt—Alienation by the matadhipathi of mutt properties—Suit under O. 1, R. 8 of the C.P. Code by two persons on behalf of themselves, other Thambirans and disciples—Suit to declare alienation invalid and to have the property handed over to the matadhipathi—Maintainability of Limitation Act, Arts 183 and 144. See (1917) DIG. COL. 1092; CHIDAMBARANATHA THAMBIRAN v. NALLASIVA MUDALIAR.*

41 Mad 124=33 M. L. J. 357=

22 M. L. T. 218=6 L. W. 666=42 I. C. 366.

— *Private charities—Right of management—Grant—Construction—Grant to person or to office—Lands granted to head of mutt for food chatram and to construct the aghraharam round the temple of original founder—Right of*

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*management—Divisibility among heirs of grantee—Private charity.*

With regard to private charities such as endowments for the support of the family idol, the law is that if there is no contrary provision in the original grant, the right of management passes to the natural heirs of the original grantee and if there be no other arrangement or usage and no scheme settled by the Court, will be exercised by the managing member of the family before partition or in turns by the several heirs after partition.

Where, however, certain lands have been granted in Inam by the Rajah of Tanjore to his royal priest for the purpose of conducting the charities of a food chatram near the tomb of the first priest and for the purpose of making an aghraharam by building houses round about the holy place and the grant was confirmed by the British Government by a title deed to the manager for the time being of the charity and his successors without any mention of his personal name.

*Held*, (1) that there was sufficient indication in the documents and the surrounding circumstances of the case that a devolution of the management of the heirs of the original donee was inconsistent with the purposes of the founder when he created the endowments;

(2) that the management would therefore vest only in the person who was for the time being the royal priest of Tanjore.

*Quære*:—Whether there is any general rule for the devolution of management of the charities of the latter kind. (*Sir Walter Phillimore*). **SRI SETHURAMASWAMIER v. SRI MERUSWAMIER.**

41 Mad 296=

34 M. L. J. 130=7 L. W. 22=

23 M. L. T. 94=16 A. L. J. 113=

27 C. L. J. 231=22 C. W. N. 487=

4 Pat. L. W. 91=20 Bom. L. R. 414=

43 I. C. 806=45 I. A. 1 (P.C.)

— *Private or Public—Court's power to go into—Suit on footing that endowment is public—Effect. See C. P. CODE. S. 92.*

(1918) M. W. N. 595.

— *Scheme—Village temple—Scheme of management settled by decree of Court on an award made on a submission by all villagers—Alteration of scheme by consent of majority, invalid—Remedy by fresh scheme suit. See C. P. CODE. S. 92.*

(1918) M. W. N. 599.

— *Shebait—Position and powers of—Transfer of trusteeship by gift or by creation of life interest therein—Invalidity.*

The trustee of a public religious endowment cannot alienate his office and duties or the possession of the trust property at his own will either by sale or gift so as to create a valid title in the transferee. He cannot also create a life interest in favour of the donee in respect of the Shebaiti right. He has no beneficial

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interest beyond what may be expressed in the trust and has no powers of alienation beyond what may be necessary or beneficial for the purposes of the trust 11 Cal. 121, 5 Mad. 89 ref. (*Dawson Miller, C. J. and Mullick, J.*)

NATHI PUJARI v RADHA BINODE NAICK.  
3 Pat. L. J. 327=4 Pat. L. W. 283=  
(1918) Pat. 247=47 I. C. 290.

———Shebait—Representation of idol—continuous representation—Not a series of life estates—Alienation of debutter property—Cause of action arises on the date of alienation—Running of time not interrupted by minority of successor See LIM. ACT, ART. 134. 27 C. L. J. 201.

———Shebaitship—Acquisition of, by adverse possession—Possession under invalid transfer. See LIM. ACT, S. 10. 4 Pat. L. W. 283.

———Temple—Archaka—Hereditary office—Position of, in relation to trustee.

An archaka of a temple is a servant of the trustee of the temple even though his office is hereditary. (*Sadasiva Iyer and Bakewell JJ.*) BHARADWAJA MUDALI v. ARUNACHELA GURUKAL. 42 Mad. 528=23 M. L. T. 288=7 L. W. 524=45 I. C. 414.

———Temple—Nature of institution—Properties and income, application of—Proper purposes.

A temple is a permanent religious charity, carried on for the benefit of the present and future worshippers and its property should be preserved intact in order that the existence of the charity might be continued and its income alone should be applied by the manager or Dhatmakarta in the administration of the charity. 40 M. 709 rel.

Consequently a creditor who has sold certain fire works to the trustee cannot obtain a decree against the temple funds. (*Bakewell and Kumaraswami Sastri, JJ.*) ADIRAJA ARSU v. SHEIK BUDAN SAHIB. 34 M. L. J. 358=23 M. L. T. 278=(1918)

M. W. N. 331=7 L. W. 440=44 I. C. 815.

———Temple public trust—Deed of endowment silent as to—Evidence of user, mode of worship and religious festivals admissible to prove public character of trust. See C. P. CODE S. 92. 45 I. C. 213.

———Temple—Right to share in offerings—Re-transfer to heir who had lost right by abandonment—Validity.

Held, that there is no reason for holding that a retransfer to the descendants of an heir of a part of the right to share in offerings which he had lost by abandonment was invalid. When the alienation in no way contravenes any principle which can be neces-

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sary to the harmonious management of the shrine. (*Leslie Jones, J.*) INAYAT SHAH v. RADIR BAKSH. 43 P. L. R. 1918=94 P. W. R. 1918=46 I. C. 422.

———Trustee—Permanent lease of temple waste lands for purpose of cultivation—Not a breach of trust. See LANDLORD AND TENANT, PERMANENT TENANCY. 7 L. W. 194.

———Trustee—Permanent tenancy—Creation of—Breach of trust—No presumption of permanent tenancy from a lost grant. See LANDLORD AND TENANT. 34 M. L. J. 234.

———Trustee—Power of, to pledge credit of temple for purchase of goods—Creditor not entitled to decree against temple's funds.

In a suit to recover the price of fireworks sold on credit to the manager of a Hindu temple the plff. is not entitled to a decree against the temple funds as the purchase of fireworks is not necessary for the performance of the trusts. 40 Mad 709 rel. (*Bakewell and Kumaraswami Sastri, JJ.*) ADIRAJA ARSU v. SHEIK BUDAN SAHIB. 34 M. L. J. 358=23 M. L. T. 278=(1918) M. W. N. 331=7 L. W. 440=44 I. C. 815.

———Trustee—Promissory note—Execution by as trustee—Personal liability See NEG. INS. ACT SS. 26, 27 AND 28 35 M. L. J. 90.

———Trustees—Suit by—All the trustees to act as a body. See CO-TRUSTEES, SUIT BY. 27 C. L. J. 605.

———Trustee—Suspension of—Power of Committee by circulation—Ordinary mode of a Corporation transacting business—Suit for a declaration that suspension was wrongful—The existence of sufficient grounds for suspension, not a valid defence—Trustee wrongfully suspended by committee—Right to damages against the members of the Committee. See (1917) DIG. COL. 1100; VENKATA NARAYANA PILLAI v. PONNUSWAMI NADAR. 41 Mad. 357=33 M. L. J. 660=22 M. L. T. 434=(1917) M. W. N. 839=7 L. W. 85=43 I. C. 205.

———Waqf—Mutawalli—Appointment of successor by will.

If a person holding the office of mutawalli, to which is attached the right of appointing a successor under the Mahomedan Law freely executes *tauliqnama* as a testamentary document for appointing a successor while he is of sound disposing mind, its validity cannot be questioned. (*Richardson and Wainmley, JJ.*) SULTAN AHAMED v. ABDUL GANI. 45 I. C. 581.

———Waqf—Public dedication—Direction to executors to take possession as mutawallis and spend income on good work.

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A testator dedicated certain houses of his to God and directed his executors to take possession as *mutawallis* and realise the rent and spend it on good work "as they might think best."

Held that the dedication did not constitute a private *wagf*. (*Scott Smith and Leslie Jones JJ.*) MUHAMMAD WAZIR v. ALI HUSSAIN.  
26 P. W. R. 1918=43 I. C. 749.

**RELIGIOUS ENDOWMENTS ACT (XX OF 1893) Ss 7, 8, 9 and 10**—Appointment of member of committee managing religious endowment—whether such appointment by a civil court is an administrative or a judicial act—Bengal and Madras Native Religious Endowments Act Ss. 7, 8, 9, 10 and 11—Case, Meaning of—Revisional powers of High Court—Code of Civil Procedure (Act V of 1908) S. 115. See (1917) DIG. COL. 1105. BALAKRISHNA UDAYAR v. VASUDEVA AIYAR.  
40 Mad. 793=11 Bur L. T. 48=  
22 C. W. N. 60=33 M. L. J. 69=  
22 M. L. T. 45=26 C. L. J. 143=  
15 A L J 645=2 Pat. L. W. 101=  
19 Bom. L. R. 715=(1917) M. W. N. 623=  
6 L. W. 501=40 I. C. 650=44 I. A. 261 (P. C.).

—S. 14—Jurisdiction—Scope of. See C. P. CODE. S. 92.

20 Bom. L. R. 954.

—Ss. 14 and 18—Suit instituted by four persons with leave of court—Death of one *pendente lite*—Suit if abates. See (1917) DIG. COL. 1106; ALAGAPPA CHETTIAR v. MUTHIA CHETTIAR. 41 Mad. 237=  
33 M. L. J. 173=(1917) M. W. N. 740=  
41 I. C. 745.

**RELIGIOUS OFFICE**—*Archaka*—Hindu female—Right to succeed to the office and emoluments.

Held, by the Full Bench (Sadasiva Iyer, J. dissenting) —

A Hindu female is not debarred by reason of her sex from inheriting the service and emoluments of an *archaka* office in a temple 38 M. 850 not foll. 35 All. 283 dist. (Wallis, C. J. Sadasiva Iyer and Spencer. JJ.) ANNAYA TANTRI v. ANMAKKA HENGUSU.

41 Mad. 886=35 M. L. J. 196=24 M. L. T. 163=(1918) M. W. N. 369=8 L. W. 301=47 I. C. 341 (F. B.).

—Gayawal—Nature of office—History and position of—Suit for declaration of right to office and for injunction—Sp. Rel. Act. S. 54, ill. (iv). See (1917) DIG. COL. 1107; LACHMAN LAL PATHAK v. BALDEO LAL.  
2 Pat. L. J. 708=(1918) Pat. 30=  
42 I. C. 478.

—Joshi—Village priest—Funeral ceremonies where Brahminical ceremonies were dispensed with—No right to fees. See DAMAGES, CAUSE OF ACTION. 20 Bom. L. R. 454.

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—Mutawalli—Alienation of the right to office—Invalid and opposed to public policy. See MAHOMEDAN LAW, MUTAWALLI.  
22 C. W. N. 996.

—Women, competency of, to hold—Mahomedan Law—*Asthan*—Mujavar—Right to perform *fatina*—Capacity of females.

A religious office can be held by a woman under the Muhammadan Law unless there are duties of a religious nature attached to the office which she cannot perform in person or by deputy and the burden of establishing that a woman is precluded from holding a particular office is on those who plead the exclusion.

Though there is no general rule of Muhammadan Law prohibiting a woman from holding a religious office, prohibition may arise by local custom or usage. 5 L. W. 226 foll. 34 Cal. 118 (P. C.) ref.

Held (on the facts of the case) that a woman was competent to succeed to the office of Head Mujavar of the suit *Asthan*. (*Abdur Rahim and Seshagiri Aiyar. J.J.*) MUNNAVARU BEGAM SAHIBU v. MIR MAHAPALLI SAHIB.  
41 Mad. 1033.

RENT—Fee paid by a student residing in a hostel, whether amounts to, within the meaning of S. 143 (2) (d). Bom City Municipal Act. See BOM. CITY MUNICIPAL ACT S. 140.  
20 Bom. L. R. 839.

—Maramut charges, whether rent within S. 40 (2) of the Mad. Est. Land Act. See MADRAS ESTATES LAND ACT, S. 40 (2) AND 8).  
35 M. L. J. 547

—Thunduwaram—Right to—Nature of. See C. P. C. S. 102.

23 M. L. T. 44 (F. B.)

RENT SALE—Fraudulent and collusive—Decree against heirs of original tenant does not bind unregistered transferee, if landlord aware of the transfer.

A *mourazi mokurari jote* was held by P., who bequeathed it to the plff. The plff's name not having been registered in the landlords books, the landlord, being aware of the bequest in plff's favour, yet sued P's heirs for rent, got a collusive decree and in execution thereof sold away the *jote*.

Held, that the plff's right to the *jote* was not extinguished by the rent sale. (*Chitty and Smither. JJ.*) JAGADISH CHANDER DEO DHABIN DEO v. SRIDAM MAHATA.  
44 I. C. 26.

REPRESENTATIVE SUIT—Damages, claim for, not sustainable See C. P. CODE, O. 1, R. 8.  
45 I. C. 425.

RES JUDICATA. See also C. P. CODE S. 11.

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—Adverse finding against successful party—Finding necessary for decision—If *res judicata* depends on right of appeal—See C. P. CODE, S. 11 34 M. L. J. 431.

—Adverse finding—First suit by plff's predecessor in title for damages for obstruction to public pathway by defts.—Dismissal of suit on the ground that no special damage proved—Subsequent suit under S 91 C. P. C.—Defts. estopped from pleading that the path way is private. See RES JUDICATA, RE PRESENTATIVE SUIT. (1918) M. W. N. 176.

—Appellability—Test of—Adverse finding not *res judicata* when decree is in favour of a person.

No appeal lies from a decree merely on the ground that certain observations made in the judgment of the Court below are unfavourable to the person in whose favour the decree is passed. An opinion of the Appellate Court in the course of a judgment in such an appeal cannot operate as *res judicata* when, in point of law, no appeal lay and the Court had no power to adjudicate on the rights of the parties on an appeal from such a decree. (*Mitra, A. J. C.*) NARAYAN v. SYED BAHADUR. 44 I. C. 723.

—Applicability of—rule of—Question raised but not divided in prior suit. See C. P. C. S. 11, 6 P. W. R. 1918.

—Cause of action—Merger of in judgment—Remedy by execution only—Fresh suit barred. See MALABAR LAW, LANDLORD AND TENANT. 34 M. L. J. 167=44 I. C. 110.

—Civil and Revenue Court—Landlord and Tenant—Decree of Civil Court declaring landlords right to suit in respect of portion of holding—Effect—Subsequent suit for recovery of rent of on that portion—Question of liability of tenant for rent if *res judicata*.

In a suit brought in the revenue courts by a landlord for recovery of rent of the area of a house site included in the tenant's holding, held that a prior decree of a Civil Court establishing and declaring the landlords' right to get a reasonable rate of rent on the site in question operated as *res judicata*, though mere finding in the judgment of the Civil Court on the question of the landlords' right might not operate as such. (*Sadasivaiyer and Spencer, J.*) RAMASAMI SERVAIGARAN v. ATHIVARAH CHARIAR. 23 M. L. T. 183=(1913) M. W. N. 340=7 L. W. 471.

=44 I. C. 663.

—Co-defendants—Active contest interse necessary to constitute *res judicata*.

To constitute *res judicata* between co-defendants there must have been a conflict of interests between the defendants interse and a judgment defining the real rights and obligations of the defendants inter se. Without necessity

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a judgment will not be *res judicata* amongst the defendants. (*Oldfield and Sadasiva Iyer J.J.*) SYED MOHEDEEN ALI SAHIB v. SYED OSMAN SAHIB (1918) M. W. N. 530=8 L. W. 473.

—Co-defendants—pro-forma debt against whom no relief is claimed—Decision not binding on.

The decision in a case does not operate as *res judicata* against a *Pro forma* debt. who was not a necessary party to the suit and who was impleaded not because any relief was claimed against him but because the might assist the Court in the adjudication of the claim against the real debt. (*Mullick J.*) SUGRIVE MISSEK v. JOGI MISSEK. 45 I. C. 318.

—Co-defendants—Pro forma defendants—Right fought out in prior litigation—*Res judicata*.

Where one of several persons interested in a property brings a suit in respect of it, and the other persons interested therein being unwilling to join themselves as plffs. in the suit are made *pro forma* defts., they cannot, upon the failure of the plff., harass the debt upon the same cause of action. (*Sharfuddin and Rec. J.J.*) BISHESHWAR DAYAL SAHU v. BANROFAN SAHU. 44 I. C. 546.

—Co-heirs—Applicability of rule of to co-heirs—Suit for partition of inheritance—Other heir and stranger claiming under independent title made parties defts.—Deft. co-heir supporting plffs claim and claiming share for himself—Stranger debt. pleading limitation—Dismissal of suit on plea—Appeal by plffs. debt. co-heir being party respondent—Reversal of finding of munsif on issue of limitation and decree for plffs. share—Effect on defendants co-heir—C. P. Code, S. 11, Expl. 6—Applicability—Scope and effect.

Plffs., sons of a daughter of one Gopala Aiya, instituted O. S. 58 of 1910 to recover 2/3 of their share from an alienee of the widow of the last male holder who was in possession. To that suit which was one for partition, R, a son of another daughter of the said Gopala Aiya was made a party debt. R. claimed to be also entitled to a third share in the suit property, and prayed for a decree in his favour on payment of the necessary court-fee and an issue was raised on that point. The alienee pleaded *inter alia*, that the suit was barred by limitation, this plea turning on the question who died first, Gopala Aiya aforesaid or his brother Govinda Aiya. The District Munsif found that Gopala Aiya died first and holding that the suit was therefore not barred. His decree was however, reversed in an Appeal preferred against it by the plffs the Appellate Court finding that Govinda Aiya died first and holding that the suit was therefore not barred. To the appeal R was made a party respondent but he died during the pendency of

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the appeal and his legal representatives were not brought on record. The Appellate Court gave the plffs a decree for 2½ share claimed by them. Subsequent to the aforesaid proceedings, plffs., obtained an assignment of R's third share in the property from his legal representatives and instituted another suit for the recovery of that share. On the plea being raised by the alienee that the Munsif's finding in the prior suit on the issue of limitation operated as a bar to the maintainability of the suit because R did not either appeal against it or file a memorandum of objections

*Held, that* (1) the finding of the Munsif in the prior suit on the question of limitation having been reversed by the Appellate Court in an appeal to which R was a party, there was no subsisting decision of the Munsif on the question of limitation to operate as a bar to the plff's suit:

(2) the finding of the Appellate Court on the issue of limitation operated as a bar in plff's favour by precluding the alienee from raising the plea that Gopala Aiyā died first and that plff's claim was therefore barred 14 M. L. J. 404 expl. and dist. (*Abdur Rahim and Napier, JJ*) LINGAPPAYYA v. SHANKARA-NARAYANA BHATTA 35 M. L. J. 625 =42 I. C. 156.

—————Competent court—Meaning of.

To constitute an earlier decision *res judicata* the two courts must be of concurrent jurisdiction as regards the pecuniary limits as well as the subject matter of the suit. (*Batten and Mitra, A. J. C.*) MUKAND RAM SIKUL v. SREO NARAIN. 47 I. C. 21

—————Competent Court—Previous suit in Munsif's Court for possession under S 6 Sp. Relief Act—Subsequent suit for damages in Small Cause Court—Maintainability. See (1917) DIG. COL. 1112; BODLU BHONJA v. MOHAN SINGH.

39 All 71. =  
15 A. L. J 788=42 I. C. 362.

—————Compromise decree—Compromise of suit by Collaterals against widow—Subsequent suit by widow against daughter-in-law for share of estate.

In a suit by a Hindu widow against her daughter in law for possession of a moiety of the estate alleged to have been left by the former's husband or in the alternative for maintenance, it appeared that the collaterals of the plff's deceased son (the husband of the deft.) had sometime previously sued for the possession of the entire estate on the allegation that the deft. having become unchaste, had forfeited her widow's estate. The present plff., who was impleaded as a deft. in that suit, resisted the claim and eventually effected a compromise with the plffs., according to which she agreed to relinquish there rights in

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their favour in lieu of certain property to be given to her as absolute owner in the event of the collateral's suit succeeding. In the event of their defeat she was to receive the property on the death of the deft.

*Held, that* this compromise could not and did not affect the rights of the two widows *inter se*, and that so far as the plff's claim was concerned, there had been neither an adjudication nor any agreement which could be set up as a bar to the suit, and that therefore the rules of *res judicata* had no applicability to the case. (*Scott Smith and Shadi Lal, JJ*) BHOLI RAI v. CHIMNI BAI.

23 P. L. R. 1313=45 P. W. R. 1918=  
44 I. C. 92.

—————Compromise decree — How far *res judicata*.

The principle of *res judicata* is applicable to a compromise decree so as to prevent the parties from agitating a matter on which they agreed in a previous action. To find out what the matter is it would not merely be enough to see what was the relief granted in the previous decree, but it would be necessary also to examine the basis on which it was granted. (*Mitra, A. J. C.*) SITARAM v. PETIA.

14 N. L. R. 35=43 I. C. 962.

—————Constructive—Subject-matter different —Rule inapplicable—C. P. Code, S. 11 Expl. IV.

The rule laid down in Expl. 4 to S. 11 C. P. C., can only be properly applied to cases where the subject of the two suits is one and the same. In order to constitute *res judicata* the matter must not only be directly and substantially in issue but it should also be heard and decided.

There can be no decision by necessary implication except in respect of the matters which might and ought to have been made a ground of defence or attack (*Lindsay J. C. and Stuart A. J. C.*) BISHESHAR BAKSH SINGH v. RAJA RAMESHAR BAKSH SINGH.

21 O. C. 1=44 I. C. 368.

—————Court of jurisdiction competent to try subsequent suit etc.—Meaning—First suit by Subordinate Judge—Subsequent suit in Small Cause Court—Decision of issue in first suit if operates as *res judicata* in second.

An issue was decided by a Subordinate Judge not exercising the jurisdiction of a Small Cause Court. In a subsequent suit in a Small Cause Court the same issue arose and it was pleaded that the decision of the Subordinate Judge did not operate as *res judicata* as he was not exercising the jurisdiction of a Small Cause Court and was therefore incompetent to try the subsequent suit.

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*Held*, that the Subordinate Judge's decision operated as *res judicata* as his inability to try the subsequent suit arose not from incompetence, but from the existence of another Court with a preferential jurisdiction. (*Kotwal A. J. C.*) MADHORAO v. AMRITRAO.

14 N. L. R. 115=43 I. C. 268

—Directly and substantially in issue—Pleadings, and judgment to be examined—Decision on several issues—All *res judicata*. See (1917) DIG. COL. 1129; BABU LAL v. HARI BAKSH.

13 P. R. 1918=122 P. W. R. 1917=41 I. C. 479.

—Dismissal of suit for non-prosecution—Presence of one out of six plffs—Appearing plff general attorney for others—Dismissal of suit—Second suit on the same cause of action—Bar. See C. P. CODE, O 9 PR 36 AND 9.

16 A. L. J. 462.

—Erroneous decision—Evidence not fully placed before the Court—Decision binding nevertheless—Ignorance of plea effect of.

*Per Oldfield, J.* Where it was not shown that the evidence sought to be let in, in the subsequent suit, could not have been adduced in the prior suit, the decision in the prior suit is final and cannot be re-opened.

*Per Sadasiva Iyer, J.* An erroneous decree establishing rights is as much *res-judicata* between the parties as a just decree; and evidence adduced to prove that the former decision is erroneous is irrelevant. A party's ignorance of a ground of plea during the former litigation does not make the former decision any the less binding. (*Oldfield and Sadasiva Iyer JJ.*) SYED MOHIDEEN ALI SAHIB v. SYED O S MAN SAHIB.

(1918) M. W. N. 580=8 L. W. 473.

—Erroneous decision—Execution proceedings—Decision at one stage not binding at another and subsequent stage—Evasion of Court fees, etc.

In a suit for partition the parties believed that some of the villages which were the subject-matter of the suit could not be partitioned. A consent decree was passed under which some of these villages were left under the management of the plff. and others under that of the deft. The decree also contained the following direction that accounts should be rendered once in a year in the month of April and the produce should be divided according to the shares at the time. The parties had been seeking accounts from each other, year after year in execution.

*Held* that accounts could not be claimed in perpetuity in execution of a decree in evasion of the law of procedure and in evasion of the Court Fees Act and that the decision at the prior stages of the execution did not

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operate as *res judicata* (*Mitra A. J. C.*) YESHEVANT RAO v. DATTATRAYA KRISHNA.

45 I. C. 201.

—Erroneous decision on necessary issue—Binding nature. See CUSTOM, SUCCESSION, 82 P. R. 1918.

—Error of law—Suit for rent—Interest, decision as to in one year, binding in suit for subsequent years' rent.

An erroneous decision on a question of law between the parties to a suit may nevertheless amount to *res judicata* in a subsequent suit between the same parties.

In a previous suit between the parties it was decided on an issue of law that the defts. were liable to pay interest on arrears of rent. In a subsequent suit on arrears of rent and interest the claim for interest was opposed on the ground that the defts. being *thikadars* were not liable under S. 141 of the Oudh Rent Act, to pay interest on arrears.

*Held*, that the matter, was *res judicata* even though the earlier decision was a wrong decision in law. (*Lindsay, J. C.*) BHAGWATI PRASAD SINGH v. PARAMESHWAR DUTT.

5 O. L. J. 16=45 I. C. 252.

—Execution proceedings—Adjudication at one stage binding unless set aside.

Where a final decree in a mortgage suit has been passed after notice the judgment-debtors, it is binding on the parties at every subsequent stage of the execution proceedings. (*Teunon and Newbould, JJ.*) MAKUNDA LAL KUNDU v. PRIYA NATH MOITRA.

45 I. C. 687.

—Execution proceedings—Decision that certain properties are liable to sale—*Res-judicata* in subsequent stages. See C. P. CODE, O. 21 R. 22.

45 I. C. 699.

—Execution proceeding—Decision after notice at one stage of the proceedings conclusive in later stages.

Where an order of attachment is made after the judgment debtor had been given an opportunity to appear and show cause against the order, it is conclusive. If the order is intended to be attached on the ground that certain pleas were not taken originally the propriety of the order can be questioned only in subsequent proceedings other than those in which it was passed; otherwise, the decision at any particular stage of the execution proceedings would be deprived of finality. S. O. 51, foll. (*Oldfield and Bakewell, JJ.*) MADLIDI DORAYYA v. SATTI VERBAYYA.

35 M. L. J. 312=(1918) M. W. N. 143=44 I. C. 4.

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—Execution proceedings—Limitation, plea of not raised in prior application for execution—Bar. See (1917) DIG. OL 1116; JANKI KUER v. SRI RAMANUJAJEYAR.

3 Pat. L. W. 213=45 I. C. 404.

—Execution proceedings—Objection to the liability of judgment-debtor raised and decided—Decision binding in subsequent stages of the execution.

Where in execution an objection is raised and gone into the same objection cannot be considered on any subsequent application in execution and the decision is binding on all parties.

Where a decision of the executing Court is that no property of the judgment debtor can be attached that decision is final and the decree-holder cannot attach properties other than those attached in the previous proceeding and re-open the question of liability. (*Roe and Imam, JJ.*) JADUBANS PANDAY v. EKRAM RAI.

4 Pat L. W. 279=44 I. C. 654.

—Execution proceedings—Objection taken in one application but not decided can be raised in subsequent application—Constructive res judicata.

Where an objection to the maintainability of an application for execution on the ground of limitation was raised but not decided, it is competent to the judgment-debtor to raise the same objection in a later application for execution. (*Richardson and Beachcroft JJ.*) ISHAN CHANDRA SAMUI v. DOLAL CHANDRA DE.

44 I. C. 220.

—Execution proceedings—Omission to plead that property is not saleable in execution, in a prior execution proceedings—Bar in subsequent execution proceedings.

If a tenant judgment-debtor omits to raise an objection as to the non-transferability of a holding in an execution proceeding in which the holding is attached, he is estopped from raising it in a subsequent execution proceeding in execution of the same decree. (*Imam and Thornhill JJ.*) RAMESHWAR SINGH BAHADUR v. KESHWAR RAI.

47 I. C. 780.

—Execution proceedings—Order on the merits essential.

Where an application for execution is dismissed for default, the decree-holder can apply to execute the decree again without setting aside the prior order. But the case is different if the prior order of dismissal was on the merits. (*Mullick and Thornhill, JJ.*) BABUI RITU KUER v. BABU ALAKHDEO NARAIN SINGHA.

(1918) Pat. 265=5 Pat. L. W. 208=47 I. C. 154

—Execution proceedings—Scope of the rule—C. P. Code O. 34 R. 14—"Bring to sale,"

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meaning of. See (1917) DIG. COL. 1117; GOPAL CHANDRA PAL v. KAILAS CHANDRA PAL.

45 Cal. 530=41 I. C. 73.

—Finding on unnecessary issue—Effect. See C. P. C., S. 11. 22 P. W. R. 1918..

—Finding on unnecessary issue not res judicata.

The decision in a previously decided case on an issue which did not arise at all cannot operate as *res judicata* in any subsequent suit. (*Shah Din, C. J.*) KIRPA RAM v. NAWAB.

141 P. L. R. 1917=43 I. C. 754.

—Foreign judgment—Rule applicable to.

A foreign judgment is subject to the same conditions as to *res judicata* as a judgment of a Court of British India and, therefore, such a judgment in order to be *res judicata* in a subsequent suit must be the judgment of the Court which is competent to try the subsequent suit. 6 Bom. L. R. 93 rel. (*Ormond, J.*) CHOKAPPA CHETTY v. RAMAN CHETTY.

43 I. C. 551.

—Fraud—Impeachment of decree for fraud—Application to set aside ex parte decree under O. 9, R. 13, C. P. C.—Dismissal of—Bar to suit to set aside decree. See DECREE, SETTING ASIDE.

45 I. C. 250.

—Heard and decided—Actual adjudication in prior suit, if necessary to constitute—Implied adjudication—How for *res judicata* Both parties debts in a suit—Contract of interest whether necessary.

In order to constitute the decision in a prior suit *res judicata* on an issue in a subsequent suit, it is not necessary that there must have been an actual adjudication on the issue in the prior suit. It is sufficient if the decision came to in the prior suit impliedly decides the point subsequently in issue. 40 Bom. 210, 33 M. L. J. 740 foll.

Where the parties to a suit were both debts in a prior suit and there was nothing to show that there was a clear conflict of interest between them *inter se* in the prior suit *Held*, that the prior decision cannot be *res judicata*. 29 Mad. 515 ref. 37 Mad. 270 dist. (*Seshagiri Aiyar, J.*) POYYALI NAICKER v. SUBBA NAICKER.

24 M. L. T. 205=(1918) M. W. N. 567=

8 L. W. 206=48 I. C. 905.

—"Heard and decided"—Issue raised but wrongly omitted to be decided—Not *res judicata*.

The refusal of a Court to determine an issue which was raised does not operate as *res judicata*. It does not matter whether the Court was right or wrong in refusing to try the issue or in giving liberty to bring another suit. S. 11 of the Code lays down that the bar of

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*res judicata* will apply only when the matter was 'heard and finally decided' 11 All. 187; 10 Cal. 856; 24 Cal. 616; 7 Cal. 331; 8 Cal. 631. 21 All. 505; 5 C. L. J. 653; 24 M. L. J. 12 ref. (*Roe and Jwala Prasad, JJ.*) **RAJA DHAKESH WAR PRASAD NARAIN SINGH v. POOKHAR PANDAY.** (1913) Pat. 162=4 Pat. L. W. 299. =45 I. C. 326.

———'Heard and decided'—Necessary to constitute *res judicata*.

Where the matter has not been heard and finally decided on the merits; there can be no *res judicata*. (*Ayling and Seshagiri Iyer, JJ.*) **DASARATHY NAIDU v. PALKUMARAMUL RAJA.** 24 M. L. T. 311= (1913) M. W. N. 427=7 L. W. 557=45 I. C. 959

———Heard and finally decided—Appellate Court judgment of the final judgment—Point left undecided not *res judicata*.

An Appellate Court's judgment takes the place of and supersedes the decision of the trial Court, so that the principle of *res judicata* cannot apply where a question is left open and undecided by an Appellate Court although it was decided by the trial Court. (*Jwala Prasad, J.*) **GOBIND MISSEER v. BEHARI GOPE.** 47 I. C. 635.

———Heard and finally decided—Claim not adjudicated upon in prior suit, not *res judicata*.

A decision cannot operate as *res judicata* on a question which the Court deliberately abstained from deciding.

A suit by plff. claiming certain property by survivorship on the death of a certain person was dismissed on the ground that the claim was not proved. *Held* that the decision did not operate as *res judicata* in a subsequent suit, for a declaration that a *hot kabula* executed by the deceased and a compromise decree entered into in a suit to enforce it are not binding on the inheritance when it comes to the hands of the plff. as a reversioner. (*Fletcher and Huda, JJ.*) **HARA NARAIN BERA v. SRIDHAR PANDA.** 47 I. C. 2.

———Hindu widow—Decree against—Binding on reversioner, if passed after a fair and bona fide contest. See HINDU LAW, WIDOW. 43 I. C. 523.

———Hindu law—Widow—Decree for maintenance against widow—Effect on reversioner—Bengal Tenancy Act (VIII of 1885) S. 22—Effect.

Where S. the daughter of a deceased Hindu by a wife who had pre-deceased him, sued his two surviving widows on the ground that they declined to deliver a certain pattah and had also dispossessed her from a part of the property covered by the pattah, the said pattah having been executed by them in accordance with a custom prevalent in the

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family by which married daughters who resided in the family dwelling house were entitled to receive a certain amount by way of maintenance for themselves, their husbands and their children, to be enjoyed after their death by their descendants, and it was found that the alleged custom did exist in the family, and the suit was accordingly decreed, *held*, in a suit by the reversioners against the son of S. for recovery of joint possession with the defendant of the land covered by the pattah, that the suit against the widows was not a suit to enforce an alienation made in their personal capacity, and that the decree obtained in that suit was binding on the reversioners in as much as in that suit the widows represented the estate of their deceased husband.

*Held*, further, that by reason of S. 22 of the B. T. Act, the law of merger did not apply to the defts. raiyati interest in the lands covered by the pattah as by the death of the widows he had acquired a proprietary right in only a share in the estate. (*Mullick and Atkinson, JJ.*) **ATUL CHANDRA MITRA v. MIRTUNJOY BOSE.** 3 Pat. L. J. 426=46 I. C. 162.

———Hindu widow—Decision against—Binding on reversioners when succession opens—Widow represents estate. See HINDU LAW, WIDOW. 24 M. L. T. 361 (P. C.)

———Interlocutory order—Order of remand by High Court—Appeal from revised decree—Finality of remand order.

In an appeal to the High Court against a decree passed by a Lower Court on a remand of the case to that Court by an order of the High Court, the appellant cannot challenge the propriety of the remand order. (*Fletcher and Smither, JJ.*) **AJA NASYA v. KARIMBAKSH SARKAR.** 46 I. C. 816.

———Landlord and tenant—Rent—Ex parte decree as to rate of, if operates as *res judicata* in subsequent suit.

An *ex parte* decree in a rent suit, allowing the plff's claim at the rate of rent alleged in the plaint, does not operate so as to render the question of the rate of rent annually payable *res judicata* unless there was a prayer in the plaint for a declaration as to the rate of rent as part of the substantive relief claimed. (*Teunon and Newbold, JJ.*) **BROJENDRA KUMAR ROY CHOWDHURY v. SARAJENDRA NATH JHA.** 45 I. C. 416.

———Letters of administration—Proceedings for—Scope of—Decision in proceedings not *res judicata*—Matter directly and substantially in issue

In an application for Letters of Administration the Court has merely to decide in a preliminary way whether the applicant is heir to the whole or part of the estate of the

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deceased and whether he is a fit person to whom Letters of Administration should be granted. Such a decision does not operate as *res judicata* in a subsequent suit for possession of the property as heir by the defeated applicant (*Shah Din and Scott Smith, JJ.*) MAQBUL SHAH AHAMAD v. MUHAMMAD AZMATULLAH. 49 P. R. 1918=46 P. L. R. 1918=34 P. W. R. 1918=43 I. C. 723.

———*Litigating under the same title—First suit for possession on the basis of a gift—Second suit as heir not barred.*

Plff brought a suit for possession of certain property basing his claim on a gift of the property by his grandmother. The suit was dismissed. He then brought a suit for possession of certain other property as heir of his mother.

Held that the suit was not barred as *res judicata*. (*Mitra, A. J. C.*) BHAGWANSA v. MAROTI. 43 I. C. 395.

———*Litigating under the same title—Property belonging to estate—Erroneously decreed to be in estate A—Tenants under B under permanent leases if bound by decree—Tenants entitled to hold under their own leases under A—Co-sharer—Zemindar purchasing tenure—Possession disputed by tenant of neighbouring Zemindar—Suit as both purchaser and Zemindar to establish title in property purchased—Zemindar's title if in issue*

A and B were neighbouring Zemindaries. The 4/5ths proprietor of A purchased in execution of a decree for his share of the rent a defaulting tenure G in A. A tenant of B having set up title as such to a portion of the land thus purchased, the purchaser sued the claimant and the Zemindar of B to establish the title both as landlord and as purchaser to the tenure G. In the course of that suit a commissioner fixed a boundary between A and B which in a subsequent investigation was found to have erroneously included in estate A lands which really formed part of estate B, as part of the defaulting tenure G, and this was confirmed by the Court

Held that the plff. in that suit was interested in establishing his title both as Zemindar and as purchaser and the Zemindari title having upon the pleadings, been directly put in issue, the decision, so far as plff's 4/5ths Zemindari title was concerned was as between the rival Zemindars *res judicata*.

The defaulting tenure-holder having prior to the sale of the tenure mortgaged his properties the tenure (amongst other properties) was sold in execution of a decree obtained on the mortgage and a part of it was purchased by the mortgagee and the rest by a stranger who later on sold it to the mortgagee. The mortgagee purchaser was no party to the suit of the 4/5ths Zemindar of A who had purchased only

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the equity of redemption at the sale in execution of his rent decree.

Held, that the decision in that suit was not *res judicata* against the mortgagee purchaser who was entitled to show that he held certain portions of the land purchased by him under permanent leases granted to the mortgagor by the proprietors of B on certain terms.

As regards such lands the 4/5ths zemindari title being found to be in the proprietor of A by *res judicata* in the present suit in which both the proprietors of B and the mortgagee purchaser are parties, the mortgagee purchaser is entitled to hold them under 4/5ths the proprietor of A as to that share on the terms of the permanent leases granted by the proprietors of B. (*Woodroffe, Chitty and Huda, JJ.*) SHIB CHANDRA RAY v. HARENDRA LAL RAY CHOWDHURI. 22 C. W. N. 721=29 C. L. J. 223=47 I. C. 315.

———*Litigating under the same title—Suit on promissory note dismissed on the ground that it was not genuine—Subsequent suit for damages for malicious prosecution—No res judicata.*

Plff. sued deft. for recovery of money on the basis of a promissory note. The suit was dismissed on the finding that the promote was not genuine. Dfts then prosecuted plff. for forgery but the plff. was acquitted. He there upon brought a suit for damages for malicious prosecution.

Held, that the finding as to the genuineness of the promote in the previous suit was not *res judicata* in the suit for malicious prosecution, inasmuch as plff. was not litigating under the same title in both the suits. (*Mullick and Imam, JJ.*) TEJU BHAGAT v. DEOKE. NANDAN PROSAD. 47 I. C. 141.

———*Mesne profits, future.—Decree in prior suit silent regarding future mesne profits—Fresh suit for such profits not barred.*

Notwithstanding the provisions of Ss. 13 and 43 of Act XIV of 1882 a subsequent suit for mesne profits *pendente lite* and from the date of the decree to delivery of possession could be maintained when the court had omitted to adjudicate upon the claim in the suit for possession of immoveable property and for mesne profits past and future and the changes in Act V of 1908 do not bar such a suit for the mesne profits accruing due after the institution of the former suit. The change embodied in O. 20, R. 12 of the present C. P. Code is that the court which hears the suit which is to ascertain the mesne profits which accrued before the institution of the suit afterwards up to the date of the delivery of possession and it is this Court which is to pass the final decree for mesne profits which has to be executed by the court executing the decree and further that there are no alterations in the nature of the claim as to the

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future mesne profits. (*Richards, C. J. and Banerjee, J.*) MAHOMAD ISHAY KHAN v. MAHOMAD RUSTAM ALI KHAN.

40 All. 292=16 A. L. J. 182=44 I. C. 88

—Mesne profits—Mortgage suit—Preliminary and final decree—Subsequent suit by mortgagor for mesne profits from date of deposit of money under preliminary decree up to date of suit. See RES JUDICATA, MORTGAGE SUIT.

23 M. L. T. 158

—Might and ought to have been raised—Muafi—Resumption—Muafi Zabti sarkari—Mortgage—Suit for sale decreed—Formal delivery of possession to tenant—Mortgagee Purchaser—Mortgagor recorded as tenant—Mortgagee's application for entry of name rejected by Revenue Court—Suit for possession—Plea that interest not saleable if open to mortgagor.

A owned some land known as muafi sarkari. This was resumed and became muafi zabti sarkari. He sold half of it and the other half passed to his heir B. B sold half of his share to plff. and made a mortgage to him of the remaining half. A admittedly claimed proprietary interest in the land. Plff. brought a suit on his mortgage and obtained a decree for sale. He applied in execution for sale of this property and B pleaded that it was ancestral. It was accordingly sold by the Collector and purchased by the plff. The plff. obtained formal delivery of possession. In the khatauni jamabandi B. was recorded as a tenant the entry being in the words "sir khud." The plff. then applied to the Court of Revenue for the entry of his name in place of B. B successfully pleaded there that the land was his Sir and he had become ex-proprietary tenant. The plff. having failed there brought this suit claiming to be maintained in possession or in the alternative for recovery of possession. He treated B as a proprietor and this was not denied. B also pleaded in the alternative that the land was his Sir and he had become an ex-proprietary tenant. Held, that the plea that B's original interest in the land was not saleable ought to have been raised in the course of the previous litigation and not having been so raised B was precluded from raising it in the present litigation (*Tudball and Rafiq, J.J.*) DEODAT SINGH v. RAM CHARRITTER JATI. 16 A. L. J. 557=

46 I. C. 897.

—Might and ought—Scope of the rule.

Where it is not certain that a matter if proved would have affected the result of a suit, it cannot be said that the matter ought to have been made a ground of attack within the meaning of Explanation IV to S. 11 of the C. P. Code. (*Chapman and Atkinson, J.J.*) SAHRO NARAIN DEO v. KUSUM KUMARI.

46 I. C. 929.

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—"Might and ought"—Suit for possession—Dismissal of—Subsequent suit on different title.

Plff. the purchaser of jote instituted a suit for declaration of title and the recovery of possession, of some lands on the allegation that they appertained to the jote purchased by him. The suit was dismissed. In a subsequent suit by plff for possession of the same lands on the allegation that they appertained to another jote which he had purchased:

Held that the subsequent suit was barred by res judicata.

Semle—A matter which might and ought to have been made a ground of attack in a previous suit between the same parties may be res judicata even though it was not finally decided in the previous suit. (*N. R. Chatterjee and Richardson, J.J.*) TAKARUNNESSA CHOWDHURANI v. TARINI CHARAN SARKAR.

43 I. C. 221.

—Minor—Decree against—represented by guardian—Fresh suit by minor barred except on proof of negligence of guardian ad litem. See MINOR, DECREE AGAINST.

43 I. C. 563.

—Mistake—Judgment and decree—Suit to set aside on the ground of mistake if and when maintainable. See DECREE, SETTING ASIDE.

3 Pat. L. J. 465.

—Mortgage decree—Preliminary and final—Appeal against order refusing to extend time—Dismissal of—Appeal against final decree—Bar. See (1917) DIG. COL. 1122; MAHADEO v. GANPAT

14 N. L. R. 25=42 I. C. 392.

—Mortgage suit—Final decree—Subsequent suit for mesne profits between date of payment of money under preliminary decree and date of subsequent suit—Maintainability of.

Where in a suit for redemption the mortgagor paid into Court the amount mentioned in the preliminary decree within the time prescribed and a final decree was passed subsequently.

Held, that a suit by the mortgagor for mesne profits between the date of payment and the date of the suit was maintainable and is not barred by res judicata. The mortgagor is not bound to claim a settlement of accounts in the passing of the final decree. 14 C. W. N. 100 fol. 42 I. C. 280 ref. 31 Bom. 527 dist. (*Seshagiri Iyer and Kumaraswamy Sastry, J.J.*) VAIRAPPA THEVAN v. SUBBIAH THEVAN.

23 M. L. T. 158.

(1918) M. W. N. 207=7 L. W. 289=

44 I. C. 251.

—Mortgage suit—First suit for redemption—Second suit for redemption, barred—Remedy by execution.

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In a suit to redeem a mortgage of 1859 the Court passed a decree for redemption and ordered payment of the mortgage amount in instalments under the Dekhan Agriculturists' Relief Act, on 8-4-1899. The decree was not executed and the possession of the property remained as before with the mortgagee. On 26-5-1899 the mortgagor mortgaged the property to the plaintiff. In 1912 the plaintiff sued to enforce the mortgage against his original mortgagor and mortgagee. The mortgagee deft. Pleaded the decree of 1899 as a bar to the suit.

*Held*, that the suit was barred under S. 11 of the C. P. Code, if it be treated as a suit for redemption of the mortgage of 1859, and that it was barred under S. 47 of the Code, if it be treated as based on the decree of 1899 taken along with the subsequent conduct of the parties in not executing the decree and in allowing the possession to remain with the mortgagee as before. (*Heaton and Shah, JJ.*)  
BAPUJI v. GUJA. 42 Bom. 246=  
20 Bom. L. R. 164=44 I. C. 908.

—Mortgage—Suit for interest after principal becomes due—Subsequent suit for principal and interest—Maintainability: See C. P. C. O. 2, R. 2. 33 P. R. 1918

—Mortgage suit—Issue as to paramount title cannot be litigated—Decision on, not *res judicata*.

A person was impleaded as a subsequent mortgagee in a suit upon a mortgage. The subsequent mortgagee claimed a title to a portion of the mortgaged property as owner. He, however, did not enter appearance in that suit. The mortgagors asserted that he was entitled to as owner to a portion of the property. The Court held that the mortgagors were estopped from raising that plea and ordered the whole property to be sold. In a subsequent suit by the subsequent mortgagee for a declaration of his right in respect of the portion in controversy in the former suit, *held*, that he was not precluded from raising the question inasmuch as in the former suit he filled two capacities, viz., (1) as a subsequent mortgagee in which capacity he was entitled to raise such defence as was open to the mortgagors, and (2) as claiming a paramount title in which case he could not raise the question in that suit (*Bannerji and A. Rao, JJ.*) GOBARDHAN v. MANA LAL. 40 All. 584=16 A. L. J. 639=  
46 I. C. 559.

—Mortgage suit—Plff. objecting to purchaser of property under mortgage in execution of money-decree to be made party deft.—Decree on mortgage subsequent suit to recover possession from purchaser—Right of purchasers to set up right to redemption, no bar.

The father of deft. No. 1, in execution of a money-decree obtained by him against the mortgagor, purchased the property and

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subsequently obtained possession. The plff. afterwards brought a suit upon his mortgage against the heirs of the mortgagor. To that suit he did not make the father of deft. No. 1 a party. Deft's. father then applied by a petition to be joined as a party deft. On plffs opposing, the application was rejected by the Court. The mortgage suit proceeded and in the result the plff. obtained a mortgage decree in the usual form and in execution purchased the property himself. He obtained symbolical possession from Court. The plff. then instituted a suit for ejectment.

*Held*, that the defts. were not debarred from setting up a right of redemption. (*Richardson and Beachcroft JJ.*) REBATI MOHAN DAS v. NADIABASHI DEY. 22 C. W. N. 543=  
23 C. L. J. 255=44 I. C. 521.

—Mortgage suit Redemption suit by one of the co-mortgagors impleading co-mortgagors as defts.—Subsequent suit for redemption by another co-mortgagor, not barred.

A decree was passed in a suit for redemption by one of several co-mortgagors in which the other co-mortgagors were impleaded as defts. The decree directed that if the plff. failed to pay the money within 6 months, the decree would become a nullity. It did not provide for redemption by the defts. co-mortgagors in case the plff. made default. The plff. failed to comply with the order of the court, and subsequently some of the co-mortgagors brought a suit for redemption.

*Held*, that the suit was not barred by *res judicata* inasmuch as the plffs. in the subsequent suit were not claiming under the plff. in the previous suit. (*Lindsay, J. C.*) BHAIROON BAKHSH SINGH v. RAGHUBANSA KUNWAR. 5 O. L. J. 43=45 I. C. 300.

—Parties and representatives—Death of defendant (contractor) pending suit—Person brought on record as legal representative and decree in plaintiffs favour—Another person real representative—Decree if binding on him or her.

In a suit for specific performance of a contract the defendant (Contractor,) died pending suit and his widow, daughter-in-law, and mother were brought on record as his legal representatives, the two latter on the ground of a will stated to have been left in their favour bequeathing the suit property. The widow and mother of the deceased appeared and stated that they had no interest in the suit because the deceased had bequeathed the suit property to his daughter-in-law by a will but the daughter-in-law did not appear and put forward the will. Plaintiff was given a decree for specific performance against the widow and the daughter-in-law and mother were exonerated the suit against them being dismissed with costs. On a question subsequently arising as to the binding nature of the decision on the daughter in law in respect of the claim arising

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under the will in her favour held, that the decision was binding on the principle of the decision in 23 Mad 230. (*Abdur Rahim and Napier, JJ*; VENKATA RANGAYYA v NARASAMMA.

23 M. L. T. 208=(1913) M. W. N. 195=  
8 L. W. 19=44 I. C. 852.

Parties and representatives—Decision against mortgagee not binding on mortgagor.

A decision obtained against the mortgagee alone in respect of a question as to the proprietary title is not binding on the mortgagor. 9 O. C. 93 expl (*Lindsay, J. C.*) KHUNNU SINGH v. ABBAS BANDI BIBI.

5 O. L. J. 121=45 I. C. 849.

Parties and representatives—Hindu Joint Family—Alienation by father for Non-binding purpose—Suit by father to set aside alienation, dismissal of, no bar to the sons suing for setting aside alienation and for recovery of their share. See HINDU LAW. JOINT FAMILY.

35 M. L. J. 45.

Parties and representatives—Mother, suit against—Adoption pendente lite—Adopted son bound by result of litigation.

Where during the pendency of a suit or appeal against a widow as representing the estate, she adopts a son, the adopted son is bound by the result of the suit or appeal and a fresh suit by the adopted son is barred by *res judicata*. (*Batten, Pridemore and Mittra, A. J. C.*) GANAPATRAO v. LAXMI BAI

15 N. L. R. 24=43 I. C. 64.

Partition—First suit for partition—Second suit for possession of certain items on the basis of partition already effected—Whether barred. See RECEIVER, POSSESSION. (1918) M. W. N. 683=24 M. L. T. 434

Partition Suit—Decree in prior suit—Bar to institution of fresh suit. See PARTITION, RE-OPENING OF. (1918) Pat. 134.

Plea of—Not to be raised in second appeal, if involves investigation of facts.

A plea of *res judicata* depending on a finding of fact which has not been challenged in the lower Appellate Court, cannot be maintained in second appeal. (*Shadi Lal and Wilberforce, JJ.*) FARZAND ALI v. BAFAR ALI.

46 I. C. 119.

Plea of—Question of law—May be raised at any stage of the case.

The plea of *res judicata* is a question of law and may be raised at any stage of a suit. (*Jwala Prasad, J.*) GOBIND MISHRA v. BEHARI GOPE.

47 I. C. 685.

Principle of—Applicability—Suit by Hindu widow for declaration that an adoption

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made by her was invalid for want of authority from her husband—Decree against widow—Adoption held valid—Suit by reversioner on death of widow questioning adoption—Whether barred. See HINDU LAW, WIDOW.

24 M. L. T. 361 (P. C.)

Promissory note given for a debt—Suit upon note—Dismissal on merits—Fresh suit upon original consideration—Effect of note on original liability—Novation of contract

A owed Rs. 3,000 to the Popular Bank for shares. It was made up of 3 items, i.e. (1) Rs. 1,000 on account of premium (2) Rs. 1,000 on account of application money and (3) Rs. 1,000 on account of allotment money, and the Bank accepted a promissory note of Rs. 2,000 as regards items (1) and (2). The Bank afterwards went into liquidation and the liquidator brought the suit on the strength of the promissory note but failed. After this he moved the liquidation Court.

Held, that there was a novation of contract to pay the application and premium money and that when the company accepted the promissory note in lieu of the liability the share holder must be deemed to have paid the premium and the application money and that the original liability merged in the liability on the promissory note.

Held also that a Court of competent jurisdiction having already adjudicated upon the liquidators claim on the strength of the promissory note the same matter cannot be re-agitated in the Court conducting the liquidation.

Held further that as the suit was dismissed on the merits and not on any technical ground (as for instance in the event of the promissory note being admissible in evidence on account of want of proper stamp) the rule that a creditor can fall back on his original cause of action does not apply in this case. (*Shadi Lal, J.*) MATHRA DAS v. OFFICIAL LIQUIDATOR OF THE POPULAR BANK.

86 P. L. R. 1918=87 P. W. R. 1918,  
=46 I. C. 586.

Rent—Decision as to amount of, for one year—Not *res judicata* in succeeding years.

A decision in a previous suit for profits between the co-sharers of a village that the sir and *khudkhast* of a particular co-sharer yielded profits at a certain rate in the years in suit does not operate as *res judicata* in a subsequent suit between the said co-sharer for profits in respect of other years. (*Lindsay, J. C.*) BALDEO BAKSH v. PAHLAD SINGH.

50 L. J. 67=45 I. C. 218.

Rent suit—Construction of patta not produced in former suit—Constructive *res judicata*

Where rent is capable of variation by contract the decision in a previous suit is *res judi-*

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*cata* only to that extent that it raises a presumption that the rent remained the same in subsequent years and where a document binding the relationship of landlord and tenant has been once construed that construction is *res judicata* for all time, and if such a deed upon such a construction of which the rent for the subsequent years depends, was not produced for the construction the decision in default of that construction will be constructive *res judicata* as to the rate of rent, (*Roe and Imam, J.J.*) : AJA DAKESHWAR PRASHAD NARAYAN SINGH v. RAM PRASAD SINGH. 4 Pat L. W. 47=

(1918) Pat. 218=43 I. C. 753.

——— *Rent suit—Decision as to rate of annual rent—Suit for rent of subsequent year—Prior decision if res judicata.*

A judgment in a suit for rent deciding the annual jama payable on a holding even where it does not operate as *res judicata* on the same question in a subsequent suit for rent is good evidence as to the rate of rent. (*Chitty and Walmsley, J.J.*) HAR KUMAR SEN v. RAJ KUMAR HALDAR. 47 I. C. 173.

——— *Rent suit—Decision, how far res judicata.*

Per *Atkinson, J.*—A decree in a rent suit is not *res judicata* as to the rate of rent payable for years other than the years covered by the decree unless the rent is payable at a rate stipulated by the contract.

Per *Mullick, J.*—The question whether a decision as to the rate of rent operates as *res judicata* depends on the frame of the issue.

Where an order for remand by the High Court directed the Lower Court to ascertain the rate of rent payable for the years in suit, *held*, that the decision of the rate of rent by the Lower Court did not operate as *res judicata* as regards the rate of rent payable for years other than the years included in the suit. (*Mullick and Atkinson, J.J.*) KISHUN DEYAL RAI v. MUSSANMAT KALPATI KUEB.

(1918) Pat. 238=3 Pat. L. J. 372=45 I. C. 316.

——— *Rent suit—Findings in, as to validity of kabuliyat, when res judicata in subsequent suit.*

The question whether the decision in a rent suit can operate as *res judicata* on matters other than the relationship of landlord and tenant, depends upon what were the issues raised and decided between the parties in the rent suit.

Where in a rent suit, a kabuliyat has been held on a judicial determination, to be valid and effective as against the tenant and to have been properly executed, a subsequent suit by the tenant for a declaration that a kabuli-

## RES JUDICATA.

yat is null and void is barred by *res judicata* (*Fletcher and Smither, J.J.*) BENI MADHAB CHAKRABARTY v. BHOLA NATH MAJILA.

47 I. C. 8.

——— *Rent suit—Negation of plaintiff's title in prior suit—Subsequent suit by plff. for the same period after registering his name—Bar—B. T. Act, S. 60 effect of*

Plff. sued the defts for rent of certain lands as usufructuary mortgagee thereof. The defts. pleaded that the plff. was not entitled to sue for rent inasmuch as his name had not been registered as mortgagee. The question of his title as mortgagee was also put in issue and was decided against him. He subsequently brought another suit for rent for the same period after registration of his name.

*Held*, that the subsequent order was barred by *res judicata* and that S. 60 of the B. T. Act had no application to the case, inasmuch as the defts. denied the mortgage in favour of the plff. altogether. (*Imam, J.*) SHEO CHARAN DHOBI v. BANSI SINGH. 44 I. C. 129.

——— *Representative suit—Public pathway—Dispute as to—Dismissal of first suit on the ground that no damage is proved—Subsequent suit under S. 91—Defence that pathway in private, barred—C. P. Code, S. II. Except 6.*

Where in a previous suit instituted by the plff's, father against the defts it was found that the suit path was a public one, but the suit was dismissed on the ground that no special damage was alleged; and the present suit was brought by the plff. with three other members as plaintiffs after obtaining the requisite sanction under S. 91 of the C. P. Code and the defts. pleaded that the pathway in dispute was a private right of way.

*Held*, that the finding in the previous suit operated as *res judicata* in the present suit. Apart from the law of *res judicata* a party who has been defeated on a particular view of the facts of the case put forward by him should not be allowed to resile from that position and to raise a defence inconsistent with his original contention and should be held estopped from questioning the judgment to which he was a party. 36 M. 141 Rel. (*Seshagiri Aiyar and Napier, J.J.*) KHAJI SAYYID YUSUFF SAHIB v. EDIGA NARASIMHAPPA.

(1918) M. W. N. 475=8 L. W. 377=44 I. C. 367.

——— *Revenue Court—Decision of, that relationship of landlord and tenant does not exist between the parties res judicata in subsequent suit for ejectment—See B. T. ACT, SS. 105 A. 107 AND 109*

3 Pat L. J. 379.

——— *Revenue Court Decision of, if res judicata, in matters within its jurisdiction.*

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A Civil Court has jurisdiction to entertain a suit for a declaratory decree that plff has acquired a proprietary title in the land in suit notwithstanding that a Revenue Court has already held that plaintiff is merely the tenant of the deft. and that the decision by the latter Court on the question of title is not *res judicata* in the Civil suit. 26 All. 468; 70 P. R. 1893; 83 P. R. 1918 Ref. 29 All. 601; 33 All. 453; dist. (*Shah Din, J.*) *BILA v SULTAN ALI*.

77 P. W. R. (1918)=45 P. R. 1918=  
84 P. L. R. 1918=46 I. C. 13.

—Rule of—Applicability—Subsequent suit beyond the pecuniary limit of the jurisdiction of the Court which tried the prior suit *See* MORTGAGE, PRIOR AND SUBSEQUENT.

35 M. L. J. 639.

—Suit for declaration of a public right of way—Dismissal of on the ground that plaint did not disclose cause of action expressly stating that plff. was not debarred from bringing fresh suit—Second suit whether barred. *See* PUBLIC WAY, OBSTRUCTION.

28 C. W. N. 91.

—Withdrawal of suit with liberty—Order by Appellate Court allowing, on ground of insufficient evidence—Effect—Fresh suit—Maintainability. *See* C. P. CODE, O. 23, R. 1.

3 Pat. L. J. 404.

—Decree for—Discretion of Court—arbitration of entire suit, irregular.

It is entirely within the discretion of the Court to grant or refuse a decree for restitution of conjugal rights but the Court cannot delegate the decision of the entire suit to arbitrators, although it is open to it to refer any particular matter to arbitration (*Shadi Lal, J.*) *KALABUTU v. PRABH DIAL*. 73 P. L. R. 1918=80 P. W. R. 1918=45 I. C. 163.

**RESTITUTION OF CONJUGAL RIGHTS—**  
*Discretion of Court—Principles for guidance of.*

A judge has no discretion to refuse a decree for restitution of conjugal rights for other causes than those which in law justify a wife in refusing to return to live with her husband. (*Scott Smith, J.*) *NIAS ALI v. SAID JAN*.

67 P. W. R. 1918=46 I. C. 112.

—Mahomedan Law—Legal Cruelty, a valid defence. *See* MAHOMEDAN LAW, —RESTITUTION.

16 A. L. J. 132.

—Suit for—Duty of plff. to provide residence for his wife.

In order to succeed in a suit for restitution of conjugal rights the plff. is bound to provide a suitable residence for his wife. (*Fletcher and Huda, J.J.*) *AHMAD ALI v. JINNATUNNESSA*. 46 I. C. 481.

**RESTITUTION—Doctrine, of—Applicability to representatives of parties to suit. — Decree for**

## REVENUE SALE.

*possession—Reversal in appeal—Recovery of property in execution of original decree—Purchaser of property in execution of decree against person so recovering—Restitution as against.*

The plffs. who were out of possession at the date of the institution of a suit for possession obtained a decree in the primary Court. That decree was executed and they were placed in possession. Meanwhile, an appeal preferred by the unsuccessful deft. was decreed by the Lower Appellate Court and the decree for possession made by the trial Court in favour of the plffs was therefore discharged. The decree of the appellate court was confirmed by the High Court, and an appeal therefrom under clause 15 of the Letters Patent proved infructuous. In the interval, the present petitioner, had purchased the disputed property in execution of a mortgage decree obtained against plffs and was placed in actual possession of the purchased property by the Court. On reversal of the decree of the trial Court, the opposite party applied to be restored to possession by way of restitution.

Held that for the purpose of transference of possession from the plffs. to the petitioner the latter was a representative of the plffs and the doctrine of restitution was applicable. (*Monkerjee and Beachcroft JJ.*) *SHEODAR. SANLAL BAJPAI v. CHANDRA ROY*.

27 C. L. J. 489=46 I. C. 168.

—Proceeding by way of—Nature of. C. P. Code Or. 2 R. 2—Applicability to proceeding for restitution. *See* C. P. CODE, S. 144.

3 Pat. L. J. 367.

**REVENUE SALE—Auction purchaser—Not bound by decision previously obtained against defaulting proprietor—Principle applies, only to purchaser of an entire estate.**

The principle that an auction purchaser of the rights of the Government in an estate sold for the arrears of revenue is not bound by a decision previously obtained to which the defaulting proprietor was party, has been extended to the case of an auction-purchaser of an entire estate at a sale under the Revenue sales Act but not to the purchaser of the share of an estate at a revenue sale. 8 W. R. 222. 8 C.W.N. 676, 9 C. W. N. and 34 Cal. 868 foll. (*Chapman and Atkinson, J.J.*) *DEBI SARAN SINGH v. RAJBANS NATH DUBEY*.

(1918) Pat 134=5 Pat L. W. 9=  
45 I. C. 895.

—Collusive Sale—Default in payment of revenue by mortgagee—Right of mortgagor to redeem.

Deft. a mortgagee in possession of a share in a taluk who had undertaken to pay the Government revenue made default in payment of the revenue, so that the taluk was sold for arrears of revenue and was purchased by A. A sold it to B who shortly afterwards

## REVENUE SALE.

sold it to the deft. Plff., who was a purchaser from the mortgagor sued to recover possession of the taluk from the deft, on redemption. It was found that the sale for arrears of revenue and the subsequent sales to B and the deft. were collusive transactions engineered by the deft. for the purpose of obtaining possession of the taluk as owner.

*Held*, that the sales did not affect the rights of the mortgagor of the plff. who was a transferee from the mortgagor, and that the plff. was, therefore, entitled to redeem. (*Richardson and Beachcroft, JJ.*) *JAMILIA KHATUN CHOWDHURY v. MAHAMUD KHATUN CHOWDHURI.* 45 I. C. 735.

—Under Act II of 1864—Confirmation by Dy. Collector—Approval by Collector under S. 8 of Madras Regulation VII of 1828—Subsequent cancellation by Collector, by direction of the Board—Suit to set aside—Limitation. See MAD. REVENUE RECOVERY ACT, SS. 37 AND 38 ETC. 41 Mad 955.

**REVENUE SALE LAW (BENGAL) (XI OF 1859).** Purchaser of right to revenue free lands within the estate—Bengal Land Revenue Sales Act (XI of 1859) See (1917) DIG. COL. 1182, *ABDUL RAHAMAN KAZI v. BAIKUNTA NATH ROY.* 27 C. L. J. 133=41 I. C. 757.

**REVIEW**—Competency of—Rejection of appeal from judgment of a tribunal, as being barred by time—Subsequent application to first court for review, incompetent. See COMPANIES, LIQUIDATION. 40 P. R. 1918

—Criminal Court—No power to entertain review See. CR. P. CODE. SS. 369 AND 145. 45 I. C. 817.

—Jurisdiction—Judicial Commissioner—Power to review his decision in rent cases.

The Court of the Judicial Commissioner of Oudh has power under the C. P. Code to review its own decision given in a rent appeal. This power is not affected by the provisions of Act XXII of 1886 which gives authority to the Board of Revenue to review its decision (*Stuart, J. C.*) *PARTAB BAHADUR SINGH v. BADLU.* 21 O. C. 254=43 I. C. 276.

—Of order for delivery of possession—Appeal from—Maintainability—jurisdiction—Review of order granting delivery of possession—Validity. EXECUTION OF DECREE. 3 Pat. L. J. 571

—Suit—Ex parte decree—Specific fraud—Decree set aside on proof of fraud—Position of parties on setting aside—Adjustment of suit—O. 23 R. 3.

A suit for the recovery of arrears of rent and for ejectment was decreed ex parte. The defts. sued to set aside the ex parte decree alleging fraud to the effect that the plff. agreed

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on receipt of Rs 44 from the defts, to withdraw from the suit, but that he had not intimated this arrangement to the Court and had, on the other hand taken advantage of the absence of the deft to secure an ex parte decree against him. The allegation was fully established and the ex parte decree was set aside on that ground.

*Held*, that the original suit was revived by the setting aside of the ex parte decree, the parties restored to the position they occupied on the day the ex parte decree was made and the arrangement between the parties, namely that the plff. do withdraw from the suit should be carried into effect by a decree under O. 23 R. 3 of the C. P. Code, without fresh investigation (*Mukherjee and Walmesley, JJ.*) *NISTARINI DAS v. MOHENDRA NATH KAR.* 28 C. L. J. 188=47 I. C. 535.

**RIGHT OF SUIT**—Assignee of portion of estate of deceased person—Right to sue for declaration of title during pendency of administration suit.

An assignment of a portion of the estate of a deceased person is competent to sue a third person for a declaration of title during the pendency of a suit for the administration of the estate of the deceased. 10 Cal. 719, dist. (*Parletti and Ormond, JJ.*) *MAUNG AUNG MYAT v. MAUNG SIN.* 43 I. C. 539.

—Benamidar—Extent of. See BENAMIDAR. 41 Mad. 433, also 7 L. W. 201

—Benamidar—Extent of—Execution of decree by benamidar assignee of decrees. See O. P. CODE, O. 21, R. 16. 7 L. W. 201.

—Company—Liquidation—Questions settled by liquidating court not liable to be reopened by regular suit. See COMPANY, LIQUIDATION. 40 P. R. 1918.

—Insolvency—Transfer by insolvent in favour of creditor set aside under S. 36 of the Pres. T. Ins. Act.—Right of creditor to bring a regular suit for a declaration. See PRES. TOWNS INS. ACT SS, 36, 9 ETC. 22 C. W. N. 335.

—Moneys of one in the hands of another—Right to recover in the absence of corruption or fraud on the part of the plff. See CONTRACT ACT S. 65. 23 M. L. T. 84.

—Money paid under decree not recoverable until decree reversed or superseded.

Money paid under compulsion of legal process, which is afterwards found not to have been due cannot be recovered back as money had and received.

Money paid under a decree or judgment cannot be recovered back in a fresh suit so long as the decree or judgment under which

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money is paid remains in force. The decree or judgment must be taken as subsisting until it is reversed or superseded by some ulterior proceeding 10 M. I. A. 263; 16 C. L. J. 437 ref. (*Jwala Prasad, J.*) UPENDRA CHANDRA SINGH v. CHIODITTI 45 I. C. 562

—Plf. suing on behalf of himself and others—Objection to, if maintainable.

Where a debt, in a suit brought by the manager of the Court of Wards knows that the manager is suing on behalf of the Ward as well as on behalf of other persons interested in the property in dispute, he cannot resist the suit on the ground that the Ward is not the sole owner of the property, (*Lindsay, J. C.*) HASEMAT ALI v. THE SPECIAL MANAGER, COURT OF WARDS. 50 L. J. 31=

45 I. C. 248

—Stranger to contract—Vendee directed to pay off creditors of vendor out of purchase money, right of creditors to sue. See (1916) DIG. COL. 1315, DEBARA NATHASHA v. PRIYA NATH MALKI. 22 C. W. N. 279=

27 C. L. J. 483=

36 I. C. 792.

—Stranger to contract—Right to take advantage of its terms. See CONTRACT.

3 Pat. L. J. 394.

**RIPARIAN OWNERS**—Right of, river flowing through proprietary estate—Right to the soil of the river bed *ad medium filum aquae* See BENGAL REGN XI OF 1825.

22 C. W. N. 872.

**RIPARIAN PROPRIETOR**—Use of water for agricultural purposes—Right to and extent of—Rights acquired by riparian proprietor in respect of artificial stream connected with natural stream—Nature of—Grant of right in respect of such stream by one riparian proprietor to another riparian proprietor—Validity—Right to divert water outside tenement—Right to use of water—Obstruction—Suit for removal of—Limitation Cause of action—Lim. Act Ss. 23 and 26—Applicability. See (1917) DIG. COL. 1185; MAHANATH KRISHNA DAYAL GIR v. MUSSAMMAT BHAWANI KUEB. 3 Pat. L. J. 51=

3 Pat. L. W. 5=43 I. C. 235

**RIPARIAN RIGHT**—Extent of, in India—Person exercising riparian rights not liable to pay water cess to Govt. See MAD IRRIGN. CESS ACT, S. I.

43 I. C. 113.

—Grant of land bounded by a river—Right to half the soil of the bed of the river—*Ad medium filum aquae*. See BENGAL REGN XI OF 1825.

22 C. W. N. 872.

—Non-navigable river—Test of—Bed of the river—Ownership of—*Ad medium filum aquae*—Common law of India—Grant of property

## RIVER.

bounded by river—Right to half the bed—Churs formation of—Right of Govt to levy assessment.

In this country the test as to whether a river is navigable is whether it allows of the passage of boats at all times of the year.

Although an exclusive right of fishery in a non-navigable river does not of itself pass the right to the soil in the bed of the river yet when the terms of a grant are unknown or uncertain, it is a matter of importance in connection with the question whether the person who has the exclusive right of fishery in the river is entitled to the bed of the river.

Churs formed in non-navigable rivers which form part of permanently settled estates are not resumable under the provisions of the Bengal Alluvial and Diluvial Regulation XI of 1825.

Before there can be a further assessment of Government revenue on churs formed in rivers there must be a "gain" from the public domain. The mere fact that a portion of a permanently settled estate has become more valuable is no ground for altering the assessment. The fact that no amount or only a small amount in respect of a particular piece of property entered into the calculation on the basis of which the Government revenue was permanently settled and that the property has since become of much greater value, is no ground for disturbing the Permanent Settlement of the Estate.

By the common law of this country, the right to the soil of a non-navigable river, when flowing within the estates of different proprietors, belongs to the riparian owners *ad medium filum aquae*.

Where a property is bounded by a road or a river the boundary, even if given as the road or the river, is the middle of the road or the river as the case may be. Therefore, permanently-settled estates bounded by a non-navigable river include half of the bed of the river.

The assessment of the Government revenue at the time of the Permanent Settlement on riparian mouzas was imposed not only on the mouzas but also on the adjoining half of the bed of a non-navigable river. (*Fletcher and Huda JJ.*) MAHARAJAH OF BURDWAN v. SECRETARY OF STATE FOR INDIA. 46 I. C. 305.

**RIVER**—Public and navigable, ownership of the bed and ownership of the banks—Submersion—Title to land submerged left bare—Evidence—Admissibility—Survey maps made before 1893—*Hakikat chowdhaddibandi* (boundary) papers. See (1917) DIG. COL. 1187; HARADAS ACHARYA CHOUDHURY v. SECY. OF STATE FOR INDIA.

(1918) M. W. N. 28=20 Bom. L. R. 49=

26 C. L. J. 590=43 I. C. 364 (P. C.).

## RIVER.

—Navigable river—Test of in India—  
Passage of boats at all times of the year. See  
RIPARIAN RIGHTS. 46 I. C. 305.

—Whether navigable. test of See  
BENG. REG. XI OF 1825. 23 C. W. N. 872.

—Of non-navigable, rivers—Right of  
grantee of land on its sides to bed of river and  
medium flum aquæ—Onus on grantor to show  
that the grant did not cover the bed. See  
GRANT, CONSTRUCTION. 35 M. L. J. 159  
also 45 I. C. 305.

—Ownership. of—Exclusive right of  
fishery as evidence of title in the soil of—  
Riparian owners' right to the middle of the  
stream. See BENG. REG. XI OF 1825.

22 C. W. N. 872

RIWAIJAM—Entries in—Strong proof of cus-  
tom, though unsupported by actual instance  
See CUSTOM, PROOF OF. 45 I. C. 966.

RYOTWARI LAND—Occupancy right in—  
lands unoccupied—Govt ryotwari at one time  
—Acquisition of occupancy rights in, by culti-  
vating tenant—Evidence necessary to prove.  
See LANDLORD AND TENANT. 7 L. W. 194  
also 34 M. L. J. 234.

SALE OF GOODS—Contract c. i. f. — Goods  
in a German ship—Outbreak of war, while  
steamer was on voyage—Effect of war on  
contract—Whether buyer bound to accept  
goods See (1917) DIG. COL. 1139; THIRUVA-  
BANGIAH v. PANIA AND CO.

33 M. L. J. 410—43 I. C. 673.

—Contract c. i. f.—Purchase under  
indent to commission agent to purchase and  
ship goods on account and risk of defendant  
—Outbreak of war while goods in trans-  
it—Right of Commission agent to recover  
under the contract—Right of vendees under  
ordinary c. i. f. contracts—Contract Act, S. 222.  
Principal's duty to indemnify agent.

Where goods are purchased from a commis-  
sion agent under a c. i. f. contract, in the  
terms of the indents by which the commission  
agent was "to purchase for us (the principals),  
the undermentioned goods on our (the  
principal's) account and risk" it is opposed  
to the law of agency to throw upon the agent  
the risk of the outbreak of the war while the  
goods are in transit on board an enemy ship,  
dissolving the contract of affreightment be-  
tween the shipper and the shipowner and  
making it impossible for the commission agent  
to do what a vendor under an ordinary c. i. f.  
contract, is bound to do namely to tender  
among the shipping documents bills of lading  
which are still valid contracts.

Where goods are purchased in this manner  
from a commission agent under a c. i. f. con-  
tract, though the agent is regarded for some  
purposes as a principal and as any other  
vendor under a c. i. f. contract, yet the rela-  
tion of principal and agent subsists. *Ireland*  
*v. Livingstone*, L. R. 5 H. L. 875 foll.

## SECOND APPEAL.

In such a case, a special contract throwing  
the risk on the buyer can be inferred from the  
fact that the goods were to be purchased and  
shipped on account of the buyer, pursuant to  
the principle embodied in S. 222 of the  
Contract Act.

In the case of an ordinary c. i. f. contract  
between vendors and vendees the tender of the  
shipping documents including bills of lading  
which have been dissolved as contracts of  
affreightment is not such a tender as the  
vendees are bound to accept under the contract  
and the goods are thrown on the vendor's  
hands. It makes no difference in the applica-  
tion of this rule if the bills of lading were  
endorsed over to the vendees before the out-  
break of the war. (*Wallis, C. J. and Spencer, J.*)  
*H. ELLIOT & Co. v. ABDUL SAHIB*.

41 Mad. 1660—35 M. L. J. 184—8 L. W. 565.

—By description—Implied warranty of  
merchantable quality—Inspection of goods  
before purchase—Effect—English and Indian  
Law. See CONTRACT ACT, S. 113.

38 M. L. J. 180.

SANCTION TO PROSECUTE—Petition for  
—Evidence—Deposition of respondent not  
recorded in conformity with provisions of O.  
18, R. 5 of Civil Procedure Code—Admis-  
sibility See C. P. C. O. 18, R. 5. 7 L. W. 435.

SEARCH—Possession of unlicensed arms—  
Sub-Inspector in charge of reporting station—  
without warrant from magistrate—legality. See  
ARMS ACT, S. 20. 16 A. L. J. 721.

SECOND APPEAL—Custom—"Usage having  
the force of law"—Findings of fact—Inter-  
ference with on second appeal when justifiable.  
See C. P. CODE, S. 100. 41 Mad. 374 (F. B.)

—Error of law—Disposal of case by  
lower appellate court on new point raised by  
itself for the first time and requiring evidence.

A Judge who disposes of a suit on a point  
taken by himself on appeal without affording  
the parties an opportunity of proving what is  
necessary to meet the point, commits an error  
of law. 17 Mad. 140 foll. (*Maung Kim, J.*)  
*BICHAY SUKUL v. BEHARI SUKUL*.

11 Bur. L. T. 1—43 I. C. 488.

—Error of law—Misconstruction of  
documents—Interference. (*Ayling and*  
*Phillips, JJ.*) *KRISHNASWAMI IYENGAR v.*  
*SUBRAMANIA GANAPATHIGAL*.

35 M. L. J. 304—23 M. L. T. 85—(1918)  
M. W. N. 231—7 L. W. 210—44 I. C. 523.

—Error of law—Omission to keep in  
view legal principles in coming to conclusion  
on facts—Interferences by High Court. (*Ayling*  
*and Phillips, JJ.*) *KRISHNASWAMI IYENGAR*  
*v. SUBRAMANIA GANAPATHIGAL*.

35 M. L. J. 304—23 M. L. T. 85—(1918)  
M. W. N. 231—7 L. W. 210—44 I. C. 523.

## SECOND APPEAL.

—————*Error of law—Omission to comment on evidence, if*

The mere fact that a court has not made any observation on a particular piece of evidence is not enough to show that the Court wholly ignored it and cannot form a ground of second appeal. (*Knoz, J.*) **SHYAM LAL v. RAM CHABAN.** 43 I. C. 528.

—————*Evidence—False case set up by both parties—Duty of High Court to decide on evidence.*

Where according to the finding of the first Appellate Court both the plaintiff and the defendant have set up a false case, the way in which the High Court ought to deal with the matter in second appeal is to decide the case upon the facts which have been found by the lower Appellate Court irrespective of the original cases respectively made by the parties in their pleadings (*Sanderson, C. J., and N. B. Chatterjee, J.*) **HARSHANKAR OJHA v. GOURI SHANKAR.** 22 C. W. N. 149=45 I. C. 795

—————*Evidence—Weight to be attached to—Not a question of law.*

The weight to be attached to a statement in a rent receipt or any other document is a matter within the cognisance of the Court of first appeal, with which the High Court in second appeal is not entitled to interfere. (*Fletcher and Panton, J.J.*) **SATISH CHANDRA MUSTAFI v. ABDUL MAJID MUHAMMAD** 47 I. C. 780.

—————*Finding of fact—Failure to consider the entire evidence—Effect of.*

A finding of fact can be questioned in second appeal, if it is found that the Lower Appellate Court failed to consider the entire evidence on the record relating to that fact. (*Lindsay J. C.*) **SHEODARSHAN LAL v. ASEESAR SINGH.** 50 L. J. 179=46 I. C. 52.

—————*Finding of fact—Finding as to 'time requisite for obtaining copies' under S. 12 of Limitation Act. See LIM. ACT, S. 12.* 100 P. R. 1918.

—————*Finding of fact—Finding as to whether particular business is or is not an actionable nuisance—Interference in Second Appeal. See NUISANCE.* 7 L. W. 505.

—————*Finding of fact—Findings based on surmise and not on evidence.*

In deciding the question of succession to an occupancy holding under S. 59 of the Punjab Tenancy Act conjecture must not be allowed to take the place of legal proof.

Where, therefore, in a suit in which the plaintiff claim to succeed to an occupancy holding on the ground that they are the collaterals of the deceased tenant, the findings of fact

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arrived at by the Lower Appellate Court are based on conjectures, they are not judicial findings and cannot be accepted as final in second appeal. (*Shah Din, J.*) **SULTAN AHAMAD v. PALA.** 102 P. W. R. 1918=45 I. C. 800.

—————*Finding of fact—Interference with, Principles. (Chevis, J.) GANGA RAM v. DEWA SINGH.* 33 P. L. R. 1918. =92 P. W. R. 1918=47 I. C. 39.

—————*Finding of fact—No power to question record of rights—Entry in—Evidence to rebut presumption of correction of.*

Where the Lower Appellate Court, though in a somewhat summary judgment came to the conclusion that the evidence was not sufficient to rebut the presumption of correctness of the entries in a record of rights held, that the conclusion was one within the exclusive competence of a final Court of fact and that the High Court having only a limited jurisdiction in second appeal, could not review that finding of fact. (*Fletcher and Richardson, J.J.*) **GOUR CHANDRA CHUCKERBUTTY v. BIREN-DRA KISHORE MANIKYA** 22 C. W. N. 449=45 I. C. 68.

—————*Finding of fact—Question of intention.*

The question with what intention a person did a certain act can hardly be said to be anything but a question of fact. The question must be examined with reference to the subsequent acts of the person alleged to have a certain intention. (*Roe and Imam, J.J.*) **RAG-HUBIR PRASAD v. MISRI KAHAR.** 45 I. C. 303.

—————*Finding of fact—Status of tenant—Mistake as to the area of tenancy—Correction in second appeal.*

A finding as to the status of a tenant arrived at by the Court of first appeal is a finding of fact, with which the High Court in second appeal ought not to interfere except on the ground of some clear mistake of law.

A mistake as to the area of the tenancy can hardly be described as a mistake of law, even where the finding regarding the status of the tenant is based to some extent upon the mistake as to the area. (*Richardson and Walmsely, J.J.*) **DARFANABAIN SARKAR v. GIRISH CHANDRA DAS.** 46 I. C. 351.

—————*Grounds—Custom—Question as to when a ground of second appeal See O. P. C. S. 100 (a)* 23 M. L. T. 44 (F.B.)

—————*Grounds for—Decision on surmises and conjectures.*

It is open in second appeal to attack decision based not on evidence but on surmise and conjectures. (*Richardson and Walmsely J.J.*) **DEHRUPAD v. HARI.** 22 C. W. N. 826=27 C. L. J. 563=45 I. C. 880.

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—*Grounds for—Defective judgment on appeal—Interference.*

In a suit for confirmation of possession on declaration of title the Court of First Instance went both into the questions of possession and title, but the Lower Appellate Court dismissed the appeal without considering the question of possession, on the ground that plf's title was not proved.

*Held*, that the appellate judgment could not stand as it was founded on a very partial view of the case without really going into the question either of possession or of title (*Fletcher and Smith, J.J.*) *RAM NATH OJAH v. NATABAR MAITI.* 36 I. C. 328.

—*Grounds for—defective judgment—Presumptions and suspicions, not a ground for decision.*

A judgment based on mere conjectures and presumptions is liable to be set aside in second appeal.

Where on the death of an occupancy tenant his collateral claim to succeed to the tenancy, the onus lies on them to establish affirmatively that the common ancestor occupied the land. In such a case conjecture cannot be accepted as a substitute for the proof. (*Shadi Lal, J.*) *BHAGWAN DAS v. SHAMSHER SINGH.* 33 P. L. R. 1918=55 P. W. R. 1918=44 I. C. 433.

—*Grounds for—Omission to consider piece of evidence by lower Appellate court—No ground for interference.* See (1917) DIG. COL. 1148; *BASIRUL HUQ v. MUHAMMAD AJMUD DIN.* 3 Pat. L. W. 213=43 I. C. 857.

—*Interference in—Lower Appellate Court reversing decision of trial Judge on a case not set out in the plaint nor in the grounds of appeal to the Lower Appellate Court—Improper procedure* See PLEADINGS. 43 I. C. 29

—*Interference with findings of fact—Railway Company—Suit for damages for loss of goods carried under Risk note B—Finding as to wilful negligence—Interference in Second Appeal—Practice.* See RAILWAY COMPANY. 4 Pat. L. W. 369.

—*Maintainability of—Appellate decree passed without jurisdiction—Second appeal maintainable.* See C. P. CODE, S. 190; SUB-SEC. (1) 27 C. L. J. 115.

—*Maintainability—Occupancy holding—Transfer of—Registration fee for—Suit for recovery.* See ORISSA TENANCY ACT, SS. 31, 350. 3 Pat. L. J. 367.

—*Maintainability of—Order dismissing memo. of cross objections—Revision.*

Deft. appealed to the Dt. Court from the decree of the first Court but the appeal was dismissed on the ground that it had not been filed by deft. nor by any one duly authorised

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by him. Plff. also appealed to the Dt. Court against the same decree and deft. filed cross-objections on practically the same grounds taken in the abortive appeal referred to above.

The Dt. Judge rejected the memo of objections holding that the deft. was not entitled to re-open the matter which was the subject of the dismissed appeal.

*Held*, that no second appeal lay from the order dismissing deft's cross-objections but that the cross-objections having been dismissed on erroneous ground, there was a case for interference in revision. (*Broadway, J.*) *ALLA BAKSH v. NUR BAKSH.* 20 P. R. 1918=44 I. C. 812

—*New issue—Retrial, not to be allowed.*

It is not open to the plffs. to ask in second appeal for a retrial on an issue of fact which had not been raised or considered in the Courts below. (*Fletcher and Newbould, J.J.*) *HALO DHAR MALO v. KALI PROSARNA BASU ROY.* 43 I. C. 18.

—*New point of law involving questions of fact, not to be allowed.* See (1917) DIG. COL. 1148; *JADAB CHANDRA MULLIK v. MANIK SARKAR.* 22 C. W. N. 156=44 I. C. 91.

—*New point of law—Investigation of facts essential for decision of.* See (1917) DIG. COL. 1148; *BASIRUL HUQ v. MUHAMMAD AJIMUDDIN.* 3 Pat. L. W. 213=43 I. C. 857.

—*New point of Law involving questions of fact not to be allowed.* See (1917) DIG. COL. 1148; *JADAB CHANDRA MULLICK v. MANIK SARKAR.* 22 C. W. N. 156=44 I. C. 91.

—*New point, when allowed to be raised.*  
A new point of law, as to the invalidity of a condition attached to a mortgage by conditional sale, can be raised in second appeal, if it is patent on the record. (*Shadi Lal, J.*) *ALLAH DIN v. FATEH DIN.* 31 P. R. 1918=27 P. L. R. 1918=54 P. W. R. 1918=45 I. C. 101.

—*Question of fact—Custom not established by evidence.* See (1917) DIG. COL. 1148; *KAILASH CHANDRA DUTTA v. PADMAKISHORE ROY.* 45 Cal. 285=21 C. W. N. 972=25 C. L. J. 613=41 I. C. 959.

—*Question of fact—Meaning of a disputed word, question of fact and not of law.* (*Drake Brockman, J. C.*) *MADHO RAO v. GOVINDBHAT.* 45 I. C. 794.

—*Question of law—Benami—Fraud—Mixed question of fact and law—Interference in second appeal.* See (1917) DIG. COL. 1149; *JANKI BAI v. NAJAF ALIKHAN.* 3 Pat. L. W. 339=43 I. C. 49

—*Question of law—Construction of documents.*

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A question regarding the construction of a document is a question of law justifying a second appeal. (*Broadway, J.*) *MANGIA RAM v. GANESH DAS.* 161 P. W. R. 1918= 47 I. C. 351.

—Question of law—Decision in ignorance of admissions by pleader—Reversal of remand.

Where the lower appellate court does not appreciate or realise the legal effect of the admission by the pleader, of a party and decides the case against a party, the case must be remanded to that Court in order that the appeal thereto might be re-heard, on the footing that the admission in question was in fact made in the Trial Court. (*Richardson and Beachcroft JJ.*) *JAHADALI v. AJIMON. NESSA BIBI.* 44 I. C. 18.

—Question of law—Findings of fact—Distinction between—No jurisdiction to High Court to interfere with findings of fact—C. P. Code S. 100.

Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law so also is the question of admissibility of evidence and the question of whether any evidence has been offered on one side or the other; but the question whether the fact has been proved, when evidence for and against has been properly admitted is necessarily a pure question of fact. The High Court has no jurisdiction in second appeal to set aside the decree of the Lower Appellate Court on the ground that it had applied the wrong standard of measurement to land of which the rent was in question. (*Lord Buckmaster.*) *N A F A R CHANDRA PAL v. SHUKUR.* 46 I. A. 183. (P. C.)

—Question of law—Finding of fact—Evidence not considered—Question of fact might be considered.

The High Court is competent to determine a point of fact in second appeal if it appears from the judgment of the lower appellate court that it failed to consider all the evidence on the record relating to that point. (*Lindsay J. C.*) *KUNJ BEHARI PRASAD v. BASDEO PRASAD.* 3 O. L. J. 464=47 I. C. 950.

—Question of law—Inference from matters not evidence in the case—Finding not good in law.

Where in a suit on a mortgage instituted on the last day of limitation, there was no actual evidence of discharge total or partial, but the courts below inferred that the bond should have been discharged on account of the fact that the suit was delayed till the last day for limitation, *held*, the inference in question was not drawn from any evidence and the drawing of such inference from matters not in evidence before the Court was an error of law. (*Beaman and Eaton, JJ.*) *LAKHICHAND v. LALCHAND* 42 Bom. 352=20 Bom. L. R. 354= 49 I. C. 555.

## SETTLEMENT.

—Question of law—More than one possible inference from facts—Decision of lower court drawing one inference—No interference in second appeal. (*Drake Brockman, J. C.*) *MADHO RAO v. GOVINDBHAT.* 46 I. C. 792.

—Question of Limitation—Mixed question of Law and fact—Not to be raised for the first time.

If there is any question of fact to be investigated requiring a fresh decision upon an issue not pressed before the courts below, the High Court will not allow a question of limitation to be raised in second appeal. But where on the face of the record the question arises it may be raised in second appeal. (*Boe and Jwala Prasad, JJ.*) *LACHMAN SINGH v. DILJAN ALI.* 4 Pat. L. W. 136. =43 I. C. 955.

—Record of rights—Entry in—Value to be attached to—Not a question of law. See RECORD OF RIGHTS. 22 C. W. N. 449= 45 I. C. 65.

—Remand—Admission of Record of Rights, not, in existence at the time of trial. See (1917) DIG. COL. 1150; *INTIAZ HUSSAIN KHAN v. BENGALI NONIA* 2 Pat. L. J. 564= 43 I. C. 750.

—Remand—Mortgage—Attestation not properly proved—Remand for fresh evidence, not proper. See C. P. CODE O. 41 R. 25. 16 A. L. J. 409 (P. C.).

—Remand in suit under Rent Act—Agra Tenancy Act—Maintainability. See AGRA TEN. ACT, S. 193, 16 A. L. J. 711.

—Suit of Small Cause Nature—What is—Suit one of small cause nature at the time of institution—Suit ceasing to be of Small cause nature at time of filing of second appeal by reason of amendment of Small Cause Courts Act—In the interval—Effect. See C. P. C. S. 102. 23 M. L. T. 253.

—Thunduwaram—Suit for—Claim less than Rs. 500—Second appeal. See C. P. C. S. 102. 23 M. L. T. 44 (F. B.).

SECURITY BOND—Forfeiture—Condition of. See Cr. P. C. S. 514. 5 P. W. R. Cr. 1913.

SERVICE TENURE—Alienability and liability of lands held on, for debts of holder. See LAND TENURE. 41 Mad. 793= 34 M. L. J. 563.

—Right of occupancy in—Surrender of tenure—Rights of Zemindar See LAND TENURE. 46 I. C. 341.

SETTLEMENT—Of Village with Talukdar—Grant of lands rent free to several holders—Failure of the Talukdar to pay Jama—

**SHAMILAT.**

Attachment by Government of village for non-payment — Right to recover proportional assessment from holder of rent free lands. *See BOMBAY LAND REVENUE CODE SS. 144, 160.*  
20 Bom. L. R. 748.

**SHAMILAT**—*Abadi* — *Encroachment on suit for removal*—*Special damage*—*Proof of—Necessity.*

Where one of the village proprietors sues certain of the proprietors for the removal of certain buildings which had lessened the area of the village *sath* or narrowed the entrance to it, and the trespassers had not taken more than the share which would fall to them on partition, the plff. cannot succeed in his action without proof of special damage. (*Shah Din and Chevis, JJ.*) LEKHU v. HANWANTA, 114 P. R. 1918=176 P. W. R. 1918=481 C. 418.

——— *Right to suit for declaration* — *shamilat deh* recorded as *Shamilat taraf*—*Acquisition by Govt.*—*Appropriation of compensation money*—*Cause of action.*

Plff sued for a declaration that they were the owners of a certain share of the village *shamilat* land. The suit land was entered as *shamilatdeh* in the settlements of 1856, 1863, 1891 and 1892. But in 1893 the land was shown as *shamilat* of *taraf Bedi*—one of the 3 *tarafs* in the village, the plff's *taraf* being known as *taraf* of the *Bedi* *defts.*, by an admission made by plffs. or their ancestors in that year. Portions of the land having been acquired by the Government in 1906 and again in 1911 compensation money was taken by the *Bedis* on the last occasion:

*Held*, that the old entries being all in plff's favour the admission of *bedis* meant nothing more than that the *Bedis* should continue to manage the land taking whatever income might accrue and incurring whatever expense might occur and that the action of the *Bedis* in 1911 in taking all the compensation money was fresh invasion of the plffs. rights and the suit was, therefore, within time. (*Chevis and Shadi Lal JJ.*) HARNAM SINGH v. MAKHAN SINGH, 43 P. W. R. 1918=

24 P. L. R. 1918=44 I. C. 31.

**SHARES**—Transfer by person in possession—Possession obtained fraudulently—Transferee *bonafide* purchaser for value—Negotiability by custom—Share certificate with negotiable transfers—Negotiability by "Estoppel." *See CONTRACT ACT, S. 108.* 22 C. W. N. 1636

——— Transfer—Transfer in possession only for particular purpose—*Bona fide* transfer for value—Rights of—Share certificate with blank transfer deeds—Negotiability—Usage. *See CONTRACT ACT, S. 108.*

22 C. W. N. 1043

——— Co-ownership in—Freight and other earnings—Relation of that of partners. *See PARTNERSHIP.* 35 M. L. J. 87.

**SOUTH CANARA.**

**SIND COURTS ACT (XII of 1868) S. 16—Pleader** — *'Misbehaviour'* — *Misconduct not connected with the profession*—*Jurisdiction of Court.*

The jurisdiction of the Judicial Commissioner under S. 16 of the Sind Courts Act extends not only to professional misbehaviour; but while the jurisdiction is unlimited, the court is reluctant to take cognizance of misconduct not connected with the office of pleader unless it is morally disgraceful or shows that the individual is not a proper person to hold that office (*Pratt, J. C. Crouch and Hayward, A. J. C.*) *In re A PLEADER.*

11 S. L. R. 81=44 I. C. 333.

**SMALL CAUSE COURT**—What is a, within meaning of S. 24 (4) of C. P. C. *See C. P. C. S. 24 (4).* 27 C. L. J. 461.

**SONTHAL PERGANNAS REGULATION (III OF 1872) S. 5**—*Property situated in Sonthal Pergannas*—*Suit for possession of—Jurisdiction.*

Under S. 5 of the Sonthal Pergannas Regulation of 1872 as it stood in 1907, no suit could lie in any Court established under the Bengal, North Western Provinces and Assam Civil Courts Act in regard to any land or any interest in or arising out of any land in the Sonthal Pergannas, so long as the land had not been settled and the settlement declared by a notification in the Calcutta Gazette to have been completed and concluded. (*Chapman and Atkinson, JJ.*) SAHDEO NARAIN DEO v. KUSUM KUMARI, 46 I. C. 929.

——— S. 6—*Effect*—*Interest*—*Which may be decreed.*

S. 6 is a bar to a decree for interest upon interest. Interest subsequent to the decree must be limited to interest upon the principal advanced and the costs of the suit. Under that section the total interest decreed on any debt or loan should not in any case exceed the principal. (*Roe, and Coutts, JJ.*) RANI KESHOBI KUMARI v. KUMAR SATYA NIRANJAN, (1918) Pat. 305=47 I. C. 179.

**SOUTH CANARA**—*Kumaki land*—*Rights of neighbouring wargdar and of Government in respect of mortgage with possession by wargdar of warg land and kumaki land attached to it*—*Subsequent classification of kumaki land as paramboke and assignment to wargdar-mortgagor*—*Effect on rights—wargdar mortgagor and mortgagee*—*Ejectment suit by wargdar—mortgagee in respect of kumaki land*—*Maintainability*—*T. P. Act, Ss. 48 and 70, Trusts Act S. 90—Applicability.*

A warg land and a kumaki land attached to it were mortgaged with possession in 1890 by plaintiff's predecessor in interest to *deft's*, predecessor and were in the possession of the mortgagees, including the *deft.* till 1914. In the meantime, however the kumaki land was by the Government declared to be waste paramboke and granted to plff. on *dharkhast*

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in 1911. In a suit in ejectment instituted in 1914 by plff. against deft. in respect of the kumaki land only held that the suit land being kumaki land, the Government was entitled to ignore the mortgage thereof by the wardgar and to grant it to whomsoever it pleased, and that the plff. as such grantee, acquired a title to it as owner against the deft.; and the deft. was not entitled to rely upon the right of possession granted by plff's. predecessor (under the mortgage.)

Held, further (1) that S. 48 of the T. P. Act was inapplicable to the cause because there was no proof of any erroneous representation by the mortgagor at the time of the mortgage or of the mortgagee having acted on any such representation to their prejudice.

(2) that the suit land could not, by reason of the rights of the Government over it and of those acquired by plff. under the dharkhast grant thereof in his favour, be treated as an accession to the mortgaged property under S. 70 of the T. P. Act.

(3) that S. 90 of the Trusts Act had also no application to the case because the grant of the suit land was obtained by the mortgagor and not by the mortgagee and there was nothing to show that the plff. obtained the grant as representing all persons interested in the mortgaged property. (*Oldfield and Sadasiva Iyer, JJ.*)

KODI SANKARA BHATTA v. MOIDIN.  
35 M. L. J. 120—8 L. W. 100.

**SPECIFIC PERFORMANCE**—*Agreement to execute mortgage—Part of consideration paid. Specific performance if enforceable on payment of balance—Deed—Construction—Agreement to lease or mortgage—Registration—Registration Act S. 17, cl 2 (F).*

A document to which the plff and the 1st deft were parties, provided, that the 1st deft, was to execute in favour of the plff. a swamibhogam for 20 years from 1st May 1915 on receiving from him Rs. 5,000, that the entire amount including the interest thereon should be realised by enjoyment of the swamibhogam and that the plff. should pay the first deft. 100 kalsams of paddy, Rs 200 in cash and 300 bundles of straw every year and at the expiry of 20 years deliver the land to the 1st deft. The document also stipulated that if there was a delay in payment, the sum of Rs. 750 was to be added to the amount and plff was to supply labour of 50 workmen every year, and that if Rs 5,000 were paid at the end of 8 years the plff should receive it and give up possession of the properties and the swamibhogam would be cancelled. The question was whether the deed was an agreement to grant a mortgage or lease. Held that it was an agreement to execute a mortgage and as such did not require registration.

Per *Abdur Rahim, J.*—The exact nature of a transaction must be found with reference to the intention of the parties, that intention has to be gathered mainly from the internal

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evidence furnished by the document itself with such light as may be derived from the surrounding circumstances. The essential test to be applied to such cases is whether by the transaction in question the debt was secured or satisfied. If the former, it would be a mortgage otherwise a lease.

Per *Seshagiri Aiyar J.*—Even if the document be regarded as a combination of an agreement to mortgage and an agreement to lease does not require registration. At best, it is only an agreement to execute an anomalous mortgage.

Where a person had advanced part of the consideration agreed upon for executing a mortgage and sued for specific performance on payment of the balance. Held that no specific performance should be decreed and that the lender was only entitled to damages for breach of contract. If the borrower was ready to pay off the advance at once. If not specific performance should be decreed on payment of the balance. English and Indian Law discussed. (*Abdur Rahim and Seshagiri Aiyar JJ.*) MEENAKSHI SUNDARAM MUDALIAR v. RATHNABAMI PILLAI

41 Mad. 959—35 M. L. J. 439—8 L. W. 438—  
24 M. L. T. 315—(1919) M. W. N. 811.

Contract embodied in a document—Document set aside by court—Specific performance on the strength of verbal agreement not maintainable. See SP. REL. ACT, S. 21.

44 I. C. 225.

Discretion of court—Delay in institution of suit—Alternative claim for damages—Not a proper ground for refusing relief. See SP. REL. ACT, S. 22.

4 Pat. L. W. 192.

Minor—Contract for sale by guardian—Specific performance, when decreed.

Specific performance of a contract of sale of a minor's property made by his guardian, should not be decreed against the minor unless the Court is quite certain that the agreement was for the benefit of the minor and that it should be for his benefit that it should be enforced (*Batten, A. J. C.*) PURANLAL v. VENKATRAO GUJAR.

45 I. C. 192.

Minor—Contract for sale in favour of—Not specifically enforceable for want of mutuality. See MINOR.

44 I. C. 163.

Minor—Contract for sale of minor's property by guardian with sanction of court—Specific performance enforceable. See GUARDIANS AND WARDS ACT, SS. 29 AND 31.

22 C. W. N. 477.

Mortgage—Agreement to execute—Remedy in damages, See SP. REL. ACT S. 21 (A).

25 M. L. J. 489.

Suit for of a contract to pay money, whether lies—Suit for Specific performance by

**SPECIFIC PERFORMANCE.**

*Vendor of Land against the vendee—Whether a Court of Small Causes has jurisdiction enus.*

Ordinarily a suit will not lie for Specific performance of a Contract to pay money. But the case of a vendor is an exception to that rule and the Court will grant the vendor Specific performance of the Contract against the purchaser.

The nature of the averments and the form of the decree in such a case pointed out.

It would none the less be a suit for Specific performance and not a suit for money as damages if the contract between the parties stipulated for payment by the vendee first and execution of the conveyance by the vendor afterwards. (*Wallis, C. J. and Seshagiri Aiyar, J.*) *BASHYA KARLU NAIDU v. ANDALAM-MAL.* 36 M. L. J. 89=9 L. W. 19= (1918) M. W. N. 896.

*Suit for—Parties—Purchaser claiming under anterior agreement—Proper party.*

In a suit to enforce specific performance of a contract for sale of land by the execution of a registered conveyance, any person in possession of land claiming under an anterior agreement of sale is a proper party to the suit and the decree should be against both of them. (*Mookerjee and Beachcroft, J.J.*) *NASIRUDDIN MIEDA v. SIDHCO MIA.*

27 C. L. J. 538=44 I. C. 361

*Suit for recovery of consideration of usufructuary mortgage—Suit for specific performance. See PROV. S. C. C. ACT, SCH 11, ART. 15.* 34 M. L. J. 342.

*Vendor and purchaser—Suit for execution of conveyance and registration—Maintainability of—Alternative prayer for possession—Subsequent vendee, if a necessary party.*

Plff. sued for possession of land on declaration of title with an alternative prayer for specific performance of a contract of sale. He impleaded the original owners of the property as well a subsequent vendee of the same.

Held that the plff. could not compel registration of the sale deed without following the procedure prescribed by S. 77 of the Regn. Act. The execution of the conveyance not followed by registration, could not be regarded as fulfilment of the contract. The plff. was therefore entitled to proceed against his vendors to compel them to fulfil the contract.

The subsequent vendee from the owners of the property was also a proper and necessary party. (*Mookerjee and Beachcroft, J.J.*) *NASIRUDDIN MIEDA v. BIPRA DAS.*

27 C. L. J. 538=44 I. C. 361.

**SPECIFIC RELIEF ACT (I OF 1877) S. 9—Applicability—Dispossession by one co-owner—Decree for joint possession.**

S. 9 of the Specific Relief Act applies to cases where a co-owner in possession of property jointly with other co-owner is dispossessed

**SPECIFIC RELIEF ACT, S. 9,**

by the latter. (*Batten. A. J. C.*) *GHOOTI v. SITKU.* 44 I. C. 587.

—S. 9—Decree under—Execution proceedings—Order not appealable. See (1917) DIG. COL. 1158; *KANAI LAL GHOSE v. JATINDRA NATH CHANDRA.* 45 Cal. 519=26 C. L. J. 325=42 I. C. 711.

—S. 9—Exclusive possession—Physical possession—Possession of Thakur Bari of a temple, nature of.

Where plff. appointed the *pujari* of a Thakur Bari, defrayed the expenses of worship repaired the building and had the key by which the door of the Thakurghar was opened.

Held, that the possession of the plff. was such physical possession as to attract the operation of S. 9 of the Sp. Rel. Act, notwithstanding that the Thakur Bari, as a residence of a deity was open to the public. (*Teunon and Newbould, J.J.*) *NARENDRA NATH LAHIRI v. CHARU CHANDRA BOSE.*

44 I. C. 497.

—S. 9—Suit for recovery of possession of land and crops—Decree—Removal of crops before execution—Subsequent suit for damages for crops—Issue as to title, if need be tried.

Plff. obtained a decree in a suit under S. 9 of the Specific Relief Act for possession of certain lands with the standing crops. In executing his decree he could not get the crops which had been removed in the meantime. The plff. brought a suit for recovery of the price of the crops. The defts. denied his title to the land. Held, that the defts. could not by cutting and removing the crops annul the effect of the possessory decree, and that they were liable. (*Richards, C. J. and Tudball J.*) *MUNNA SINGH v. AUSAN SINGH.*

16 A. L. J. 924=48 I. C. 422.

—S. 9—Suit under maintainability of Cr. P. Code, S. 145 (4)—Order of attachment under, effect of.

Where prior to the institution of a suit under S. 9 of the Sp. Rel. Act, it was found that in proceedings under S. 145 of the Cr. P. Code, the properties were attached and an order had been made adverse to the plff. held that the suit was not maintainable.

Per *Huda, J.*—But for an intervening attachment under S. 145 (4) of the Cr. P. Code, a mere order under S. 14, is not sufficient to deprive the plff. of his right to relief in a suit under S. 9 of the Spec. Rel. Act. (*Teunon and Huda, J.J.*) *AZIMUDDIN AHMED v. ALAUD-DIN.* 22 C. W. N. 931=43 I. C. 153.

—S. 9—Suit under—Question of mesne profits not to be decided.

The right to possess immoveable property and the right to enjoy the profits thereof, are distinct causes of action. A person who has been dispossessed of immoveable property, is entitled to sue for possession under S. 9 of the

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Specific Relief Act and to leave the question of mesne profits for another suit in which the title to the property can be gone into. (*Praduman, O. A. J. C.*) JANARDHAN GANESH v. RAMACHANDRA 46 I. C. 885.

—Ss. 14 and 27 (c)—Contract for sale of property by one member of a joint Hindu family—Specific performance, if can be decreed. See (1917) DIG. COL. 1153; SHAMA CHABAN KOTAL v. KUMED DASI. 27 C. L. J. 511=42 I. C. 378.

—S. 15—Specific performance—Right to—Discretionary relief—Completion of sale—Effect of.

A right to specific performance is in the discretion of the Court and can only be claimed subject to the condition laid down in S. 15 of the specific Relief Act. But after the parties have performed the contract by executing a sale-deed and delivering possession, the rights of the parties are no longer governed by the Specific Relief Act but by the T. P. Act. (*Mitra, A. J. C.*) SALIGRAM SADASHE PANDU v. NARAIN. 45 I. C. 669.

—S. 21—Agreement to arbitrate—Suit when demand and refusal not proved, if by itself a refusal to arbitrate—Implied refusal.

Where two days after concluding an agreement to refer their disputes to arbitration, one of the parties instituted a suit and it was urged in defence that the suit was barred by S. 21 of the Specific Relief Act, but there was no allegation in the written statement that the plff. refused to perform the contract to refer the arbitration nor was any evidence given to prove such a refusal.—

*Held Per Fletcher, J.*—That the filing of the suit was not a "refusal" within the meaning of S. 21 of the Specific Relief Act.

*Per Shamsul Huda, J.*—Neither demand nor refusal need be expressed and both may be implied.

That the institution of the suit in circumstances which showed that plff. was determined not to go to arbitration amounted to a refusal to perform the contract to arbitrate. 8 All. 67 cons. (*Fletcher and Huda, JJ.*) DINABANDU JANA v. DURGA PRASAD JANA. 22 C. W. N. 362=45 I. C. 279.

—S. 21—Specific performance of contract embodied in document—Document set aside by Court—No Specific performance.

Where a suit for specific performance of a contract to grant a lease was brought on the basis of an agreement embodied in a sole-namah filed in the Court which was subsequently set aside by the Court. *Held*, that there was no contract subsisting which the plff. could put before the Court for enforcement and that in such a case the plff. could not fall back upon some verbal agreement to grant the lease. (*Chitty and Smither, JJ.*) JIBAN KRISHNA CHAKRAVARTHI v. RAMESH CHANDRA DAS. 44 I. C. 225.

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—S. 22—Suit for specific performance—Delay—Alternative claim for damages.

Mere delay in instituting a suit for specific performance, is not sufficient to defeat the plff's suit. It must be of a character to give rise to an inference of the abandonment of the right or should disclose any prejudice to the deff.

Where the plff sought for specific performance of a contract in the first instance and in the alternative damages in case the court found any difficulty in granting the relief.

*Held*, that in the absence of any special damages the relief sought in the first instance *vis.*, specific performance should be granted. (*Imam, J.*) MUSSAMMAT BATULAN v. NIRMAL DAS. 4 Pat. L. W. 192=44 I. C. 244.

—S. 23 (b)—Contract—Sale to decree-holder by debtor—Covenant to re-purchase after ten years of sale—Covenant personal—Assignment outside the family—Validity Specific Relief Act, S. 23 Personal quality.

Where rights originate in contract, Courts must decide whether it was the intention of the promisor to make the contract personal to the promisee. Personal quality mentioned in S. 23 Specific Relief Act need not necessarily be restricted to particular skill or learning but may include anything peculiar to a man or his descendants which would entitle them to especial favour at the hands of the contracting parties.

A judgment-debtor sold his land to the decree-holder on condition that after the lapse of ten years the vendor or his descendants should have the right to repurchase it within two years for the same price for which the land was sold. After the death of the vendor and his son, the vendor's widow sold the right to the plffs. (strangers to the family) who sued to enforce it as against the decree-holder.

*Held*, dismissing the suit, that the intention of the parties was that the vendor and his descendants alone should be given the privilege of re-purchasing the land after the lapse of ten years and within the period of twelve years at the same price at which it was originally sold; and assignees outside the family could not enforce the contract specifically. (*Beaman and Heaton, JJ.*) VITHOBA v. MADHAV. 42 Bom. 344=20 Bom. L. R. 654=

46 I. C. 734.

—S. 27—Specific performance—Suit for—Person claiming under another agreement for sale—Necessary party. See SPECIFIC PERFORMANCE. 44 I. C. 361.

—S. 27—Suit for specific performance of contract to sell against subsequent transferee—Onus of proving good faith and want of notice.

Where the prior contract of which the plff. seeks specific performance is proved, a subsequent transferee from the vendor must prove that he is a transferee for value in good faith

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and further that he had no notice of the plff's contract. (*Le Rossignol, J.*) HAMID HUSSAIN v. BISHEN SARUP 137 P. W. R. 1918=46 I. C. 659.

—S. 27 (b)—Prior contract of sale—Subsequent purchaser pleading bona fide purchase without notice—Onus on him.

Where the prior contract of the plff. in a suit for specific performance is proved, the onus of proving that the subsequent purchaser is a transferee for value who has paid his money in good faith and without notice of the original contract under S. 27 (b) of the Specific Relief Act is on the latter. (*Roe and Jinala Prasad, JJ.*) DHARAMDEO SINGH v. RAM PRASAD SAH. 4 Pat. L. W. 152=44 I. C. 470.

—S. 27 (b)—Specific performance—Bona fide purchase for value without notice—Onus on person pleading registered sale—Effect of.

In a suit for specific performance of an unregistered written contract for sale entered into by the plff. and the deft., the second deft. pleaded that he was a bona fide purchaser for value without notice and in good faith within S. 27 (b) of the Sp. Rel. Act, having purchased the property by a registered sale-deed subsequent to the contract sought to be enforced. Held, that the fact that the sale deed in favour of the second deft was registered did not affect the rule that the burden of proving want of notice lies, on the party asserting it since S. 50 (1) of the Registration Act had no application to such cases which are governed by the provisions of S. 27, of the Sp. Rel. Act, 18 O. P. L. R. 173 and 31 All. 184 foll. (*Batten, A. J. C.*) GANGA PRASAD v. KHUSHUL CHAND. 14 N. L. R. 27=43 I. C. 940.

—S. 28 (b)—Specific performance—Contract to grant a lease—Omission to disclose prior default of lease—Relief if can be granted.

Specific performance of a contract to grant a lease cannot be refused on the ground that the grantee did not disclose at or before the making of the contract, that in some previous transaction with the grantor he had defaulted in the performance of his obligations. (*Fletcher and Smither, JJ.*) MAHARAJAH BIRENDRA KISHORE MANIKYA BAHADUR v. HASHMAT ALI. 46 I. C. 558.

—S. 35—Gift rescission of—Relief, when granted. See (1917) DIG. COL. 1162 BEHARI LAL GHOSE v. SINDHUBALA DAS. 45 Cal. 434=22 C. W. N. 210=27 C. L. J. 497=41 I. C. 878

—S. 39 and 42—Registered mortgage-deed—delivery of possession to mortgagee—non-payment of consideration—Effect of—Transfer of property Act S. 58—Suit for cancellation of mortgage deed if maintainable—Remedy of mortgagor—Declaration that mortgage is not supported by consideration.

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Where a mortgage-deed has been registered and possession also has been given to the mortgagee under the deed, no suit for cancellation or the deed would lie on the ground that the consideration was not paid. When the deed was registered, and possession of the secured properties given, the transaction was complete under S. 58 of the T. P. Act. Non-payment of consideration in such a case will not render the transaction void or voidable. The remedy of the mortgagor is to sue for the consideration money.

Where the Lower Courts had found that there was no danger of any injury to the mortgagor, a declaration that the consideration had not been paid by the mortgagee was refused. (*Phillips and Kumaraswami Sastri JJ.*) ABDUL HASHIM SAHIB v. KADER BATCHA SAHIB. 42 Mad. 20=35 M. L. J. 740=24 M. L. T. 478=(1913) M. W. N. 719=8 L. W. 543=48 I. C. 370.

—S. 39—Suit for cancellation of registered deed—Consequential relief, involved in sending copy of decree to Registrar—Duty of Court See COURT FEES ACT, S. 7 (4) (C). 3. Pat. L. J. 194.

—S. 41—Minor Sale by—Suit to set aside on attaining majority—Decree conditional on refunding binding portion consideration. See MINOR, SALE BY. 7 L. W. 124.

—S. 42—Consequential relief—Suit for declaration of title against persons not in possession but denying title—Maintainability of.

It is open to a plff. who is out of possession to sue for a declaratory decree against persons not in possession if the person in possession had not denied plff's right. (*Banerji and Ryves, J. J.*) RATAN MOTI v. TILAK CHAND. 16 A. L. J. 666=47 I. C. 856.

—S. 42—Declaration—Grant—Discretion of court—Declaration prayed for merely introductory to claim for possession—party against whom declaration asked, not interested in relief for possession—Effect.

A. instituted a suit for declaration of title and recovery of possession of the estate of one K, as his next reversionary heir after the death of K's grandmother who had succeeded to his estate, M. a cognatic relation of K. was made a deft. to the suit because in a probate proceeding relating to the will of another separated member of the family M had claimed to be the nearest cognatic relation and had not admitted A's claim as an agnatic relation of the family. M claimed no interest in the property in suit and also alleged that M was interested in denying A's title to the estate of B, another member of the family, succession to which had not opened yet.

Held, that the declaration claimed being merely introductory to a claim for possession was not one for which legislative sanction

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was required and the suit was not one under S. 42 of the Specific Relief Act.

M. not having claimed any interest in the properties in suit it would be an abuse of the process of the courts to allow the parties to be harassed by being made parties to litigation the only relief claimed in which was one in which they had no interest and were not directly concerned, to enable the plff to support a possible claim in a future litigation which might arise (*Dawson Miller C. J. and Jwala J.*) **ASHARFI SINGH v. MADHABESHWAR INDRA NARAIN SINGH.**  
4 Pat L. W. 412=45 I. C. 665.

—S. 42. Declaration of right.—Discretionary relief—Refusal of, when persons really interested and likely to be affected, not made parties to the suit. See INJUNCTION EASEMENT  
34 M L. J. 425.

—S. 42—Declaration—Right to—Trespasser, if can sue for declaration of title.

S. 42 of the Specific Relief Act does not contemplate an action by a person having no title.

A trespasser cannot, therefore, sue for a declaration that he is a trespasser. (*Roe and Imam JJ.*) **RAGHBIR PRASAD v. MASBI KAHAR**  
45 I. C. 303.

—S. 42—Declaration, suit for—Issue joined on maintainability of suit without consequential relief—Possession, addition of, prayer of Amendment of plaint, right to, in appeal, when not made in trial Court. See. (1917) DIG. COL. 1342. **MAUNG SOK KYUN v. MA SHWEYA.**  
10 Bur. L. T. 241=36 I. C. 611.

—S. 42—Declaration of title and confirmation of possession—Prayer for issue of temporary injunction—Deft. Setting up title in himself—Dismissal of suit for want of cause of action.

A suit for declaration of title to and confirmation of possession of a certain plot of land on the allegation that the defendant had threatened to commit a trespass with a prayer for a temporary injunction in which the defence is that the title is with the defendant, cannot be dismissed on the ground that the plaint discloses no cause of action. (*Teunon and Richardson, J. J.*) **HDYANATH RAY v. BIS SESWAR DAS.**  
46 I. C. 553.

—Ss 42 and 43—Declaratory relief—Legal character—Mother of Mahomedan minor—Appointment of, as certified guardian—Suit for declaration of invalidity of marriage of minor girl—Relief, if can be granted—Discretion—Minor not a party to the suit effect of.

It would not be a proper exercise of judicial discretion to make any declaration under S. 42 of the Specific Relief Act, in a suit by the certificated guardian of a Mahomedan minor

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girl for a declaration that her marriage with a certain person is invalid when the minor is not a party to the suit inasmuch as under S. 43 of the Act, the decree would not be binding upon the minor. Nor could it be said that the guardian fills any legal character within the meaning of S. 42 of the Sp. Rel. Act. (*Richardson and Beachcroft, JJ.*) **SONAULLA SARKAR v. TULA BIBI.**  
27 C. L. J. 603=45 I. C. 203.

—S. 42—Declaratory relief—Non transferable occupancy holding—Transfer of portion—Rights of landlord and transferee—Consent to transfer of some of the lands—Effect—Suit for declaration of invalidity of rent decree obtained by landlords against recorded tenant—Not maintainable. See OCCUPANCY HOLDING. (1918) Pat. 289.

—S. 42—Declaratory suit—Denial of title, what constitutes—Cause of action when arises.

The denial of title referred to in S. 45 of the Specific Relief Act must be communicated to the plff. in order to give him a cause of action. A claim or statement denying title not communicated to the owner cannot save the Statute of Limitation running against him. (*Walsh, J.*) **MAHABIR RAJ v. SARJU PRASAD RAI.**  
43 I. C. 175.

—S. 42—Declaratory suit—Discretionary relief—Cause of action, existence of, if enough.

Where a plff. proprietor sues for a declaration that the debt is not an under-proprietor, the Civil Court will not exercise its discretion in granting the declaratory relief, until it is shown that he has exhausted his remedy by applying to the Rent Court for ejectment. It cannot however be said that he has no cause of action to sue in the Civil Court unless and until the Rent Court acting on the representation of the debt, to the effect that he is an under-proprietor, passes an adverse order against the said plffs. in ejectment proceedings (*Lindsay, J. C.*) **AMRAJ SINGH v. SARAB SUKH PANDI.**  
46 I. C. 650.

—S. 42—Declaratory suit—Insolvency, Property seized—Suit for declaration of title, not maintainable. See (1916) DIG. COL. 1345. **PITA RAM v. JHUGHAR SINGH.**

39 All. 626=15 A. L. J. 661=43 I. C. 573.

—S. 42—Declaratory suit—Right of way—Proof of—Evidence necessary to show. See EASEMENTS ACT, Ss. 22 and 23.  
22 C. W. N. 922.

—S. 42—Legal character—Plff., not filling any—no right to sue for a declaration that adoption by a widow is invalid.

The widow of a Hindu who lived in union with his family having adopted a son to her deceased husband, her unmarried daughter sued

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to have it declared that the adoption was invalid.

*Held*, that the plff. was not entitled to maintain the suit under S. 42 of the Specific Relief Act inasmuch as she was neither entitled to any legal character nor had she any right to any property, her only right being to be maintained out of the family property and to have her marriage expenses paid from it (*Batchelor A. C. J and Kemp J.*) GANESH v RANGNATH. 20 Bom. L. R. 413=461 C. 49.

— S 42—*Person entitled to a legal character, divorced wife if—Mother if can sue for declaration of legitimacy of child.*

The Plff. sued her late husband for a declaration under S. 42 Sp. Rel. Act. for a declaration as to her marriage and the legitimacy of four children. The lower Court found that the Plff. had been divorced some 20 years ago and refused the declaration about marriage but decreed it as to the legitimacy of the eldest of the children who, it was found, was born shortly after the divorce.

*Held*, that the plff who ceased to have the legal character of a wife 20 years ago was not entitled to ask the Court to make a declaration as to her marriage, for there was no legal character in having been a wife and then divorced.

That the decree of the lower Court as to the legitimacy of one of the children could not stand, for the mother of a child cannot be said to have a legal character as to whether her child, who is not a party to the suit, is or is not legitimate (*Fletcher and Huda, JJ.*) LATIFAN MEAN v. MT, MOORTI JANONA. 23 C. W. N. 171

— S. 42—Record of Rights—Wrong entry in—Suit for declaration in respect of—Maintainability—B. T. Act, S. 111 A, effect of See B. T. ACT, S 111 A 4 Pat. L. W. 303.

— S 42—*Suit for declaration—right to pass along a public street accompanied by music past a masjid in public road.*

The plffs. trustees of a Hindu temple, brought a suit for a declaration under S. 42 of the Specific Relief Act, that they were entitled to go on in procession playing music past a Mahomedan mosque.

*Held*, that such a suit would not lie, in as much as playing music was not one of the natural uses to which public streets ought to be put 11 Bom L R 372 app. (*Beaman and Heaton JJ.*) VENKATESH v. ABDUL KADIR. 42 Bom. 438=20 Bom L. R. 667=46 I. C. 740.

— S 42—*Suit for declaration that plff. is absolute owner of properties under a valid partition—Maintainability.*

Where in spite of a valid private partition between the plff. and his co-sharers, under which the suit properties were allotted to the

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plff the debt applied to the Revenue authorities for partition, it is competent to the plff. to sue for a declaration that the properties are his absolute properties not liable to partition any more. (*Cheris and Leslie Jones JJ.*) ABDUL LAH SHAH v. MUHAMMAD BAKAR SHAH. 12 P. W. R. 1918=43 I. C. 127

— S 42—*Suit for declaration that a will by the deceased brother of the plff's authorising his widow to adopt was never executed—maintainability of—Scope of S. 42*

A suit by plff. for a declaration that a will said to have been executed by their brother the deceased husband of the debt authorising her to adopt a boy was never executed is maintainable under S. 42 of the Specific Relief Act. 34 M. L. J. 67 (P. C.) Ref 12 M 134; 35 M 592 not foll.

S. 42 of the Specific Relief Act while indicating the character of the right which may be declared by a Court of law, leaves it to the discretion of the Court to grant or refuse the relief claimed.

The necessity of keeping in view, the distinction between the maintainability of the suit, and the discretion of the Court in granting or refusing the relief pointed out (*Ayling and Seshagiri Iyer JJ.*) BOBBA PADMANABHUDU v. BOBBA BUCHAMMA. 35 M. L. J. 144=8 L. W. 335=47 I. C. 702.

— S. 42—*Illustration (e)—Hindu reversioner—Alienation by Hindu Widow—Presumptive heir—Declaration to protect his interests whether permissible.*

When a deed is executed, the result of which may be to prejudice the interests of the reversionary heirs, those heirs though still reversionary and though they may never get any title because events may preclude them from doing so, may have a declaration as to the effect of the deed. 39 Mad. 634, dist. (*Lord Parker*). SAUDAGAR SINGH v. PARDIP NARAYAN SINGH. 45 Cal. 510=34 M. L. J. 67=23 M. L. T. 31=7 L. W. 146=(1918) M. W. N. 323=4 Pat. L. W. 52=27 C. L. J. 186=22 C. W. N. 436=16 A. L. J. 61=20 Bom. L. R. 509=43 I. C. 484=45 I. A. 21 (P. C.)

— S. 42—*Proviso—C. P. Code, O. 21 R. 63—Suit for declaration that decree is not liable to attachment and of ownership of decree—Consequential relief.*

In a suit for a declaration under O. 21 R. 63 C. P. C. that a sum of money deposited in court in execution of a decree in favour of A and attached by the debt. in execution of a decree against A was the property of plff. *Held*, that the suit was not barred by the proviso to S. 42 of the Specific Relief Act, inasmuch as the plff. was not bound to sue for the payment of the money to him, and that the consequential relief which it was possible for him to claim viz, that the decree was really the plff's.

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had in fact been claimed. (*Mullick and Atkinson, JJ.*) *HARI LAL SARU v. RANCHI, MINISTERIAL OFFICERS URBAN CO-OPERATIVE CREDIT SOCIETY.* (1918) Pat. 141=

3 Pat. L. J. 132=4 Pat. L. W. 138=43 I. C. 396.

—S. 42—Proviso—Mortgage—Suit for declaration of terms of redemption—Absence of prayer for redemption—Maintainability of suit. See (1917) DIG. COL. 1167. *RAM DOOR RAI v. MAHANTA HARNAM DAS.*

3 Pat. L. J. 71=2 Pat. L. W. 223=42 I. C. 473.

—S. 42, Proviso—Scope of—Consequential relief arising from declaration—Independent cause of action—Relief based on.

The proviso appended to S. 42 of the Specific Relief Act refers to the legal character of right to the property which is set up in the plaint. In other words, the further relief, referred to in that proviso, is a relief appropriate to, and consequent on, the right asserted.

Where the sons of a Hindu sued for a mere declaration that their share in the family property was not liable to attachment and sale in execution of a money-decree obtained against their father, and it was found that the decree-holder defendant was in possession of the property under a mortgage effected by the plff's father.

Held, that the suit was not barred by the proviso to S. 42 of the Specific Relief Act inasmuch as it arose quite independently of the mortgage (*Kanhaiya Lal and Kendall, A. J. C.*) *NARINDRA BAHADUR SINGH v. RAM SINGH.* 50 L. J. 133=45 I. C. 859.

—S. 42—Proviso—Scope of—Suit for declaration that a mortgage-decree is not binding on plff and for injunction restraining execution—Prayer for redemption if essential. See (1917) DIG. COL. 1167; *KANNIAMMAL v. SANKA KRISHNANMURTHI.*

33 M. L. J. 676=(1917) M. W. N. 790=43 I. C. 25.

—S. 45—Minor girl—Suit for declaration of invalidity of her marriage with another person—suit by certificated guardian of person and property of minor—Minor girl not a party to the suit—Declaration not binding on her—Relief, refusal of. See SP. REL. ACT. SS. 42 AND 48. 27 C. L. J. 608=45 I. C. 203.

—S. 45—Mandamus—Conditions for exercise of jurisdiction—Grievance at the hands of a quasi judicial body—Good case on the merits—Improper cancellation of entry of the design in the Patents Register by comptroller—Interference by High Court on proof of novelty of design. See PATENTS AND DESIGNS ACT SS. 62, 64, ETC. 22 C. W. N. 580.

—S. 45—Mandamus—Municipal election—objection to voters' claims to be on the electoral roll—Decision of Chairman refusing

## SPECIFIC RELIEF ACT, S. 45.

to expunge names of certain voters—Application by mandamus—Jurisdiction of High Court—*Calcutta Municipal Act, Ss. 3 (30), 37 and 47—“Occupier” of premises, when entitled to vote.*

A person standing as one of the candidates for election as a Commissioner of the Calcutta Municipality and who was also a voter on the list of voters, objected that the names of various persons shall not be entered and retained on the Municipal Election Roll for the ward for which he was a candidate. The Chairman of the Corporation having heard the objections, refused to expunge their names from the Election Roll. The aggrieved candidate applied under S. 45 of the Sp. Rel. Act.

Held, that in the absence of any provision in the Calcutta Municipal Act to the effect that the Chairman's decision was final, the High Court has power to interfere under S. 45 of the Sp. Rel. Act.

To make a person, who occupied certain premises, and who was entitled to the owner's vote in respect thereof, entitled to a vote as occupier in respect of the same premises, he must either pay rent to the owner or to be liable to pay rent.

Voters must give written notice of their claims, whether they sign the notice or not, to the Chairman of the Corporation under the provisions of Rule 8 (1) of Sch. IV of the Calcutta Municipal Act prior to 1st January immediately preceding each general election. It was upon the person objecting to the votes to prove that the voters had not complied with the provisions of the Act or the rules.

The only persons to whom Rule 3 of Sch. IV of the Calcutta Municipal Act applied, were persons who were actually liable for the rates in respect of the six months specified therein.

Persons occupying flats or portions of houses used as flats which were not separately assessed as such in the records of the Corporation were not associations of individuals within the meaning of S. 37 of the Calcutta Municipal Act. The word “occupier” in S. 37 (2) (i) (c) and in S. 37 (2) (i) (a) of the Calcutta Municipal Act meant an occupier in the ordinary sense and not as defined in S. 3 (30) of that Act, and the only person who fell within S. 37 (2) (i) (c) was a person who occupied a building separately numbered and valued for the assessment. (*Greaves, J.*) *SURENDRA CHANDRA GHOSE, In re.*

45 Cal. 950.

—Ss. 45 and 50—Public officer, failure to exercise discretion—Interference under. Principles. See CALCUTTA MUNICIPAL ACT, S. 56 SCH. V. B. 2. 22 C. W. N. 951.

—S. 45—Public officer, failure to exercise discretion—Interference, when.—*Calcutta Municipal Act S. 56, Sch. 5 B. 2—Nomination paper, description of candidate—Rai Bahadur if sufficient description—Delay in presenting petition, effect of—Infructuous order whether ought to be passed.*

## SPES SUCCESSIONIS.

The appellant sent in his nomination paper on the 4th March 1918 in which he was described as Rai Bahadur and it was also stated that he was Voter No. 679. On the 16th March a list of nominated candidates was published. On the 18th March judgment was delivered by the Appeal Court in election case of Narendranath Mitter (22 C. W. N. 943). On the afternoon of the same day the Applicant (respondent in this case) applied to the Chairman of the Corporation to reject the nomination paper of the appellant on the ground that the nomination paper did not contain the description of the appellant. The Chairman declined to entertain the application on the ground that it was too late; On the morning of the 19th March a petition was presented by the applicant before Chaudhuri, J., and a rule was issued on the appellant returnable at 4 p. m., on the same day to show cause why his name should not be expunged from the list of nominated candidates and the rule was made absolute. In pursuance of this the appellant's name was taken out of the list. On the 20th, which was the day fixed for election, the respondent being the only nominated candidate was elected Commissioner. This appeal was filed on the 28th March and came on for hearing on the 21st after the election had taken place.

*Held*, that an order overruling the decision of Chaudhuri, J., would be infructuous, for the appellant's name had been expunged from the list of nominated candidates, the election had taken without the inclusion of the appellant's name in the list of candidates and the Appeal Court had in this appeal no power to set that right, and so the appeal must be dismissed.

The Court's order ought to have been limited to a direction to the Chairman of the Corporation to exercise his jurisdiction to hear and determine the application which had been made to him and which he had refused to entertain on the ground that it was too late.

The Court will, in all cases, regard its exercise of the extraordinary jurisdiction as discretionary, and subject to considerations of the importance of the particular case or of the principle involved in it, of the delay on the part of the applicant and of his merits with respect to the case in which the interference of the Court is sought. Should other special causes appear for, or against the Court's intervention, due weight is to be given to him, regard being always had to the principles already enumerated. (*Sanderson, C. J. and Woodroffe, J.*) **RAI BAHADUR MANI LAL NAHAR v. MOWDAD RAHAMAN.**

22 C. W. N. 851=48 I. C. 736.

SPES SUCCESSIONIS—Agreement to divide—inoperative. *See* WILL CONSTRUCTION.

33 M. L. J. 684.

—Mortgage and sale of—Not operative on mortgagor's interest when it falls into possession. *See* LAND TENURE, PALAYAM.

41 Mad. 749=34 M. L. J. 563.

## STAMP ACT, S. 35.

STAMP ACT (II of 1899)—*Applicability—Instruments executed out of British India and relating to property situate in or thing done or to be done in British India—Stamp duty—Necessity.*

Instruments executed out of British India, and not relating to any property situate, or to any matter or thing done or to be done in British India are not chargeable with duty under the Stamp Act.

The Karenni Estates are not part of British India within the meaning of the General Clauses Act. (*Thompson, F. C.*) *In re* MAWCHI MINES LTD.

11 Bur. L. T. 126=

48 I. C. 187.

—Foreign State—Promissory note executed in but stamped with the stamp of British India—Suit on promissory note in a British Court—Jurisdiction of Court to entertain suit. *See* STAMP ACT, S. 35.

20 Bom. L. R. 464.

—S. 2 (2) Sch. 1 Art. 13—"Bill of Exchange"—*What is.*

An order on a firm of Chetties directing the firm to pay a specified sum of money to a certain person or bearer is a bill of exchange within the meaning of S. 2 (2) of the Stamp Act and is chargeable with stamp duty under Art. 13 of the first schedule to the Act. (*Thompson, F. C.*) *M. A. RAEBURN & CO. In re.*

11 Bur. L. T. 87=47 I. C. 561.

—S. 2 (10)—"Conveyance"—*What is Deed—Construction.*

*Held*, that a document which ran as follows was not a conveyance within the meaning of S. 2 (10) of the Stamp Act. "I am enclosing herewith the original sale-deed in respect of the land A, which I have sold to you for the sum of Rs. 1,000 and in respect of which I have already received the purchase-money from you." (*Rattigan. Le Rossignol and Leslie Jones, JJ.*)

*SETH RUSTOMJI v. THE CROWN*

1 P. W. R. 1918=44 I. C. 261.

—S. 2 (16)—Lease—Counter-part of mortgage—Mortgage—Marupat—How must be stamped. *See* (1917) DIG. COL. 1169. *GOVINDAN NAMBUDEI v. OTTATHAYIL MOIDEEN.*

41 Mad. 469=33 M. L. J. 693=

42 I. C. 943.

—S. 32—Impounding of documents—Jurisdiction of Court—Impounding documents in bound book not relating to claim—Produced in the performance of his function, meaning of—C. P. Code. O. 7 R. 14—Plaint. *See* (1917) DIG. COL. 1170. *SASHI MOHAN SAHA v. KUMUD KUMAR BISWAS.*

21 C. W. N. 246=

27 C. L. J. 525=35 I. C. 415.

—S. 35—Award not duly stamped, suit to set aside—Plf. whether liable to pay deficiency and penalty. *See* (1917) DIG. COL. 1170. *MA SHWE PU v. MAUNG PO DAN.*

11 Bur. L. T. 17=(1916) II U. B. R. 136=

39 I. C. 382.

## STAMP ACT, S. 35.

— S. 35—Negotiable Instrument—Not Stamped—Inadmissibility in evidence—Decree on original consideration not to be given. See NEGOTIABLE INSTRUMENT. 44 I. C. 386.

— S. 35—Nizam's dominions—Promote executed in, but stamped with a British stamp—Suit on the promote in a British Court.

The debt, executed, in the Nizam's dominion, a promissory note in favour of the plffs. It was stamped with a British stamp and not with a Hyderabad stamp which was required by the law of Hyderabad State. The plff. having sued to recover on the promissory note in a Court of British India.

Held, that the British Court was competent to adjudicate upon the claim, inasmuch as the Hyderabad law did not render such a promissory note void.

If the law of the foreign country in which the document was executed provides no more than that agreement shall not be received in evidence because it is not stamped then the agreement may be sued upon and enforced in a Court of British India, but if the law of the foreign country provides that by reason of the want of stamp the agreement itself which is contained in the unstamped document shall be void, then the plff. cannot succeed in a Court of British India. (Batchelor, A. C. J. and Shah J.) DHONDIRAM v. SADASUK.

42 Bom. 522=20 Bom. L. R. 464=46 I. C. 174

— S. 35 (A)—Document—Construction—Bond or promissory note—Admissibility in evidence on payment of penalty and stamp duty. See (1917) DIG. COL. 1171 KARARAM RANGIAH v. M. CHENGAMA NAIDU.

33 M. L. J. 603=43 I. C. 55

— S. 35 (A).—Foreign hundi payable on demand—One-anna stamp—Admissibility. See PAPER CURRENCY ACT, S. 26. 8 L. W. 50.

— S. 67—Collector's certificate that document duly stamped—Reference by Board of Revenue to High Court—Jurisdiction of High Court.

A Collector finding a sale-deed being insufficiently stamped, under S. 40 (1) of the Stamp Act, levied the deficit together with the penalty provided by law which fact was endorsed on the document and the Board of Revenue then referred the question as to the stamp duty, if any payable on the document to the High Court under S. 57 of the Act. Held that the High Court had no jurisdiction to decide the question. 26 Mad. 752 foll. (Knox, A. C. J. (Rafiq and Piggot, J.J.) IN THE MATTER OF KHUB CHAND

40 All 128=

16 A. L. J. 49=47 I. C. 299 (F. B.)

— S. 62, Sch I, Art. 8—Petition to Court intimating compromise of suit—Agreement—General stamp—Court Fee label See (1917) DIG. COL. 1171; EMPEROR v. RAM SABAN LAL.

40 All 19=15 A. L. J. 846=42 I. C. 1008=19 Cr. L. J. 48.

## SUCCESSION ACT, S. 92.

— S. 64—Cmission to stamp document—Fraudulent intent.

Mere non-payment of the proper stamp duty does not make a person liable to prosecution under S. 64 of the Stamp Act, unless it is proved that he had an intention to defraud the Government of its stamp revenue (Chitty and Smither, J.J.) BROJENDRA NATH BAKSHI v. EMPEROR. 45 I. C. 275=19 Cr. L. J. 515.

— Sch. 1 Arts. 13 and 35—Agricultural lease—Document hypothecating moveable property—Stamp duty chargeable—Charge on crops in favour of landlord—Liability of person removing.

An agricultural lease is exempt from stamp duty under exemption (a) to Art. 35, Sch. I of the Stamp Act.

A document under which the landlord was to have the sole right over the whole crop until the rent is paid and the tenants agree not to alienate or otherwise do away with the crops without consent until such payment, is an instrument evidencing an agreement relating to the hypothecation of moveable property of a future debt and as such is liable to stamp duty chargeable on a bill of exchange under Art. 13 (b) of Sch. I of the Stamp Act.

Where the landlord has a charge for rent on the crops, a person removing the crops with notice of the charge is liable for the difference between the amount of the rent due and the quantity of the crops not removed and not for the whole of the crops removed. (Parlett, J.) MAUNG HTAT v. MAUNG SAN DUN.

44 I. C. 169.

STATUTE—Interpretation. See INTERPRETATION.

STATUTORY BODY—Discharge of public duties—Negligence—Liability for misfeasance—Negligence of contractor not a ground of exemption. See MADRAS DT. MUNICIPALITIES ACT, SS. 172 AND 173. 44 I. C. 308.

STAY OF EXECUTION—Order becomes effective only when communicated to the Lower Court. See (1917) DIG. COL. 1173; VEN KATACHELAPATHI RAO v. KAMESWARAMMA.

41 Mad. 151=33 M. L. J. 515=22

M. L. T. 330=6 L. W. 617=(1917)

M. W. N. 785=43 I. C. 214.

SUCCESSION ACT (X OF 1895) S. 50—Scope of formalities required by law in execution and attestation of a will.

S. 50 of the Succession Act merely lays down the formalities required by law to be observed in the execution and attestation of a will, and must not be confused with the question of the proof of the fact whether those formalities have been properly observed. (Fletcher and N. B. Chatterjee J.J.) RAMMAL DAS KOCH v. KARAL KALI KOCHNI 22 C. W. N. 315=43 I. C. 208.

— Ss. 92 and 111—Will—Construction—Bequest to A and on her death, to her daughter, of a specific share—Successive

## SUCCESSION ACT S. 101.

estates—Absolute estate cut down to life-estate  
See WILL, CONSTRUCTION. 43 I. C. 991.

—Es 101 and 105—Applicability of—  
Charitable bequests—Rule against perpetuities  
—English rule, if applicable to India.

S. 101 of the Succession Act applies to all bequests, whether they are of a charitable nature or not.

The question whether a bequest is invalid for remoteness, does not depend upon what did in fact happen but whether under the terms of the will the bequest might be delayed beyond the time specified in S. 101 of the Succession Act.

The positive language of the Succession Act as contained in the provisions of S. 101 is sufficient to preclude the application of English law. (*Sanderson C. J. and Woodroffe J.*) JOSEPH HENRY JONES v. THE ADMINISTRATOR GENERAL OF BENGAL. 47 I. C. 383.

—Es 106 and 107—Illustration (c) to S. 107—Will—Construction—Successive life interests—Reversionary trust to a person "if then living"—Meaning of—Estate when becomes vested. See. 48 I. A. 257.

—S. 111—Will—Construction—Bequest to A and on her death to K—Gift to, dependent on uncertain contingency—Substitutionary or successive gifts. See WILL, CONSTRUCTION. 43 I. C. 991.

—S. 269—Executor disposing of property of deceased—Duty to give reasons for doing so. See EXECUTOR, POWER OF. 28 C. L. J. 141.

—S. 293—Assent to legacy—Power of—Executor to deal with property after. See Executor, Power of. 28 C. L. J. 141.

SUCCESSION CERTIFICATE ACT (VII OF 1889) — Application for certificate under — Objector claiming certificate an account of reunion—Question of reunion whether enter- tainable. See (1917) DIG. COL. 1174; JAGANNATH PRASAD SAHU v. MT KUADARI SAHU. (1917) Pat. 264= 43 I. C. 126

—S. 4—Hand-note executed in favour of father—Renewal in favour of son and another—Suit by sons for their share of the debt—Succession certificate unnecessary (*Richardson and Beachcroft, JJ.*) NILMONI DE v. SOORENDRA NATH MITRA. 46 I. C. 648.

—S. 4 — Right to institute suits although no certificate obtained.

S. 4 of the Succession Certificate Act is no bar to the institution of suits for arrears of rent due to a deceased person although the

## SUCCESSION CERTIFICATE ACT S. 16.

plff. has not obtained a succession certificate and has omitted to file probate papers. But what is barred is the passing of a decree in such circumstances. No decree can be passed until the succession certificate has been obtained or the probate papers filed and the Court should give the plff. time to do this (*Roe and Imam, JJ.*) ALICE THORP v. SHIEKH SHAMA LULLAH. 3 Pat. L. J. 160=44 I. C. 733.

—Ss. 4 and 16—Succession certificate—Holder of, assigning his rights—Right of assignee to recover debt due to deceased without producing certificate in his own name.

An assignee from a person who has obtained a succession certificate is entitled to sue for the recovery of a debt due to the estate of the deceased and obtain a decree without producing a succession certificate in his own name. 35 All. 74 diss. 36 All. 21 foll. (*Phillips and Kumaraswami Sastri JJ.*) ARUNACHELLA CHETTIAR v. MUTHU. 35 M. L. J. 668. 48 I. C. 735.

—S. 4—Suit by a firm—Death of one member—Succession certificate—Production of by the heirs of deceased partner, unnecessary.

In a suit on a hand note executed in favour of a firm the full amount of the claim should be decreed even where one of the members of the firm dies during the pendency of the suit. His legal representative who is added as a plff. need not produce any succession certificate to the deceased partner. Cal. 86, 17. C. L. J. 648 foll. (*Richardson and Beachcroft JJ.*) PULIN BEHARY RAI v. ABDUL MAJID. 44 I. C. 911.

—S. 4. Sub-S. (1) (A)—Plaintiff, death of—Substitution—Suit for recovery of money.

S. 4 Sub-S. 1 Cl. (a) of the Succession Certificate Act applies to the case of a person who has been substituted as plff. for one who has died pending a suit for recovery of money due on a bond. No decree can be passed in favour of the substituted plff. without the production of a succession certificate. C. L. J. 658 foll. (*Mookerjee and Beachcroft JJ.*) NEPUSI BEWA v. NASIRUDDIN. 27 C. L. J. 400=45 I. C. 730.

—S. 9—Application by widow—Security asked as condition precedent to grant—No special circumstances—Legality of order. See (1917) DIG. COL. 1175. NARAIN DEI v. PARMESHWARI. 40 All. 81=15 A. L. J. 881=42 I. C. 941.

—S. 16—Right of one of the heirs obtain- ing a certificate to execute decree—Judgment, debtor if can go behind succession certificate.

Where one of the heirs of a deceased decree- holder obtains a succession certificate in respect of the decree he is entitled to maintain an application for the execution of the decree, and the judgment-debtor cannot go behind the

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terms of the succession certificate. (*Fletcher and Huda, JJ.*) SHAHEH GOLAM KHALIK v. TASARDAK KHAN. 23 C. L. J. 299= 45 I. C. 89C.

—S 16—Succession certificate—Grant of, effect of—Right to recover debts.

The grant of a succession certificate gives the grantee a title to recover a debt due to the deceased and payment to the grantee is a good discharge of the debt. (*Wallis C. J. and Kumarasani Sastri, J.*) MUTHIA CHETTIAR v. RAMANATHAN CHETTIAR.

(1913) M. W. N. 242= 7 L. W. 339=43 I. C. 972.

**SUCCESSION (PROPERTY PROTECTION) ACT (XIX OF 1841) Ss 3 and 4—Application under—Procedure—Jurisdiction of Sub-Judge—Non-compliance with provisions of—Effect of—Revision—Other remedy open—No interference.**

An application was made under Act XIX of 1841 to a Sub-Judge, acting as an Addl. Judge for possession of property, moveable and immoveable, belonging to a deceased on the allegation that a person holding the property was in wrongful possession of it and was wasting it. The Judge took some evidence on both sides and made an order under S. 4 of the Act without making a complete inquiry and without finding that the applicant was *prima facie* entitled to the property and would be materially prejudiced if left to the ordinary remedy of a regular suit.

Held, that the Sub-Judge had no jurisdiction to deal with the application, as there was no evidence to show that there was any general assignment of cases under the Act to him by the Dt. Judge.

The provisions of Ss. 3 and 4 of Act XIX of 1841 are imperative and a failure to comply with them is a material irregularity affording a good ground for revision, but as a general rule the Chief Court will not interfere in revision unless it is satisfied that the person moving it has no other remedy open to him whereby he may obtain the relief sought. (*Broadway, J.*) GANGA SAHAI v. BABU LAL. 72 P. R. 1918=31 P. L. R. 1918= 148 P. W. R. 1918=46 I. C. 889.

**SUITS VALUATION ACT, (VII of 1877) S. 4—Suit for declaration that land is absolute property of plaintiff—Valuation for purposes of jurisdiction—Appeal**

The proper valuation for purposes of jurisdiction of a suit for declaration that certain property is the absolute property of the plaintiff and is not liable to partition is thirty times the jama (*Le Rossignol and Wiltonforce, JJ.*) SOHAN SINGH v. DEVI SINGH.

81 P. R. 1918= 46 I. C. 490.

## TAX ASSESSMENT.

—S 11—Under-valuation—Trial in inferior Court—Prejudice.

Where a suit which has been undervalued is tried by a Munsif's Court, the defendant can reasonably say that he has been prejudiced by the case being tried by a Court which had no jurisdiction to try it. (*Walmsley and Panton JJ.*) MAMRAJ AGARWALLA v. AHAMAD ALI MAHAMMAD.

47 I. C. 932.

—S 11—Valuation of suit—Jurisdiction—Objection to, if can be taken in High Court.

Where an objection to pecuniary jurisdiction of the Lower Appellate Court based on the valuation of the suit is not raised before that Court and that the Jurisdiction of the court is accepted, the objection cannot be raised for the first time before the High Court (*Mullick and Thornhill, JJ.*) BOUKAI SARU v. MOSAHEB ALI.

46 I. C. 892.

**SUMMONS**—service of—Entry in order sheet—Proof of Service. See (B. T. ACT S. 167)

22 C. W. N. 788.

**SURETYSHIP**—Hindu Law—Surety Debts of father—Contract of suretyship to pay in default of payment by another—Liability of son to pay — Distinction between different kinds of suretyship. See HINDU LAW DEBTS.

35 M. L. J. 229.

**SURRENDER**—Lease—Writing or registration unnecessary. See T. P. ACT S. 9.

46 I. C. 100.

—Life estate—Surrender in favour of remainderman.

A transfer of his entire interest effected by the holder of a life estate in favour of the remainder man operates as a surrender accelerating the devolution of the estate in favour of the latter. (*Lindsay J. C. and Kanhaiya Lal A. J. C.*) RUDRA PRATAP SINGH v. UMBRAI KUNWAR. 50 C. L. J. 505=47 I. C. 912.

—Oral, validity of—Writing unnecessary — Inference from conduct. See RELEASE.

22 C. W. N. 441.

**TALUKDARI ESTATE**—Accretion to—Property obtained in exchange for talukdari property—Land granted to talukdar for his use—Right to, of personal heirs of talukdar. See GRANT DEVOLUTION. 21 O. C. 105 P. C.

**TAX—ASSESSMENT**—Principles of — Salt work, assessment of— Aden settlement.

In 1909, the plaintiffs obtained from the Government a lease of certain lands at Aden for the purpose of constructing salt works at the annual rent of Rs. 7,000 for the land and a royalty of eight annas per ton of salt export.

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ed. A factory was erected for crushing salt on the land, and the works first commenced to yield salt in the year 1911-12. Prior to that year, the defts. who were the assessing authority for the Aden Settlement, assessed the plffs. in the annual rent of Rs. 7,000 payable under the lease. From the year 1911-12, when the works commenced to produce salt, the defts. adopted a different basis of assessment and assessed the plffs. on the basis of half of the produce of the works less 10 per cent, representing the landlord's deductions. The value of the salt was taken at Rs. 5-8-0 and Rs. 5 per ton of crushed and uncrushed salt respectively F. O. B. at Aden. In adopting the basis of the assessment adopted for one other salt works in Aden and which they considered was also in practice with reference to the particular conditions of the plff's salt—pans. The plffs. appealed unsuccessfully against the assessment for that year, to the Court of the Resident at Aden. Being assessed at the same basis for the years 1912-13 and 1913-14 they filed a suit in the Court of the Resident at Aden to set aside the assessment. On a reference to the High Court by the Resident under S. 8 of the Aden Court's Act 1864, of the questions in the suit including the question whether the assessment was wrong and illegal:—

*Held*, that the assessment was wrong and should be quashed; and that the defts. should consider what a tenant from year to year with a reasonable prospect of the continuation of his lease would give for these particular premises *rebus sic stantibus*.

*Held, further*, that though the volume of the business done by the works, the rent and royalty reserved by the lease, the actual yearly receipts with the usual deductions, the value of the land and the factory and any other buildings on the premises, were all factors which would assist the Court in determining the mode of assessment to be applied to the works in question, yet it was no recognised mode of assessment to take the output of the works at so much a ton and assess the plffs. at half of that figure less landlord's deductions.

*Per Kemp, J.*—In assessing any particular property the assessing authority must consider what a tenant from year to year with a reasonable prospect of the continuation of his lease would give for his premises. In considering this, the assessing authority must regard the then occupier as a likely tenant but must not assess the premises at the highest rent that can be extorted from him, *i.e.*, which he would rather pay than be turned out. The assessment is to be fixed on the highest rent that a hypothetical tenant might reasonably be supposed to be willing to give. Further, the premises must be valued for rateable purposes *rebus sic stantibus i.e.*, as they exist at the date of the valuation.

So long as the assessing Court applies one of the recognised formulae for valuation and in

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so doing does not take into consideration evidence which it should not take into consideration and does not include evidence which it should take into consideration it is left to that Court to select its particular formula and it is no objection to say that it should have adopted some other formula (*Batchelor A. C. J. and Kemp, J.*) **ABDULLABHI LALJI v. THE EXECUTIVE COMMITTEE ADEN.**

20 Bom. L. R. 639=46 I. C. 721.

**TENDER**—Sum larger than the amount remaining due whether a valid tender—Right to interest. *See T. P. ACT, S. 83*

34 M. L. J. 439.

**THEERTHAKARS**—Whether offer holders in Hindu Temples. *See C. P. CODE, S. 9.*

7 L. W. 614.

**TORT**—Master and servant—Assault by a servant of railway Co. on a passenger who pulled communication chain and stopped the train—Railway company not liable—Railways Act Ss. 108, 121 and 128.

The plff and his wife were travelling in a compartment of a train of the deft. company. The compartment got overcrowded. The plff became afraid of being molested by other passengers and he pulled the communication chain and the train stopped. The engine driver of the train ran up to the plff's compartment, pulled him out of it and struck him blows with his fist; the guard came up to the spot and he too slapped the plff on his face. The plff was arrested by the engine driver and the guard and was handed over to the station master at a station. After his statement was recorded by the police he was released and allowed to proceed to his destination. The plff sued the railway company claiming Rs. 3,000 as damages for the wilful assault committed by the engine driver and the guard:—

*Held*, that, as the company was not authorised under S. 108 of the Indian Railways Act, to arrest the plff. for pulling the communication chain the company was not liable for assaults committed by its servants. *Poultton v. London and Western Railway Co.*, (1867) L. R. 2 Q. B. 534 *fol.*

*Held, further* that the special provisions of S. 108 of the Indian Railways Act could not be controlled by the more general language of Ss. 121 and 128 of the Act *Barker v. Edger* (1828) A. C. 748 *ref.*

The master is liable when the servant acting in a matter which is within the scope of his authority, that is, within the course of his employment commits a wrong by exceeding the authority vested in him. The act itself which constituted the wrong may be, and usually is in excess of the servant's authority, but if in thus transgressing his authority the servant is doing in the master's interest one of the class of the acts which the

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master has employed him to do then the master is liable. (*Scott, C. J. and Batchelor J.*)  
**GIRJASHANKAR DAYASHANKAR VAIDYA v. B. B. AND C. I. RAILWAY.**

20 Bom L. R. 123=45 I. C. 715.

———Negligence—Vicarious liability—Test of—Master and servant—Bailor and bailee  
*See* (1917) DIG. COL. 1178; **MA MYAING v. MAUNG SHWE THE.** 10 Bur. L. T. 223=

42 I. C. 52.

**TORT**—Person seen canvassing and introducing litigants to members of the Bar. *See* LEGAL PRACT. ACT, S 36. 16 A.L. J. 76.

**TRADING WITH ENEMY**—What is—Paying bill of exchange against goods shipped in enemy bottoms. (*Robinson, J.*) **BUCHANAN v. MALL** 11 Bur. L. T. 84.

**TRANSFER—Appeal**—Notice to parties—Necessity—Omission to give notice and disposal of appeal in absence of parties—Restoration of appeal—Duty of court. *See* PRACTICE (1916) Pat. 17.

———Jurisdiction of District Judge—High Court circular R. O. C. 3656 of 1916—Applicability *See* C. P. CODE, S 24

(1918) M. W. N. 291

**TRANSFER OF PROPERTY ACT (IV OF 1882)**—Scope of—Not exhaustive of the law of transfer of property—Part-performance—Acquisition of title by. *See* T. P. ACT S. 54

28 C. L. J. 77.

———Immovable property—Mortgage debt—Transfer—Registration necessary. *See* T. P. ACTS S. 54

22 C. W. N. 641.

———S. 3—Notice—Benami purchase—Possession with real owner Notice of defect in title *See* BENAMI. 43 I. C. 536

———S. 3—Notice—Possession—Notice of the title under which it is held. *See* LESSOR AND LESSEE. 45 I. C. 49.

———Ss. 6 and 58—Future property—Assignment of—Creation of charge on fund to come into existence on a future date.

An assignment of future property is not invalid in India. S. 6 of the T. P. Act does not contain a total prohibition against the assignment of all future property, but must be construed as an exception to the general rule in favour of transfers of property, present and future.

Portions of a section should be construed *ejusdem generis* with the rest of the section.

The words "of a like nature" in clause (a) of S. 6 indicate that 'possibility' referred to therein must belong to the same category as

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the chance of an heir-apparent or the chance of a relation obtaining a legacy.

Under S. 58 of the T. P. Act a property can be specific so long as it is identifiable, though it may not be in existence on the date of the transfer. A transfer, therefore if otherwise valid is not rendered inefficacious by reason of the subject-matter not having been in existence on the date of the agreement.

Where a loan is charged on a fund to come into existence in the future the charge attaches to the property on its coming into existence. (*Ayling and Seshagiri Aiyar, JJ.*) **PUSAPATHI VENKATAPATHI RAJU v. VENKATA SUBHA-DRAYAMMA** 47 I. C. 563.

———S. 6 (a)—Hindu Law—Adoption by widow—Agreement postponing son's estate during widow's life-time transfer by adopted son of property forming part of estate during widow's life-time—Spes successioneis

D. K. adopted B by means of a deed of adoption which provided that the latter would from that day acquire all the rights which an adopted son had under the law in all the property left (matruka) by Raja Raghubar Singh deceased and now in the possession of the Rani Saheba. But it had been agreed..... that according to the wish and permission of Raja Raghubar Singh, the Rani Saheba would continue to be owner and in possession (malik aur qubiy) of the entire Reyasat during her life. Subsequently B transferred certain property of the Reyasat to J, and others. After the sale B leased the property to D, father of J. There was considerable litigation between B and J which eventually terminated in a decree based on compromise between the parties to the effect that in the event of B paying to J on a certain date certain sums of money by J would give up all claims to the property in question, and that in the event of non-payment the suit of J against B would be decreed and the suit of B against J would be dismissed. B did not pay the amounts as required and the result provided for in the decree followed. J applied for the execution of the decree, B objected that he had only an expectant interest in the estate which interest was inalienable:—*Held*, upon a construction of the adoption deed the interest created in favour of B was not a mere possibility of succession to the estate after the death of D. K. but that it was a vested right, the right of enjoyment and possession being only postponed, and that the sale was unaffected by the provisions of S. 6 (a) of the T. P. Act. (*Tudball and A. Raoof, JJ.*) **BALWANT SINGH v. JOTI PRASAD.**

40 All 652=16 A. L. J. 765=47 I. C. 599.

———S. 6 (a)—Hindu law—Reversionary interest—Dealing with—Contract in respect of, void.

The interest of a reversioner in the estate of the last male owner is a *matra spes*

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*successionis* and it is not open to them or to his guardian if he is a minor to bargain with it or bind himself by any agreement in respect thereto. Such a dealing with the estate by the minor or his guardian is null and void. (*Ameer Ali*). AMRIT NARAYAN SINGH v. GAYA SINGH. 34 M. L. J. 293=45 Cal 590=23 M. L. T. 142=27 C. L. J. 296=4 Pat. L. W. 221=22 C. W. N. 406=16 A. L. J. 265=(1918) M. W. N. 306=44 I. C. 403=20 Bom. L. R. 546=7 L. W. 581=45 I. A. 35. (P. C.).

———S. 6 (a)—*Reversioner—Transfer of property—Void under the Hindu law.*

A transfer made by a Hindu reversioner of his expectant interest in an estate prior to the passing of the Transfer of Property Act, is void under the Hindu Law. (*Lindsay, J. C. and Stuart, A. J. C.*) HAR NATH KUAR v. INDRA BHADUR SINGH.

47 I. C. 214.

———S. 6 (a)—*Spec successionis—Release of — Mahomedan Law — Relinquishment of rights of inheritance if valid.* (*See* (1917) DIG. COL 1180: ASA BEEVI v. KARUPPAN CHETTI.

41 Mad 665=34 M. L. J. 460=7 L. W. 215=41 I. C. 361=42 I. C. 35.

———Ss. 6 (b), 109, 111 (g)—*Breach of condition involving forfeiture by tenant — Transfer by landlord of his right subsequent to breach—Right of transferee to enforce forfeiture.*

In 1896, defts. Nos. 3 to 7 granted a mulgeni — Lease of their lands to deft. 1 on condition that if the latter alienated his rights under the lease to anybody the lease was to come to an end. Deft. No 1 sold his rights under the lease to deft. No. 2 in 1908. Defts. Nos. 3 to 7 took no action; but sold their right to the plff in 1911. The plff. having sued in 1912 to recover possession of their land on breach of the condition:

Held, that the plff. was entitled to recover possession of the lands from deft. No. 2 (*Beaman and Heaton, JJ*) VISHVESHWAR v. MAHABLESWAR.

20 Bom. L. R. 767=47 I. C. 198.

———S. 6 (c)—*Profits—Transfer of right to receive, valid.*

A transfer of a share of the profits of a village which have at the time actually accrued due, is an assignment of a debt and not of a mere right to sue and is therefore not bad in law under S. 6 (e) of the T. P. Act although the transfer of a right to sue is a necessary incident of the transaction. (*Stuart and Syed Muhammad Ali A. J. C.*) BHARAT SINGH v. BINDHA CHARAN.

47 I. C. 634.

———S. 6 (e)—*Mere right to sue—Assignment of contract of service.*

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A contract of service being a personal contract is not assignable before breach, as the transfer would be of a mere right to sue. (*Mitra, A. J. C.*) KARAN KHAN v. DANGUSHTI.

47 I. C. 902.

———S. 6 (e)—*Suit for past profits by transferee of land, if maintainable*

A suit, by an assignee of a village share along with profits accrued due prior to the sale to recover such profits is not maintainable inasmuch as it is a suit for the enforcement of a mere right to sue within clause (e) of S. 6 of the T. P. Act. (*Batten, A. J. C.*) LAKHPAT SAHAI v. TIKARAM.

47 I. C. 158.

———S. 6 (f) and (h)—*Mahomedan Law—Mutwalli—Mortgage of the rights of—Invalid and opposed to public policy.* See MAHOMEDAN LAW, MUTWALLI.

22 C. W. N. 996.

———S. 8—*Hypothecation of land—Fixtures form part of the security.*

Where immoveable property is hypothecated the fixtures pass to the mortgagee. The rule in this respect as between landlord and tenant does not apply as between mortgagor and mortgagee. (*Fletcher and Huda, JJ.*) HARIPADA SADHUKHAN v. ANANTH NATH DEY.

22 C. W. N. 758=44 I. C. 211.

———S. 8—*Transfer of land—Right to profits accrued due on the date of transfer if also transferred.*

Under S. 8 of the T. P. Act only profits accruing after the transfer pass to the land. Profits already accrued due are not a beneficial interest in the land since the land cannot be transferred with retrospective effect. (*Batten, A. J. C.*) LAKHPAT SAHAI v. TIKARAM.

47 I. C. 158.

———S. 9—*Surrender of lease—Writing and registration, not essential.*

A surrender of a lease need not be in writing nor need it be registered. (*Fletcher and Huda, JJ.*) BROJONATH SARMA v. MAHESHWAR GAHANI.

23 C. L. J. 220=46 I. C. 100.

———S. 9—*Surrender—Writing unnecessary—Inference from conduct* See RELEASE.

22 C. W. N. 441.

———S. 11 — *Condition repugnant to interest created—void—Gift—Reservation of rights.*

Per *Kanhaya Lal, A. J. C.*—Where an intention to make an absolute transfer in praesenti of all proprietary rights is clear, any condition which derogates from the immediate completeness of the gift is regarded as void. Where the condition, however may be given effect to without in any way interfering with or detracting from the immediate completeness

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of the gift, or rather the immediate transfer of the right in the substance of the gift, the condition as well as the gift are valid.

Any reservation of proprietary rights in the corpus would be inconsistent with an intention to make a gift, but the reservation of a right to the usufruct of a portion of the property given would not be inconsistent if the intention to give the corpus be otherwise manifest. (*Stuart and Kanhaiya Lal, A. J. C.*) FAKHIR JAHAN BEGAM v. MD. ABDUL GHANI KHAN 5 O. L. J. 49=45 I. C. 307.

———S. 11—Creation of Hindu widow's estate by deed or will—Absolute restriction on alienation—Condition void. See WILL, CONSTRUCTION. 3 Pat. L. J. 193

———S. 11—Mahomedan Law—Gift with invalid condition attached—Gift, valid. See MAHOMEDAN LAW, GIFT. 22 C. W. N. 512.

———S. 12—Permanent lease—Restriction on alienation—Validity of.

A restraint as regards alienation might be void where property is transferred in other respects in absolute right. But where land is merely granted for use or cultivation, either free of rent or at a favourable rate of rent, any condition restraining alienation would not be inconsistent with the rights conferred or necessarily void.

Hereditary rent-free tenancies of a perpetual character might exist without any right of alienation attaching to them. (*Kanhaiya Lal, A. J. C.*) KATESAB ESTATE v. MAHOMED AMIR. 5 O. L. J. 149=46 I. C. 73.

———S. 19—Interest in immoveable property to take effect on the death of a person, whether contingent or vested—Suit by two reversioners—Compromise—Provision that properties should be taken by them on a certain person's death—Death of one, other if solely entitled to the whole.

Where two persons claiming to be reversioners to one K. deceased, instituted a suit against K's widow, mother and brother disputing the genuineness of a will whereby the properties of K were bequeathed to them and a compromise was arrived whereby some of the properties were to be taken by the plffs, on the death of the mother, the widow's rights having been already purchased by the mother and brother in a compromise in a prior suit by her, and subsequently one of the two persons having predeceased the other, the other alone brought a suit for the recovery of the whole of the property secured by the compromise on the ground that he has become entitled to the whole properties by survivorship in preference to the heirs of the deceased.

Held, that the rights secured to the two persons by the compromise was a vested interest and that it did not pass from

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one to the other by survivorship but was inheritable and divisible between the two donees. 4 M. I. A. 187 and 83 Cal. 466 ref. (*Ayling and Seshagiri Aiyar JJ.*) KRIHNA AIYAR v. SWAMINATHA AIYAR 24 M. L. T. 101= (19.8) M. W. N. 503=3 L. W. 140=47 I. C. 723.

———S. 21—Period of vesting—Will—Successive life-interests—Reversionary trust to particular persons "if then living"—Vesting, period of, on the death of the last life-tenant. See WILL, CONSTRUCTION. 45 I. A. 257 (P. C.)

———S. 39—Impartible Estate—Transfer of—Junior members not entitled to a charge for maintenance against transferees in the absence of a special custom. See HINDU LAW, IMPARTIBLE ESTATE 3 Pat. L. J. 648.

———S. 41—Constructive notice—Benami purchaser—Possession with real owner—Notice of defect in title. See BENAMI. 43 I. C. 556.

———S. 41—Disclaimer by real owner—Transfer by ostensible owner—Estoppel

A person who has disclaimed a title cannot be allowed to set it up afterwards to the prejudice of 3rd parties who have purchased the disclaimed property from the ostensible owner in good faith and for value (*Stuart and Kanhaiya Lal, A. J. C.*) FAKIR JAHAN BEGAM v. MD. ABDUL GHANI KHAN. 5 O. L. J. 49=45 I. C. 307.

———S. 41—Estoppel—Benamidar allowed to pose as ostensible owner and to alienate property—Real owner if can deny title of benamidar.

Where the real owner C allowed L to pose as the ostensible owner of the property and attested a mortgage by L in favour of the plff C. is estopped from denying as against a bona fide encumbrancer for value that L was not competent to deal with the property.

A who claimed through C. as his creditor, had no superior rights against the plff to that of C. and the plffs, claim must, therefore prevail against A's debt. (*Le Rossignol and Waltherforce JJ.*) SANT SINGH v. LACHMI. 46 I. C. 102.

———S. 41—Principle of, based on estoppel—Silence where no duty to speak—No estoppel.

S. 41 of the T. P. Act is based upon the doctrine of estoppel. The mere fact that the real owner kept silence and advanced no claim for a long time cannot be treated as evidence of an implied consent on his part to the continuance of a trespasser's possession during that time. (*Lindsay, J. C.*) SAIED UN NISSA v. MAIKU LAL. 5 O. L. J. 391=47 I. C. 687.

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—S. 41—*Transfer by ostensible owner—Purchase of equity of redemption—Nominal endorsement of satisfaction by a life-tenant of the mortgage—possession obtained by purchaser from the life-tenant out of affection—Sale of property to third party—Plea of bona fide purchase for value without notice cannot avail against remainderman of the mortgagee suing for possession*

In 1885 the property in dispute was mortgaged to P. who died in 1899; having made a will under which his widow H. was given a life interest in his estate and the remainder was left absolutely to his daughter's daughter (plff.). In 1900, deft. No. 3 who was a confidential clerk of H. purchased the equity of redemption in the mortgage and purported to pay off the mortgage, on the 5th of April 1900. Though the mortgage-deed bore an endorsement that the mortgage was satisfied yet it was found that the endorsement was a sham, nothing having been really paid. Nor was any transfer of the property taken by deft. No. 3 from H. Deft. No. 3 sold the property to deft. No. 4 in 1912. On H's death in 1914 the plff. sued to recover possession as mortgagee from deft. No. 4 or to recover the amount of the mortgage debt. Deft. No. 4 pleaded that he was a bona fide purchaser for valuable consideration without notice:—

*Held*, (1) that the endorsement of satisfaction on the mortgage-deed amounted merely to a gratuitous promise not binding on the releasor, since the English method of procedure by deed, on the principle that a deed imported consideration, had no application in India

(2) that S. 41 of the T. P. Act, 1882, could not avail deft. No. 4 for deft. No. 3 never became the ostensible owner inasmuch as there was no transfer to him from H, in whom consequently the title always remained;

(3) that the possession which deft. No. 3 had obtained out of affection from H. would enure for the benefit of the assignee (deft. No. 4 so long as H. the life-tenant of the mortgagee, survived, but it would not prejudice the right, of the plff., the remainderman of the mortgagee;

(4) that therefore deft. No. 4 was not protected by the plea of bona fide purchase for value without notice (*Scott, C. J. and Batchelor, J.*) *BAI JAYAGAVRI v. PURSHOTTAMDAS.* 20 Bom. L. R. 177=44 I. C. 926

—S. 43—*Applicability of — Erroneous representation.*

Before S. 43 of the T. P. Act can be brought into operation there must in fact have been an inducement by erroneous representation. The question of the applicability of S. 43 depends upon the decision of the issue of fact. 26 Bom. 379, 34 Bom. 175 and 34 Mad. 159 ref. (*Roe and Imam, J.J.*) *CHAKRAPANI NUNDI v. SRIMATI GAYAMONI DASSI (1918)* Pat. 278=5 Pat. L. W. 219=48 I. C. 228.

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—S. 43—*Applicability of—Mortgage of warg land and kumaki land — Kumaki land granted in dharkhast by Govt. to mortgagor—Mortgagee not entitled to benefit of the grant. See SOUTH CANARA, KUMAKI LAND.*

35 M. L. J. 120.

—S. 43—*Applicability of — Transfer of spes-succes-siones—Transfer not operative as regards interest when it becomes vested. See LAND TENURE, PALAYAM.* 41 Mad. 749.

—S. 43—*Ghatwali land—Sale of—Subsequent enfranchisement—Vendee acquires no interest. See LAND TENURE, GHATWALI*

28 C. L. J. 253

—S. 43—*Principle of—Mortgage of non-transferable interest—Subsequent acquisition of transferable interest by mortgagor—Alienation of portion of property—Right of mortgagee over whole property for sum-originally lent and subsequent advances.*

Where at the date of a mortgage the mortgagor had only a non-transferable interest in the property mortgaged but subsequently acquired a transferable interest in it and conveyed a portion of the mortgaged property to a third party, held that the mortgage operated as a valid charge on the whole property (including the portion conveyed) enforceable at the instance the mortgagee immediately on the acquisition of the transferable interest. The mortgagee has a charge not only for the original advance but also any money subsequently paid to save the property. *Hobrayd v. Marshall*, (1882) 10 H. L. C. 191. *Collyer v. Issacs*, (1892) 19 Ch. D. 312. *Tailby v. Official Receiver*, (1888) 13 A. C. 523, 7 C. L. J. 387, 31 C. 667, 10 A. 133, 29 A. 133 Ref. (*Mookherjee and Beachcroft, J.J.*) *SURENDRA NATH DEY v. RAJENDRA CHANDRA.* 27 C. L. J. 239=42 I. C. 740.

—S. 51—*Improvements—Compensation for purchaser for value from limited owner—Right to compensation—Principles regulating.*

Where a purchaser knows or is presumed to know that the vendor can sell only under certain circumstances and either knows that such circumstances do not exist or wilfully abstains from making any enquiry on the subject, the mere fact that he purchased for consideration will not suffice to show good faith and he will not be able to claim compensation under S. 51 of the T. P. Act for improvement effected by him.

Apart from the provisions of S. 51. of the T. P. Act however, an equitable right may arise in favour of a purchaser from the owner of a limited interest who makes improvements on the property in his possession

But this rule can only come into existence if it can be shown that the true owner stood aside and abstained from asserting his rights. There must be in such cases some equity

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arising out of the conduct of the true owner and further, apart from the conduct of the owner in this connection, the right cannot come into existence unless it is found that the person in possession was under a mistaken belief that he had a permanent interest in the property. (*Lindsay, J. C.*) ETIZAD HUSSAIN v. BENI BAHADUR. 50 L. J. 1= 45 I. C. 242.

—S. 52—*Lis pendens*—Contentious proceeding—Partition proceedings under C. P. Land Revenue Act, institution of—Lease by *lambardar* during pendency of.

The mere institution of partition proceedings under the C. P. Land Revenue Act 1881. does not in itself put an end to the authority of the *lambardar* to give lease. A partition proceedings under the C. P. Land Revenue Act, 1881, is not in its origin and nature necessarily a contentious proceeding. It is only when an objection on a question of title is raised and the Deputy Commissioner elects to exercise his powers as a Civil Court under S. 136 (G) of the C. P. Land Revenue Act that the proceeding became contentious within the meaning of S. 52 of the T. P. Act. (*Mitra O. A. J. C.*) FAKIRGIR v. MULCHAND 14 N. L. R. 18=43 I. C. 934.

—S. 52—*Lis pendens*—Doctrine of not applicable to parties ranged on the same side—Any other party meaning of.

The doctrine of *lis pendens* has no application between parties ranged on the same side between whom there is no issue for adjudication.

The words "any other party" in S. 52 of the T. P. Act, mean any other party between whom and the party alienating, there is no issue for adjudication which might be prejudiced by the alienation. 29 All. 339 and P. O. coll. (*Wallis, C. J. Kumaraswami Sastri and Bakewell, J.J.*) MANJESHWARA KRISHNAYYA v. VASUDEVA MALLAYYA. 41 Mad 453 =34 M. L. J. 263= 23 M. L. T. 70=7 L. W. 164= 44 I. C. 471

—S. 52—*Lis pendens*—Doctrine of, if applicable to a compromise decree between original parties when alienor has also been impleaded

Per *Wallis C. J.*—An alienor of immovable property *pendente lite* from the debt. in a suit is bound by a decree passed in terms of a compromise arrived at between the plff and the debt after the date of the alienation in question and before the date when the alienor was made a party to the suit.

29 M. 426; *London v Morris*, (1882) 5 Sim 247; *Mellen v. Moline Malleable Iron Works* (1898) 181-184 U. S. S. O. Rep 552, 10 M. I. A. 476 Ref.

Per *Srinivasa Iyengar J.*—A compromise entered into between the original parties to a

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suit cannot be made a decree of Court so as to affect the interests of an alienor *pendente lite* after he is made a party

For the application of the rule of *lis pendens* there must be, first a decree or order of Court and, secondly, that decree or order must have been passed while the alienor *pendente lite* was not a party on the record, for the rule of his *pendens* is an exception to the general rule that a decree or order is binding only on the parties to the suit (*Wallis C. J. and Srinivasa Iyengar J.*) CHERLO SUBRA REDDI v. AMPARAYANI VENK ATASESHIAH. 43 I. C. 502.

—Ss 52 and 2 (d)—*Lis pendens*—Mortgage suit pending in High Court—Compulsory winding up—Transfer effected under another Courts order pending suit—Liquidators authorised to create—Charge created gains no priority over claims of parties. See (1917) DIG COL. 1181; *MOTI LAL SHIV LAL v. POONA COTTON AND SILK MFG CO. LTD.*

42 Bom. 215=19 Bom. L. R. 602= 41 I. C. 246.

—S. 52—Principle of—Transaction entered into during pendency of suit, resulting in subrogation.

The essence of S. 52 of the T. P. Act is that a transaction entered into during the pendency of a suit cannot prejudice the interests of a party to the suit who is not a party to the transaction. A transaction entered into during the pendency of a suit resulting in a subrogation is within the section. (*Sharfuddin and Roe, J.J.*) RAI BENODE BEHARY BOSE v. HIRA SINGH. (1913) Pat. 76=44 I. C. 726.

—S. 52—*Lis pendens*—Suit to eject *ijaradar* after termination of lease—Settlement by *ijaradar* with tenant during pendency of suit if binding on landlord.

Where an *ijaradar* of certain lands made a settlement of the lands on the expiry of the *ijara* while a suit by the proprietors for his ejectment from the lands covered by the *ijara* was pending:

Held, that the raiyats with whom the *ijaradar* had settled the lands were liable to be ejected by the proprietors thereof, as the *ijaradar* did not act in good faith in making the settlement. (*Walmsley and Panton J.J.*) FELU SARKAR v. HUMANTA KUMARI DERYA. 47 I. C. 365.

—S. 52—Transfer *pendente lite*—Agricultural lease under Tenancy Act—Validity—Burden of proof.

An agricultural lease under the Tenancy Act is a transfer within the meaning of S. 52 of the T. P. Act and it lies on the party relying on the lease to show that it did not affect the rights of the other party to the litigation. A fresh lease of a surrendered holding may or may not so affect the rights of the lessors

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successor, according to the circumstances of the case 15 C. P. L. R. 6 foll. (*Batten, O. A. C.*) *SHRI GANESH v. PANDURANG*.  
14 N. L. R. 133=46 I. C. 762.

—S. 53—Fraudulent benami transfer—Fraud carried out—Transferee's suit for possession under the transfer—Plea of benami character of transaction—Sustainability. See (1917) DIG. COL. 1189; *KAMAYYA v. MAMAYYA*.  
32 M. L. J. 484=  
43 I. C. 352.

—S. 53—Fraudulent transfer Test of—Preference of one creditor—Validity.

*Held*, that transactions made merely for the purpose of preferring one creditor over another are not void under S. 53 of the T. P. Act. In order to invoke the aid of that section it must be proved that the transaction was entered into with the object of defeating all the creditors.

*Held*, further, that the fact that a person has made an extremely good bargain is no reason to conclude that the transaction is tainted with dishonesty. (*Lindsay, J. C.*) *KALU SINGH v. RANDHIR SINGH*.  
21 O. C. 97=  
50 L. J. 208=46 I. C. 330

—S. 53—Transfer in fraud of creditors—Absence of benefit to transferee—Part payment of consideration, effect of.

A transfer of immoveable property, which is not *bona fide* and is effected so as to defraud creditors, is void though the transferor secures no benefit thereby. Where the transfer is fraudulent and is effected with a *malice fide* intent the mere fact that a portion of the consideration is actually paid will not clothe the transaction with reality and take it out of the operation of S. 53. 43 C 521 dist; 5 M. L. T. 283; 24 M. L. J. 266 foll, 30 M. 6; 25 B. 202 dist. (*Spencer and Seshagiri Iyer, JJ.*) *SUBROYA GOUNDAN v. PERUMAL CHETTIAR*.  
43 I. C. 956

—S. 53—Transfer in fraud of creditors but really intended to pass title—Whether should be set aside or resisted by way of defence to a suit on the transfer. See (1917) DIG. COL. 1190. *PALANIANDI CHETTI v. APPAVU CHETTI*.  
30 M. L. J. 565=  
19 M. L. T. 390=22 M. L. T. 474=  
45 I. C. 52=34 I. C. 78.

—S. 53—Transfer in fraud of creditor's—Representative action if necessary.

*Quære*: Whether a suit to set aside a transfer under S. 53 of the T. P. Act as being in fraud of creditors, should be brought by all the creditors or by some of them as representing the entire body of creditors. (*Ayling and Phillips, J.J.*) *VENKATESWARA AYYER v. SOMASUNDARAM CHETTIAR*.  
(1918) M. W. N. 244=7 L. W. 280=  
44 I. C. 551.

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—S. 53—Transfer to stranger for value in fraud of creditor—Knowledge of intention to defraud, is enough

A transferee who is not himself a creditor and who takes the transfer with full knowledge of the fraudulent intention of the transferor to defeat his creditor is not a transferee in good faith and such a transfer is void as against a creditor even if the transferee had paid full value of the property purchased by him.

Such a transfer cannot be held to be valid on the ground that a portion of the consideration money was applied by the transferor in payment of some debts which he owed to third persons. (*N. R. Chatterjee and Richardson, JJ.*) *AFTABUDDIN CHOWDHURY v. BASANTA KUMAR MUKHOPADHYA*, 22 C. W. N. 427=  
45 I. C. 441.

—S. 53 (2)—Fraudulent Transfer—Presumption—Actual existence of debts unnecessary—Likelihood of decrees etc being passed against transferor enough.

The Courts below dismissed a creditor's suit to set aside a transfer of property as being fraudulent, on the ground that the transferor had no debts at the time of the transfer although it was proved that the transfer was executed in the very year in which the creditor obtained his decree against the transferor.

*Held*, that the decision of the lower Courts could not stand, as neither of them had considered the fact that the transfer was executed at a time when the executant was well aware of the probability of a decree for a substantial sum being passed against him and as neither of the courts below had taken into consideration the presumption laid down by S. 53 (2) of the T. P. Act (*Walmsley and Panton, JJ.*) *MAMRAJ AGARWALA v. AHAMAD ALI MAHAMAD*.  
47 I. C. 932.

—S. 54—Contract of sale unregistered not effective to pass title.

Under S. 54 of the T. P. Act a contract of sale of immoveable property of the value of Rs. 100 and upwards unless followed by the registration of the deed cannot completely transfer property.

When one of several executants of a deed admitted execution before a Registrar but the deed was not actually registered the document could pass no title (*Jwala Prasad J.*) *SHEIKH WAZIR ALI v. MUSSAMMAT MAHIMUNNESSA*.  
4 Pat. L. W. 72=43 I. C. 777.

—S. 54—Conveyance unregistered—Title by estoppel.

A purchaser at a court auction whose sale is confirmed under O. 21. R. 92, became the absolute owner of the property and if the title is again to vest in the Judgment debtor it must be by registered conveyance.

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There is no such thing in law as title by estoppel. (*Batten A. J. C.*) DEORA v. LAXMAN  
44 I. C. 978.

—S. 54—Immoveable property—Mortgage debt—Transfer of—Registered instrument necessity.

A mortgage debt is immoveable property both for the purposes of S. 54 of the Tr. of P. Act and for the purposes of S. 17 (b) of the Registration Act and where such a debt is transferred by an instrument in writing and the value of the right, title or interest transferred is one hundred rupees or more, the writing requires registration under the Registration Act. (*Richardson, J.*) SAKHIUDDIN SAHA v. SONAULLA SARKAR.

22 C. W. N. 641=27 C. L. J. 453  
=45 I. C. 986.

—S. 54—Purchase money—Non-payment of—Title passes notwithstanding.

Where parties enter into a bargain for the sale of property of any nature, if the real intention is that the right to the property should pass, the mere fact of non-payment of part or even the whole of the consideration will not make the deed of transfer fictitious. The non-passing of the consideration may often be very strong evidence that the deed was not intended to operate. (*Richards, C. J. and Banerji J.*) ALAMDAR HUSSAIN v. MOTI RAM.

16 A. L. J. 454=46 I. C. 382.

—S. 54—Sale of land—Non-payment of price—Effect of—Title passes notwithstanding unless sale is made conditional on payment of price.

The non-payment of the consideration money stated to be paid by a sale may be an important item to take into consideration to determine whether the conveyance is or is not a real transaction, but a conveyance notwithstanding the non-payment of the consideration money may be a perfectly good transaction, except where the conveyance is drawn in such a form that the transfer is conditional only upon the satisfaction of the consideration money. (*Fletcher and Richardson, JJ.*) KUMUD KAMINI DASI v. KHUDUMANI DASI

47 I. C. 202.

—S. 54—Sale of land—Vendee in possession of land under contract of sale—Payment of consideration—Right of vendee if can be sold in execution—Right of purchase. See (1917) DIG. COL. 1199; JNAN CHANDRA DAS v. HARI MOHAN SEN.

22 C. W. N. 522=41 I. C. 856.

—S. 54—Sale—Non-payment of purchase money—Passing of title—Remedy of seller.

In a sale of immoveable property the non-payment of the purchase-money does not prevent the passing of the ownership of the

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purchase property from the vendor to the purchaser and the purchaser can notwithstanding such non payment maintain a suit for possession of the property. The only remedy of the vendor is a suit for the recovery of the purchase money. (*Maung Kin. J.*) VENKATACHELLUM v. MAUNG TUN E. 45 I. C. 860.

—S. 54—Unregistered agreement—Possession under—Ejectment suit—Defence.

A suit for ejectment by a person having a legal title can be met by one in possession under an agreement not formally executed and administered, though a suit for specific performance is barred. 24 M. 377; 39 B. 472; 44 C. 542; 29 M. 336; 38 M. 519; 40 M. 1134 18 C. W. N. 445; 20 C. W. N. 149 Ref.

Per *Richardson, J.*—The T. P. Act does not contain the whole law on the subject of transfer of property. (*Teunon and Richardson, JJ.*) MAHAMMAD SHAFIKUL HUQ CHOUDHURY v. KRISHNA GOBINDA DITA.

28 C. L. J. 77=47 I. C. 423

—S. 54—Sale—Unregistered deed—Vendee under, position of.

A Vendee claiming title under a deed of sale, which for want of registration cannot be received in evidence, is in the position of a trespasser and is liable to ejectment by a vendee under a subsequent deed of sale duly registered unless he has gained a title by adverse possession. 34 Mad 64 to ref. (*Shah Din J.*) UTTAM CHAND v. JANJI RAM.

111 P R 1918=48 I. C. 390.

—Ss 54 and 118—Unregistered exchange—Actings of parties—Part performance—Cure of defect in title.

Equity will support a transaction though clothed imperfectly in those legal forms in which finality attaches after the bargain has been acted upon

Where two persons sold each other's property among themselves by duly registered deeds of sale but under a subsequent contract of exchange remained in possession of their respective properties and long after the transaction one of the parties brought a suit to eject the other on the strength of the sale deed ignoring the unregistered contract of exchange.

Held, that the transaction had become effectually binding upon the parties in spite of the fact that the provisions of Ss 54 and 118 of the T.P. Act had not been complied with. 42 C. 80 31 B. 165 24 B. 440; 38 M 519 29 M. 336 16 A. 344; 38 A Ref. (*Piggot and Walsh JJ.*) SALAMAT v. ZAMINI BEGAM v. MASHA ALLAH KHAN.

40 All. 187=16 All L. J. 68=43 I. C. 645

—S. 55 (1) (f)—Vendor and purchaser—Purchaser not put in possession—Vendor

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*stipulating as to non-liability for failure to secure possession—Effect of.*

Plff. made a speculative purchase of a piece of land from the deft who protected him self by inserting a clause in the conveyance to the effect that if the plff. was dispossessed by anybody other than the vendor the latter would not be liable to the purchaser.

*Held* that on his failure to get possession of the land the plff. was not entitled to a refund of the purchase money. (*Walmsley and Ponton JJ.*) **INDRA NARAIN DAS v. BADAN CHANDRA DAS.** 47 I. C. 340.

—S. 55 (2) *Covenant for title—Breach of—Damages—Knowledge of defect of title—Effect.*

Under the provisions of S. 55 (2) of the T. P. Act the vendor is deemed to contract with the buyer that the interest, which he professes to transfer, subsists and that he has power to transfer the same.

Where a vendor sells land as belonging to him and it turns out that his title was defective, he is liable in damages for breach of the agreement, whether the vendee knows of the defect in the title or not. The vendee is entitled to rely upon the covenant contained in the deed and is not bound to exercise due diligence in discovering the facts. Mere knowledge or suspicion regarding the defect in title does not prevent an express or implied covenant from operating. It is only when there is a contract to the contrary that the implied covenant does not apply. (*Mittra, A. J. C.*) **SHALIGRAM SADASHO PANDU v. NARAIN.** 45 I. C. 669.

—S. 55 (2)—Vendor and purchaser—Covenant for title—Indemnity clause in sale-deed—Continuing covenant—Breach—Damages cause of action stating point when title interfered with. See LIM. ACT. ART 115 and 116. 35 M. L. J. 124

—S. 55 (4) (b)—Vendor's lien for unpaid purchase money—Extinction of by act of parties — Contract to the contrary — Vendor taking a promissory note from one of the vendees for portion of the price.

Plff. and another sold land jointly to defts. 1 to 4 for Rs. 10,000. Of the amount Rs. 8,650 were received by the vendors in cash and for the balance of Rs. 1,350 the 1st deft. alone executed two promissory notes one in favour of each of the vendors for Rs. 675 each. Plff. sued on his promissory note for Rs. 675 with interest and claimed a lien as for unpaid purchase money.

*Held*, the facts that the promissory notes were executed in favour of each of the vendors by only one of the vendees, that there was a stipulation for a fixed rate of interest and that only one of the vendors brought the suit without joining the co-vendor showed that the

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promissory note formed part of the consideration, that there was therefore no unpaid purchase money and that the plff. (vendor) was not entitled to a charge on the land. (*Earl of Jersey v. Briton Ferry Floating Dock Co.* Eq. 409; *Winter v. Lord Anson.* 57 E. R. 174; *Dixon v. Gayfare.* 44 E. R. 878; *Parrot v. Sweetland.* 40 E. R. 250; *Inre Brentwood Brick and Coal Co.* 4 Ch. D. 262; *Thompson v. Percival.* 110 E. R. 1038; 21 M. L. J. 849, (1912) M. W. N. 826; 15 M. L. J. 396 Ref. (*Ayling and Phillips, JJ.*) **KRISTNASWAMI IYENGAR v. SUBRAMANIAN GANAPATHIGAL.** 35 M. L. J. 304=23 M. L. T. 88= (1918) M. W. N. 231= 7 L. W. 210=44 I. C. 523.

—S. 58—Charge—Property to come into existence in future—Validity of the charge. See T. P. ACT, SS. 6 AND 58. 47 I. C. 553.

—Ss. 58 and 69 'Mortgage money', meaning of—Interest—Mortgage with power of sale—Default of payment of interest—Right to sell.

Where under a mortgage the mortgagee is given a power of sale at any time on default of payment of principal or interest and the sale proceeds are to be applied towards the payment of the principal and interest, the document should be considered as a whole subject to S. 69 of the T. P. Act and the right of redemption should be taken as dependent on punctual payment of the monthly interest as it falls due in the meantime. The power of sale can be exercised under S. 69 of the T. P. Act even if there is no default in respect of payment of the principal money.

The term "mortgage money in S. 58 of the T. P. Act includes interest along with the principal". (*Twomey, C. J. and Parlett, J.*) **THE FIRM OF A. C. KUNDU v. ROOKANAND.**

11 Bur L. T. 147=43 I. C. 921.

—S. 58—Mortgage—Mortgage money only partially paid up—Pro tanto charge.

A mere default on the part of the lender to pay the full amount of the charge would not deprive him of his lien in respect of the money actually advanced 2 M. 79; 2 M. 212; 35 M. 114; 14 A. 273 Ref. (*Ayling and Seshagiri Aiyer, JJ.*) **PUSAPATI VENKATAPATHI RAJU. v. VENKATA SNBHADRAYAMA.**

47 I. C. 563.

—S. 58 (c)—Mortgage by conditional sale—no personal covenant to pay.

In a pure mortgage by conditional sale there is no personal covenant to pay as in the case of a simple mortgage. Therefore, if in a suit based on a deed of mortgage by conditional sale the mortgagee fails to get a mortgage decree owing to want of due attestation, he is not entitled to a personal decree as there is no personal covenant to pay. (*Batten, A. J. C.*) **ANANDRAO v. TUKARAM.** 46 I. C. 326.

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———S. 58 (d)—Usufructuary mortgage—Meaning—Usufructuary mortgage—Failure of mortgagor to give possession of mortgaged property—Mortgagee's right to sue for sale of mortgaged property. See (1917) DIG. COL. 1199; MARTURU SUBBAMMA v. GADDE NARAYYA. 41 Mad. 259=33 M. L. J. 623=22 M. L. T. 429=(1917) M. W. N. 828=6 L. W. 738=43 I. C. 4 (F. B.)

———S. 58 (d)—Zarpeshgi ijara—Provision for annual bargain payable to executant—Mortgage or lease.

The plff. borrowed money from the deft. and gave a certain share in a village in Zarpeshgi ijara at a fixed rent whereby it was provided that *ijaradar* would be entitled to deduct the interest on the money advanced out of the rent payable and a portion of the balance as Government dues and pay the rest to the plff. every year and that on repayment of the entire sum advanced on the expiry of the term of the *ijara*, the *ijara* shall be annulled but in case of non-repayment on the due date the *ijara* will continue.

*Held*, that the transaction created the relationship of mortgagor and mortgagee and that this was not a case in which the amount advanced to the owner of the land ought to be viewed as an advance of the rent fixed upon the land. 25 All. 115, 24 Cal. 272, 2 C. W. N. 758 ref.

It is impossible to lay down any general rule as to effect of a Zarpeshgi transaction. Every case must depend upon its own facts.

The question to be decided in each case is whether the main object of the instrument was to create the relationship of mortgagor and mortgagee or of simple landlord and tenant. (Dawson Miller, C. J. and Mullick, J.) SHEIKH MUHAMMAD HANF v. MOORAT MAHTON. 4 Pat. L. W. 146=44 I. C. 153.

———S. 58 (e)—English mortgage—Mortgagee, owner of the property subject to ownership being divested by re payment of the loan on the appointed day. See CROWN, DEBTS. 22 C. W. N. 793.

———S. 59—Document reciting delivery of securities to equitable mortgagee—Registration if necessary.

A document merely reciting what securities are handed over to an equitable mortgagee is a memorandum and not a mortgage and does not require registration. (Ormond and Pratt, JJ.) BADRI DAS v. THE CHETTY FIRM OF O. A. M. K. 45 I. C. 918.

———S. 59—Equitable mortgage—Letter from mortgagor to equitable mortgagee showing object of mortgage—Registration unnecessary. See REGISTRATION ACT, S. 17 (1) (b). 22 C. W. N. 768=44 I. C. 211.

## TRANSFER OF PROPERTY ACT S. 59.

———S. 59—Mortgage—Attestation—Acknowledgment of signature by executant before attesting witness—Mortgage invalid—Evidence Act, S. 68—Effect of.

A mortgage deed purported to have been signed by two witnesses as required by S. 59 of the T. P. Act. but it was admitted in evidence that one of them was not present at the time of execution but signed it and being told by the executant that he had executed it the document is not only inadmissible under S. 68 of the Evidence Act but does not effect a mortgage at all. (Twomey, C. J. and Parlett, J.) PERIANNAN CHETTY v. MAUNG BA THAW. 11 Bur. L. T. 114=43 I. C. 916.

———S. 59—Mortgage—Attestation—Scribe of when an attester—Scribe deposing to execution of deed—Proof of execution.

The essence of attestation of a document is that the person attesting must have seen the document executed by the executant.

The fact that a person calls himself a scribe in a certain document does not necessarily debar him from being an attesting witness thereto and the question whether a scribe is also an attester and was intended to witness the execution of the document is question of fact depending upon the facts of each case. 24 M. L. J. 534, 23 C. W. N. 699 and 5 C. W. N. 445 ref.

Where in a suit on a mortgage-deed which was attested by two witnesses and signed by the scribe as the writer thereof, one of the attestors was dead and the other was not examined as a witness but the scribe was examined and deposed to having seen the deed executed.

*Held*, that the scribe under the circumstances of the case must be regarded as an attesting witness and that the document and the attestation thereof sufficiently proved his evidence. (Seshagiri Iyer and Napier, JJ.) PARAMASIVA UDAYAN v. KRISHNA PADAYACHI. 41 Mad. 535=7 L. W. 241=43 I. C. 933.

———S. 59—Mortgage—Attestation, what constitutes—Direct evidence of execution of deed—Essential.

The requirement as to attestation contained in S. 59 of the T. P. Act is not complied with unless the attesting witnesses are able to answer both to the act of execution and the identity of the person performing the act.

When, therefore, the only evidence was that the attesting witnesses were on one side of a purdah and the executant of the deed a purdanashin lady, on the other, but her son took the deed behind the purdah returned with it bearing a signature purporting to be hers, and said that it had been signed by her and the witnesses thereupon attested.

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*Held*, that the terms of the statute had not been complied with and that the mortgage was void. 85 Mad. 607 foll. 37 All. 474 dist.

It is an unusual course to remand for fresh evidence an appeal which has been argued, and which ought *prima facie* to be decided, upon the materials which were before the courts below: and their Lordships declined to assent to the respondents' prayer for such a remand in the present case. (*Viscount Haldane*.) GANGA PERSHAD SINGH RAI BAHADUR v. ISHRI PERSHAD SINGH

45 Cal. 748=20 Bom. L. R. 587=  
22 C. W. N. 697=34 M. L. J.  
545=4 Pat. L. W. 349=  
23 M. L. T. 388=8 L. W. 176=  
27 C. L. J. 548=(1918) M. W. N. 382=  
16 A. L. J. 409=45 I. C. 1=  
45 I. A. 94 (P. C.)

—S. 59 mortgage bond Attestation—Validity—Attestation before execution—Effect C. P. Code, O. 8, R. 5—Evidence Act S. 58—Admission in pleadings—Court power to require proof of fact admitted—Pleading—Admission no—Suit on mortgage bond—Admission in written statement of execution of bond—Scope and effect.

Where, in a suit on a mortgage bond executed by A and B it appeared that after the bond was executed in the presence of two persons who then and there attested the document, it was taken to B, who lived in a different place and that he executed the document in the presence of the attesting witnesses who however, did not subscribe their names again as attesting witnesses *held* that the mortgage bond was not properly attested within the meaning of S. 59 of the Transfer of Property Act, so far as B was concerned and that it was not valid as against him.

Per *Abdur Rahim J.* An admission in the written statement that the mortgage bond sued upon had been executed does not amount to an admission that it was validly executed, and that the requirements of law as to attestation by witnesses had been complied with.

Both under S. 58 of the Evidence Act and under O. 8 R. 5 of the Code of Civil Procedure, the trial court has a discretion to require proof of the due attestation of the mortgage bond sued upon notwithstanding an admission by the deft. in his written statement that the bond had been duly executed. (*Abdur Rahim and Oldfield JJ.*) MONIAPPA CHETTIAR v. VELLAI-CHAMI MANNADI. 1918 M. W. N. 853 =9 L. W. 5.

—S. 59—Mortgage deed executed by—Purdanashin lady—Attestation of—Validity—Conditions.

In the case of a mortgage deed executed by a purdanashin lady it is not necessary that the witness should be actually inside the purdah and there is ample authority to the

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effect that they are deemed to be present on the execution of the document in such a case although they may be screened off from the execution by a purdah.

Where one of the witnesses to a mortgage-deed was inside the purdah where the executants who were purdanashin ladies affixed their signatures to the deed and the other witnesses were on the other side of the purdah, and after the deed had been read out and explained by the executants and then taken by the witnesses to the other side of the purdah where he signed it himself and the other witnesses then signed it.

*Held*, the deed was attested according to law. (*Miller, C. J. and Jwala Prasad, J.*) SYED ZAKIR RAZA v. MADHSUDAN DASS. 4 Pat. L. W. 417=45 I. C. 691.

—S. 59—Mortgage by deposit of title deeds—Possession transferred to mortgagee—Registration if necessary—Right to eject mortgagee without payment of rent.

In consideration of a loan advanced by defts. to plffs. the latter made over certain lands to the former together with their title deeds, under an arrangement that the defts. should remain in possession of the lands and take the rents and profits thereof in lieu of interest. Subsequently the plffs. sued for possession of the lands on the ground that no interest in the lands had passed to the defts. in the absence of a registered document:

*Held* that no registered document was required for such a transfer of possession as was effected in this case, inasmuch as the transaction was not one of sale or mortgage requiring such an instrument under Ss. 54 and 59 of the T. P. Act.

The defts. had a charge on the land and were entitled to retain possession thereof until the charge was paid off, and in the meantime to take the rents and profits in lieu of interest as arranged at the time when they were put into possession. (*Twomey, C. J. and Ormond, J.*) SHWE LON v. HLA GYWE. 47 I. C. 133=9 L. B. R. 172.

—Ss. 60, 98 and 94—Applicability of—Mortgage—Forfeiture Clause whether turns simple mortgage into anomalous mortgage—Redemption, right of—Tender before money becomes payable, effect of. See (1917) DIG. COL. 1202; NGA PO, NYUN v. MAYIN.

11 Bur. L. T. 36=(1916) II U. B. R. 141 =39 I. C. 377.

—S. 60—Mortgage—Redemption—Right of owner of a portion of the equity of redemption—Consent of mortgagee, if essential, when mortgagee acquires portion of the property.

Where a mortgagee acquires a portion of the mortgaged property, the right of the owner of the other portion of the property to redeem the whole is not absolute. In such a case the

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right of redemption depends upon the will of the mortgagee. He can insist upon the mortgagor's seeking redemption of the entire mortgage: but if he acquires any portion of the mortgaged estate, he can in that case insist that the plaintiff shall not be allowed to redeem more than his own share of the mortgaged estate. (*Lindsay, J. C.*) *RAMADHIN v. JORHAN*.  
5 O. L. J. 248=47 I. C. 115.

—S. 60—Purchase of portion of mortgaged property by mortgagee—Effect on his right against remainder of property.

The effect of the purchase by a mortgagee of a portion of the mortgaged property at an auction sale held in execution of his decree for money at which his prior lien was notified is to extinguish the mortgage only to an amount proportioned to the extent of the property purchased: the question of the price paid at the sale is quite immaterial. (*Kanhaya Lal and Daniels, A. J. C.*) *SHAMSHAD ALI KHAN v. MUHAMMAD ALI KHAN*.  
21 O. C. 172=47 I. C. 266.

—S. 60—Redemption—Inadmissibility of mortgage—Mortgagors owning equal shares—Purchase of share of one. See (1917) DIG COL 1208; *FAKIR CHAND v. BABU LAL*.  
39 All. 719=15 A. L. J. 791=42 I. C. 879

—S. 60—Redemption—Meaning of—Security extinguished by part-payment. See MORTGAGE, REDEMPTION  
3 Pat. L. J. 490.

—S. 60—Redemption—Mortgagee not entitled to insist on payment of barred items of account before redemption. See MORTGAGE, REDEMPTION.  
35 M. L. J. 414

—S. 60—Redemption, right to—Partial owner of equity of redemption.

A partial owner of the equity of redemption is entitled to redeem the whole of the mortgaged property. (*Richardson, and Walmsley, JJ.*) *PROTAP CHANDRA DHAR v. PEARY MOHAN DHAR*.  
22 G. W. N. 800=48 I. C. 669.

—Ss. 60 and 62—Usufructuary mortgage—Stipulation for payment of principal and interest by appropriation of the usufruct—Option to redeem on a particular date before the expiry of the period—Default—Redemption, suit for, before expiry of the original term—Maintainability—Postponement of redemption for 37 years if a clog on redemption.

Under an usufructuary mortgage executed in 1902 the mortgagee was put in possession of the property and the amount of the mortgage was directed to be worked off by applying the usufruct of Rs. 24 a year, in discharge, firstly of the principal and secondly of the interest. In this way the entire mortgage amount would be discharged in about 37 years. There

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was also a provision in the deed of mortgage that if payment of what was then due was made on 12-1-1912 the property should be handed over to the mortgagor but if such payment were not made, the mortgagee's possession was to continue for the full term. No payment was made on 12-1-1912 but a suit for redemption was brought in 1916. Held, that the suit was premature and was liable to be dismissed.

The stipulation for payment on 12th January 1912 was not a personal covenant to pay so as to entitle the mortgagor under S. 60 of the T. P. Act, to redeem the mortgage at any time after that date. It was merely a provision inserted for the benefit of the mortgagor who having failed to avail himself of it, was bound by the terms of the original covenant.

The provision in the mortgage deed that the mortgagee was to remain in possession until the mortgage money was paid off by the appropriation of the usufruct (a period of 37 years in this case) was not a clog on the equity of redemption, the validity of such a covenant being expressly recognised in S. 62 of the T. P. Act. (*Phillips and Krishnan, JJ.*) *AGA MUHAMMADALLY BEG. SAHIB v. VENKATAP. PAYA*.  
35 M. L. J. 287=48 I. C. 379.

—S. 61—Consolidation—Rule of—Application to India before Tr. P. Act—Redemption—Contract: creating right of—Validity—Central Provinces Laws Act, 1875—Mortgage by conditional sale prior to—right of redemption of.

The rule of consolidation does not apply in India, and even before the T. P. Act it was open to a mortgagor to redeem a subsequent mortgage without redeeming a prior mortgage of the same property, in the absence of a contract to the contrary. 7 Bom. 526, 16 All. 25 8 N. L. R. 123, 38 M. 927, 21 M. L. J. 562 ref.

A contract curtailing the 60 years period of redemption allowed by law would be void.

A document executed before the Central Prov. Laws Act which provides that the mortgagees will be the owners if the debt is not repaid within 2 years would in effect be a mortgage by conditional sale and the mortgagor would still have 60 years within which to redeem. (*Mitra, O. A. J. C.*) *DEOCHAND v. BINJRAJ*.  
14 N. L. R. 184=48 I. C. 368.

—S. 61—Prior mortgage—Subsequent deed executed in favour of mortgagee providing for consolidation—Transferee of mortgaged property—Liability of to pay off both deeds.

Where the executant of a deed of mortgage executes a subsequent simple deed, by which he creates a personal covenant not to redeem the mortgage until he satisfies the amount due on the subsequent deed, such a covenant cannot be enforced against a subsequent transferee of the mortgaged property. But, where

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the subsequent deed pledges as security the property already mortgaged, the effect is a consolidation of the two mortgages, and a subsequent transferee must satisfy the amount due on both as a condition precedent to redemption 35 I. C. 905 expl. (*Stuart, A.J.C.*)  
**JANG BAHADUR v MATA DIN. 53 L.J. 159=**  
**46 I. C. 80.**

———**S. 63—Khot Village—mortgagee of khot village purchasing occupancy rights without Khot's permission—Improvements by mortgagee. Right to recover. See KHOTI VILLAGE; OCCUPANCY HOLDING. 20 Bom. L. R. 681**

———**S. 63—Mortgage—Acquisitions by mortgagee—Redemption—Mortgagor, if entitled to possession of acquisition.**

A mortgagee who has acquired what any stranger or even the mortgagor himself could have acquired equally well despite the mortgage, cannot be compelled to hand over his rights to the mortgagor.

It is, therefore, competent to a mortgagee during the continuance of the mortgage to purchase an absolute occupancy tenure for himself and to treat it as his separate property after the mortgage comes to an end 5 Cal 198 foll. 17 C. W. N 586 dist (*Leslie Jones J.*)  
**GIRDHARI RAM v MUHAMMAD KARM DAD KHAN. 63 P. R. 1918=25 P. L. R. 1918=**  
**53 P. W. R. 1918=44 I. C. 266.**

———**S. 67—Sub-mortgagee—Rights of See MORTGAGE, SUB-MORTGAGE. 45 I. C. 769.**

———**S. 68—Usufructuary mortgage—Dispossession of by third person—Remedy of mortgagee—Suit against trespasser, maintainability of.**

The provisions of S. 68 of the T. P. Act are designed for the purpose of indemnifying the mortgagee against any disturbance of his peaceful enjoyment of the property. They are provisions of an enabling nature but they do not preclude any mortgagee who has been disturbed by a person claiming without title from suing the trespasser according to the general law claiming as against him a declaration of title and recovery of possession.

There is nothing in law to debar the mortgagee from asserting his rights against the trespasser alone without claiming the indemnity which S. 68 of the T. P. Act empowers him to claim from his mortgagor. (*Mullick and Atkinson JJ.*)  
**BECHU SAHU v. ARJUN. 3 Pat. L. J. 162=43 I. C. 917.**

———**S. 70—Mortgage—Accession—Kumaki land mortgaged along with warg land Kumaki land declared to be potamboke—by Government and darkbast issued to mortgagor—Mortgagor not entitled to treat land so granted as accession. See SOUTH CANARA.**

**35 M. L. J. 120.**

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———**S. 72—Preliminary decree—Payment of subsequent arrears of revenue by mortgagee to save property from sale—Right to a charge—Burma Land Revenue Code, S. 48.**

Where a mortgagee who has obtained a preliminary decree in the mortgage suit to save the mortgaged property from being sold under S. 48 of the Lower Burma Land and Revenue Act pays the arrears of revenue due he gets a charge and lien over the mortgaged property for the amount so paid. 30 C. 794, 11 C. 809; 14 A 273; 16 B. 437; 26 M. 682 11 M. 452 31 C. 975; 13 A. 195 ref. (*Maung Kin, J.*)  
**MA PWA KIN v. K. P. S. A. R. P. FIRM. 43 I. C. 190.**

———**S. 72—Right of mortgagee to recover expenses incurred in protecting mortgagor's title, by separate suit—Minor—Step-mother, if entitled to act as guardian—Liability of minor on a bond executed by guardian for proper purposes.**

A mortgagee in possession instituted criminal proceedings against his tenants who cut off and carried away the crops on the land asserting the title of a stranger as owner. The mortgagor died leaving an only minor son and the step-mother of the minor acting as his guardian executed a bond in favour of the mortgagee undertaking to pay the expenses of the criminal prosecution it was found that the expenses incurred in the criminal prosecution were necessary and that the mortgagee acted as a prudent owner in incurring them. In a separate suit on the bond against the minor son of the mortgagor, it was contended on his behalf that the suit was not maintainable by reason of S. 72 of the Transfer of Property Act, that the step-mother was not a guardian of the minor and had no power to bind him and that no decree could be given against the minor personally or against his estate.

*Held*, (1) that S. 72 of the Transfer of Property Act was no bar to the suit, as the terms of that section were merely permissive and did not make it obligatory on the mortgagee to add the expenses incurred by him to the mortgage money and to insist on being paid those sums before redemption; 9 M. L. J. 177. diss.

(2) that the step-mother of the minor was competent to act as his guardian in the absence of near relations; and

(3) that though the minor could not be charged with personal liability, his estate was liable for the debt due under the bond.

19 Cal 507 (P. C.) dist. 26 Mad. 333; 31 Mad. 458; 39 Mad. 915. (*Seshagiri Aiyar and Napier, JJ.*)  
**VENKATASWAMI NAIKER v. MUTHUSAMI PILLAI. 34 M. L. J. 177=**  
**23 M. L. T. 280=45 I. C. 949.**

———**S. 72 (b)—Mortgage of non-transferable interest—Subsequent acquisition of transferable interest by mortgagor—Right of mortgagee to a charge on properties for**

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money originally advanced and subsequently spent to save the property. See TRANSFER OF PROPERTY ACT, S. 48. 43 I. C. 740.

—S. 76—Improvement made by a mortgagee in possession—Mortgagee can recover costs of improvements from the mortgagor.

A mortgagee in possession is entitled to recover from his mortgagor reasonable costs incurred in making improvements.

The court, in allowing costs of improvements must naturally be on its guard against extravagant or unfounded claims. It shall enquire strictly into the *bona fides* and fairness of the claim in each particular case. 19 Mad. 927 foll. (*Batchelor, A. C. J. and Marten, J.*) NIJALINGAPPA v. CHANBASAWA.

20 Bom. L. R. 895=47 I. C. 751.

—S. 76—Applicability of.

S. 76 of the T. P. Act does not apply to a case where the mortgage has in fact become extinct. (*Roe and Courts JJ.*) BASAWAN SINGH v. GANGA PHAL RAI. 47 I. C. 224

—S. 76—Mortgagor and mortgagee—Mortgagee entering into possession of mortgaged property during period of mortgage, redemption of by mortgagor—Possession of mortgagee not adverse.

Where a mortgagee not entitled to possession takes possession of the property mortgaged with or without the consent of the mortgagor his possession will be that of a mortgagee subject at least to the same liabilities; and such possession for any length of time short of the statutory period of sixty years, except in cases where the right of redemption has been released by the mortgagor, will be no bar or defence to a suit for redemption where the plff. is otherwise entitled to redeem. (*Stanyon, A. J. C.*) AWDH SINGH v. NANHA. 46 I. C. 872

—S. 76 (g)—Lekha Mukhi mortgage—Failure of mortgagee to keep full and regular accounts, effect of—Presumption.

It is the duty of a mortgagee under a lekha mukhi mortgage to keep full and regular accounts of the income and expenditure of the lands in his possession and if he omits to do so every presumption should be made against him. (*Shah Din and Sectt Smith, JJ.*) ALLAH YAR v. THAKAR DAS. 24 P. L. R. 1918=46 P. W. R. 1918=44 I. C. 9.

—S. 82—Contribution—Mortgagee not affected by principle—No liability to distribute debt.

S. 82 of the T. P. Act defines the relation of the mortgagors inter se; there is nothing in the language of the section which compels the conclusion that the mortgagee must distribute his debt in a certain manner, or is unable to enforce it against each and every part of the

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property made security for the mortgage. (*Batchelor, A. C. J. and Shah, J.*) TIMAJI v. RAMA. 20 Bom. L. R. 475=45 I. C. 862.

—S. 82—Mortgage of village, A—Subsequent mortgage of villages A and B to the same mortgagee—Decree on the first mortgage Sale of A in execution—Decree on the second mortgage—Whether property purchased if ensures towards the second mortgage.

Where the owner of two villages A and B mortgaged village A and subsequently mortgaged A and village B, to the same person and the mortgagee purchased A in execution of his decree on the first mortgage and wanted to sell B in execution of his decree on the second mortgage but was met by the objection that the second decree having directed that both A and B were to be sold B alone could not be sold without giving credit for the amount for which A was liable.

Held, that the effect of the sale of A in execution of the decree on the first mortgage was to extinguish the right, title and interest of the mortgagor in it and to extinguish all incumbrances subsequent to the first mortgage so that it was open to the mortgagee to enforce the whole of his debt upon the remaining security. (*Roe and Jwala Prasad, JJ.*) DUND BAHADUR SINGH v. DEONANDAN PRASAD SINGH. 4 Pat. L. W. 108=

(1918) Pat. 69=43 I. C. 915

—Ss. 83 and 84—Deposit after institution of suit—Effect of, on the running of interest

A deposit under S. 83 of the T. P. Act is invalid if made after the institution of the suit by the mortgagee for the recovery of the money due on the mortgage. The fact that the deposit was made before the mortgagor received notice of the institution of the suit does not make any difference.

Obiter.—Even if a deposit could be made after the institution of the suit, it must include the costs incurred by the mortgagee. (*Phillips and Kumaraswami Sastri, JJ.*) THIAGARAJA AIYAR v. RAMASWAMI AIYAR. 35 M. L. J. 605=48 I. C. 693.

—Ss. 83 and 84—Deposit by mortgagor of the amount due into Court and notice given through Court to mortgagee—whether proper tender—Interest if ceases to run. See (1917) DIG. COL. 1211. GOVINDAN NAIR v. CHERU VANNA. 35 M. L. J. 313=(1917) M. W. N. 853=7 L. W. 81=43 I. C. 126.

—S. 83—Deposit—Tender of more amount than is actually due on the mortgages—Validity of—Deposit with conditions not covered by the section—Objection to deposit waiver of—Right to interest.

In the year 1902 the debt obtained a usufructuary mortgage of several items of

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property. In 1908 plff. purchased in Court auction a portion of the property subject however to deft's mortgage. On the 8th January 1912 plff. deposited in court the full amount due on the mortgage and presented a petition requesting the court to pass an order "directing the counter-petitioner (deft) to hand over all the mortgaged properties with the produce to the petitioner (plff.) on receiving the mortgage money or directing the counter-petitioner liable for costs and granting other reliefs." The Court gave notice of the deposit under S 83 of the T. P. Act but the mortgagee took no objection that the mortgagor had not deposited the amount remaining due on the mortgage as required by the section but merely declined to accept the amount deposited on the ground that there was only an offer to pay a proportionate amount without specifying what the amount actually was. The mortgagor also expressed his willingness to hand over such of the properties as had been purchased by the plff on receiving the whole of the mortgage money. As the parties were not able to come to terms the court passed the following order on plff's petition "counter petitioner (deft.) refuses to receive the money. Petitioner (plff.) is referred to a regular suit. The petition is dismissed" In 1913 plff. brought a suit for redemption of the properties purchased by him and it was found that the deposit had remained in court all along since 1912 and that the amount stated in the plaint as due to the deft in respect of the suit properties was correct. *Held*, that there was a good deposit of the mortgage money and the plff. was entitled to interest on the amount of deposit after the date of the service of the plaint and the summons on the deft.

Per *Seshagiri Iyer, J.*—A tender of a sum larger than the amount remaining due on a mortgage is a valid tender under S. 83 of the T. P. Act Cases on the subject discussed. (*Seshagiri Iyer and Napier JJ.*) SUBRAHMANIA IYER v NARAYANSWAMI VANDAYAR. 34 M. L. J. 439=7 L. W. 337=45 I. C. 368.

—S. 84—Tender—Mere willingness to pay not sufficient—Communication to creditor essential.

A mere readiness and willingness to pay not communicated to the creditor and without the accompanying circumstances of the debtor being in a position to pay immediately if the officer is accepted does not amount to a valid tender. 30 C. 865 dist. (*Kothwal, O. A. J. C.*) SHEORATAN v BIHARILAL SEWARAM MAR WADI 45 I. C. 106.

—S. 84—Tender—Mortgage—Usufructuary—Mortgagor asking the mortgagee for an account of what is due under the mortgage with an expression of willingness to pay—Mortgagee setting up absolute title in himself—Mortgagor not ready to pay amount—No valid tender—Legal Practitioners Act—Rule.

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*framed under—Vakil's fee—Two sets—Special importance—Heavy amount involved.*

Where a mortgagor wrote to the usufructuary mortgagee asking the mortgagee to give him an account of what is due on the mortgage and expressed his willingness to pay what is due to the mortgagee, but the mortgagee stated that under the terms of the deed of mortgage he had acquired an absolute right to the property and therefore he was not bound to render any account and refused to do so and at the same time he mentioned the balance of amount due, and it is found that the mortgagor had not given the money with him to pay the amount due, the interest on the mortgage would not cease to run from the date of the mortgagee's reply.

Per *Abdur Rahim, J.* The question whether interest on a mortgage debt ceases from the date of the tender or deposit depends upon the provisions of the T. P. Act. That Act lays down the conditions relating to a valid tender and a valid deposit. It nowhere says that even if a valid tender has not been made interest will cease to run if the mortgagee happens to set up a right to the property in himself.

Per *Oldfield, J.*—The foundation of S. 84 of the T. P. Act is that liability for interest on the amount due on the mortgage shall cease from the date of the tender inasmuch as the person who has made the tender not merely

has to produce money in order to make it, but must also keep it ready for payment in Court or otherwise. There is a distinction to be drawn between a proposal to make a tender and an actual tender and there is no reason why a person who makes the former should be treated any better than a person who makes the latter. (*Abdur Rahim and Oldfield, JJ.*) VENKATARAMAN GARU v VENKATA SUBHADRAYANMA 34 M. L. J. 488=24 M. L. T. 56=8 L. W. 416=(1918) M. W. N. 371=45 I. C. 437.

—S. 84—Tender—Partial tender—Provision in mortgage deed—Payment after demand by mortgagees not a valid tender.

In a suit on a mortgage for principal and interest, it was found that though there was no provision in the mortgage deed for partial redemption but it was contemplated that part payment of the principal mortgage money should be allowed. A tender of a certain sum was made by some of the defts. (mortgagors) on the 11th August 1909, but the plffs. (mortgagees) refused to take part payment as they had become entitled to the entire mortgage money and did not wish that part of the property should be redeemed. The deft. did nothing till October 1913 when they again tendered the same sums. But on the 28th January 1913 the plffs. had sent notices to all the mortgagors demanding payment of the full sum due under the mortgage.

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*Held*, that under the circumstances no offer by any of the debt. subsequent to the 28th January 1913 could be a valid tender so as to entitle them to claim rebate of interest on the sums tendered and the plffs. were therefore entitled to recover the full payment of principal as well as interest. (*Scott-Smith and Le Rossignol, J.J.*) SALIG RAM v. SABGHAT ULLAH. 81 P. L. R. 1918=83 P. W. R. 1918=45 I. C. 175.

—S. 85—*Suit for sale by mortgagee—Effect of not making puisne mortgagee party—Order absolute for sale—Substitution of right to Sale for right under security—T. P. Act, S. 67, 69, 85, 88, and 89.*

Under S. 85 of the T. P. Act a first mortgagee is bound to make a second mortgagee a party to his suit for sale, and if he does not do so, the second mortgagee is not bound by any order for sale obtained in such a suit. (*Viscount Haldane*), HET RAM v. SHADI RAM.

40 All 407=35 M. L. J. 1=  
24 M. L. T. 92=20 Bom. L. R. 798=  
22 C. W. N. 1033=28 C. L. J. 188=  
(1918) M. W. N. 518=16 A. L. J. 607=  
5 Pat. L. W. 88=45 I. C. 798=  
45 I. A. 130 (P. C.)

—S. 88—*Decree not complying with provisions of—Validity—Sale in execution and confirmation thereof—Fresh suit for redemption against auction-purchaser on ground of invalidity of decree—Maintainability—C. P. Code of 1882, S. 244—Effect See C. P. CODE. 247.* 23 M. L. T. 197 (P. C.)

—S. 89—*Decree for sale—Order absolute—Effect of—Extinction of rights of mortgagee and mortgagor.*

On the making of an order absolute for sale under S. 89 of the T. P. Act the mortgagee's security as well as the mortgagor's right to redeem are both extinguished and for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree. (*Viscount Haldane*). HET RAM v. SHADI RAM.

40 All 407=35 M. L. J. 1=  
24 M. L. T. 92=20 Bom. L. R. 798=  
22 C. W. N. 1033=28 C. L. J. 188=  
16 A. L. J. 607=(1918) M. W. N. 518=  
5 Pat. L. W. 88=45 I. C. 798=  
45 I. A. 130 (P. C.)

—S. 91—*Usufructuary mortgage of sir lands prior to Tenancy Act—Sale of mortgagor's proprietary rights after Tenancy Act—Expropriation tenancy—Redemption of usufructuary mortgage.*

In 1898 and 1899 two usufructuary mortgages of certain sir plots were made. After 1902 the mortgagor's proprietary rights were sold and purchased by the defendants. The defendants subsequently acquired the mortgage rights also. The mortgagor then brought the present suit for redemption:—*Held*, that

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upon the sale of the proprietary rights the mortgagor became entitled to occupy the sir land as ex-proprietary tenant and as such he had an interest in the property within the meaning of S. 91 of the T. P. Act which enabled him to redeem the usufructuary mortgage. (*Richards, C. J. and Tudball, J.*) MAHOMED HUSSAIN KHAN v. HANUMAN. 16 A. L. J. 796=47 I. C. 861

—S. 91 (a)—*"Interest in property",—Malik-mabruza lease—Right of redemption of malik—Mabruza's lease.*

Under S. 91 (a) of the T. P. Act a person cannot be said to have 'any interest in the property' unless he can be prejudiced by a foreclosure or sale in pursuance of the mortgage.

A malikmabruza mortgaged certain lands to the debt. After this he made the plff. a permanent rent-free sub-tenant of the same lands, liable however to eviction under the Central Provinces Tenancy Act, 1898. *Held*, that the lease in perpetuity did not bind the mortgagee and so the plff.'s interests would be prejudiced by a foreclosure or sale in pursuance of the mortgage. The plff. was therefore entitled to redeem. (*Mitra, A. J. C.*) SHANKERSINGH v. HUKUMCHAND. 14 N. L. R. 117=47 I. C. 99.

—S. 95—*Charge—Acquisition of—Persons owning a portion of the equity of redemption paying off the whole mortgage—Suit by remaining co-sharer to redeem—Limitation Act, Art. 148, not applicable—Period of 12 years.*

Where on 7th May 1890 in execution of a decree against two out of three brothers who had mortgaged their property one A purported to purchase the whole property which he redeemed on the 6th April 1892 by paying off the mortgage and A or persons claiming through A remained in sole possession of the property for 19 years from 19th April 1892, when A obtained possession through Court, until the present suit by an assignee of the share of the remaining brother K was brought for redemption of K's one-third share of the property in the hand of A's successor-in-interest.

*Held*, that under S. 95 of the T. P. Act, A obtained a charge on the one-third share of K which not being a mortgage, Art. 141 of the Lim Act did not apply to the suit. That suit, having been brought more than twelve years from the date when the charge came into existence and more than twelve years from the date when A obtained exclusive possession was barred by limitation. (*Richardson and Walsley, J.J.*) PURNA CHANDRA PAL v. BARODA PRASANNA BHATTACHARIYA. 22 C. W. N. 637=45 I. C. 783.

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—S. 95—*Payment by one co-mortgagor out of Court—Right to a charge—Acceptance of payment by decree-holder—Certified payment.*

All that S. 95 of the T. P. Act requires is that one of several co-mortgagors should redeem the mortgaged property in order to obtain a charge on the share of the other co-mortgagors. It is not essential that the redemption should take place in court. If the money is paid out of Court and the decree-holder accepts it and certifies the payment the requirements of the section are fulfilled. (*Mitra, A. J. C.*) TUKA RAM v. ARJUNA.

45 I. C. 904.

—S. 95—*Scope of—Simple mortgage—Property not in the possession of the mortgagee and therefore incapable of being transferred to person releasing the security—Section applicable. See MORTGAGE, REDEMPTION.*

3 Pat. L. J. 490.

—S. 98—*Anomalous mortgage—Clog on equity of redemption—Validity—Malabar Law—Kanom—Demise of land in perpetuity with covenant for renewal every 12 years—Validity of covenant. See MALABAR LAW, KANOM.*

23 M. L. T. 67.

—S. 99—*Applicability to Punjab—C. P. C., O. 34, R. 14—Applicability.*

The Principal of S. 99 of the T. P. Act can no longer be applied to the Punjab, the legislature having repealed that section and substituted therefor order 34 R. (1) of the C.P. Code which is expressly inapplicable to this province (*Chevis and Broadway, J.J.*) KISHEN NARAIN v. PALA MAL.

88 P. R. 1918=

167 P. W. R. 1918=47 I. C. 937.

—S. 99—*Mortgagee—Purchase of equity of redemption by mortgagee in execution of money decree by a stranger.*

A mortgagee is competent to purchase the equity of redemption brought to sale at the instance of a stranger decree-holder, although the position is different where the mortgagee himself acquires the equity of redemption at an execution sale at his instance in contravention of the rule enunciated in S. 99 of the T. P. Act. 28 M. 377; 12 C. L. J. 574 24 M. 99; 12 M. L. J. 39; 27 M. 428; 5 C. 198, 32 Cal 296. Ref (*Mockerjee and Beachcroft, J.J.*) BHARAT RAMANUJ DAS v. ISHAN CHANDRA HALDHAR.

27 C. L. J. 431=43 I. C. 212.

—S. 99—*Sale in contravention of—Validity—Purchase by mortgagee—Right of mortgagor to redeem—Full Bench—Whether Division Bench bound to refer.*

When a mortgagee purchases at an execution sale in contravention of the terms of S. 99 of the T. P. Act, the sale is voidable and the mortgagor is entitled to redeem. 10 C. L. J. 574 foll.

## TRANSFER OF PROPERTY ACT S. 108.

A Division Bench is not bound to refer a case for the consideration of a Full Bench. (*Fletcher and Smither, J.J.*) NARAYAN CHANDRA PODDAR v. KESHAB LAL DHAI BHAI.

28 C. L. J. 15=46 I. C. 493.

—S. 101—*Mortgage—Keeping alive—Intention of parties—Presumption.*

The widow of the last male holder alienated her husband's properties directing the alienee to discharge a mortgage binding on the estate. During the pendency of a suit for a declaration that the alienation was bad the alienee mortgaged the properties to pay off the existing encumbrance. The mortgagee brought a suit on his mortgage and purchased the properties in execution.

Held, that it was for the mortgagee's benefit to keep alive the mortgage both when he advanced the money and when he purchased the properties in execution of the mortgage decree. The presumption was in favour of the original mortgage being kept alive under S. 101 of the T. P. Act. (*Wallis, C.J. and Aylmer, J.*) SUPPU SOKKAYYA BHATTAR v. SUPPU BHATTAR. 7 L. W. 30=(1913) M. W. N. 41=

43 I. C. 714.

—S. 106—*Landlord and tenant—Provision in lease for re-entry on payment of compensation—Notice to quit if essential.*

Where a lease itself provides that the landlord may at any moment resume possession of the land on payment of full compensation to the lessee for the buildings he may have erected thereon, there is no necessity for giving a notice to quit under S. 106 of the T. P. Act in order to entitle the landlord to get back Khas possession of the land. (*Fletcher and Huda, J.J.*) MONINDRA NATH CHOUDHURI v. RADHA PROSANN GON.

47 I. C. 19.

—S. 106—*Notice to quit. Service of. See LANDLORD AND TENANT.* 35 M. L. J. 713 =22 C. W. N. 27 (P. C.)

—S. 107—*Scope and meaning of—Lease of immoveable property—yearly rent if conclusive as to tenancy being from year to year. See (1917) DIG. COL. 1215. SARAT CHANDRA DUTTA v. JADAB CHANDRA GOSWAMI.*

44 Cal. 214=21 C. W. N. 208=

27 C. L. J. 198=37 I. C. 956.

—S. 108 (b)—*Lease—Duty of lessor to put lessee in possession—Notice to tenants, whether sufficient See (1917) DIG. COL. 1215. ABDUL KARIM v. THE UPPER INDIA BANK, LTD.* 19 P. R. 1918=110 P. L. R. 1917=

96 P. W. R. 1917=40 I. C. 684.

—S. 108 (j)—*Homestead, if transferable.*

The interest of a lessee of a homestead is transferable under the T. P. Act, unless it was in existence prior to the coming into operation

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of the Act. (*Fletcher and Smither, JJ.*)  
**MOHENDRA LAL SINHA v. KRISHNA KUMARI DEBI.** 46 I. C. 656.

—S. 108 (j)—Lease, transfer of—Liability of original lessee for rent.

Under S. 108 cl. (j) of the T. P. Act, the liability of a lessee to pay rent continues even after he has parted with his interest in the lease, and it is no answer to a suit for rent that the transferee from the lessee is willing to pay the rent. (*Fletcher and Huda, JJ.*)  
**AKRURMANI BAISNABI v. MADHAB CHANDRA CHAKRABARTY.** 47 I. C. 800

—S. 108 (j) Principle of, applicable to agricultural leases.

In the absence of any contract, usage or law to the contrary, the principle of S. 108 (j) of the T. P. Act will apply although the section itself, is not applicable to agricultural tenancies. (*Kotwal, A. J. C.*)  
**NARAYAN DAS KHUSHAL RAM MARWARI v. KRISHNA RAO.** 43 I. C. 970.

—S. 111—Forfeiture on breach of condition of lease by mulgeni tenant—Transfer by landlord of his right subsequent to breach—Right of transferor to enforce forfeiture. See T. P. Act, S. 6. 20 Bom. L. R. 767.

—S. 111 (g)—Denial of landlord's title in a suit for rent—Forfeiture—Determination of tenancy.

A denial by a tenant of his landlord's title in a suit for rent causes a forfeiture of the tenancy enabling the landlord to eject the tenant as a trespasser.

In order to determine a tenancy on the ground of denial of title by the tenant, it is not necessary that any notice should be given or prescribed act should be done by the landlord. It is sufficient if something is done by the lessor to show his intention to determine the lease (*Jwala Prasad, J.*)  
**MAHOMED ABDUL LATIF v. HARBUR RAHMAN.** 45 I. C. 642.

—S. 111 (g)—Forfeiture and denial of title—Direct and unequivocal repudiation of landlord's title essential. See LANDLORD AND TENANT, FORFEITURE. 34 M. L. J. 70.

—S. 111 (g)—Forfeiture—Denial of title—Permanent tenancy—Rule applicable to Denial of title of heir or assignee of landlord—Overt act showing intention of landlord to avail himself of the forfeiture, if necessary. See LANDLORD AND TENANT, FORFEITURE. 35 M. L. J. 129.

—S. 111 (g)—Landlord and tenant—Denial of landlord's title—Assertion of denial in plaint—Sufficient intention to determine the lease—Forfeiture.

## TRANSFER OF PROPERTY ACT, S. 122.

Where a landlord sues his tenant in ejectment, the mere institution of the suit and the assertion in the plaint as to the repudiation of the landlord's title constitutes a sufficient manifestation, of the landlord's intention to determine the lease for the purposes of clause (g) of S. 111 of the Transfer of Property Act. (*Scott, C. J. and Batchelor, J.*)  
**ISABALI v. MAHADU.** 42 Bom. 195=20 Bom. L. R. 29=43 I. C. 851.

—S. 111 (g)—Lessor and lessee—Forfeiture for non-payment of rent—Ejectment, suit for—Act showing intention to determine lease necessary. See (1917) DIG. COL. 1217. **NAURANG SINGH v. JANARDAN KISHORE LAL SINGH DEO.** 45 Cal. 469=22 C. W. N. 312=27 C. L. J. 277=41 I. C. 982.

—S. 111 (g)—Principle of, if applicable to agricultural leases. See LANDLORD AND TENANT, FORFEITURE. 23 M. L. T. 170.

—Sub-lease or under-lease—Effect of, forfeiture on—Assignment of lessee's interest—Repudiation of lessor's title by original lessee, whether works forfeiture against assignee.

The plf's father let permanently the land in dispute to the grandfather of defendants Nos. 1 and 2. Later on, defendants Nos. 1 and 2 assigned the permanent lease to defendant No. 3. Defendants Nos. 1 and 2 having denied the plaintiff's title, it was contended that the denial operated to forfeit the interest of defendant No. 3 in the land:—

*Held*, negating the contention, that the mere repudiation by defendants Nos. 1 and 2 of the plaintiff's title did not work a forfeiture against defendant No. 3 who was an assignee of a lease. (*Beaman and Heaton, JJ.*)  
**GOPAL v. SHRINIWAS.** 20 Bom. L. R. 830=47 I. C. 635.

—S. 117—Agricultural lease—Lease before the T. P. Act—Permanent tenancy—Denial of title of heir or assignee of landlord—Forfeiture—Overt act on the part of landlord unnecessary. See LANDLORD AND TENANT, FORFEITURE. 35 M. L. J. 129.

—S. 118—Exchange—Unregistered deed—Acting of the parties—Part performance—Cure of defect in title. See T. P. ACT, SS. 54 and 118. 43 I. C. 645=16 A. L. J. 98.

—S. 122—Gift—Delivery of possession if essential—Gift of a portion of a house by father to son—House in actual possession of another son—Gift, if valid. See (1917) DIG. COL. 1219. **BASIRUL HUQ v. MUHAMMED JIMUDDIN.** 3 Pat. L. W. 213=43 I. C. 357.

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—S. 122—Gift—Interest in land—Delivery of possession not essential. *See* (1917) DIG. COL 1220, BASIRUL HUQ v. MUHAMMAD AJIMUDDIN 3 Pat. L. W. 213=43 I. C. 857

—Ss. 122 and 123—Gift—Registration—Buddhist Law—Burmese—Registration if necessary.

Burmese Buddhist religious gifts are not exempted from the operation of S. 123 of the T. P. Act. Therefore, a gift of the dedication of a Kyaung is not valid unless registered. (*Ormond, J.*) U ZAYANTA v. U. NAGA. 45 I. C. 926.

—S. 129—Gift—Deed of—Completion—Repudiation before registration—Effect. *See* MAHOMEDAN LAW. 7 L. W. 339.

—S. 130—Actionable claim—Transfer of—Formalities necessary—Entry in account books—If sufficient—Consent of debtor if necessary to validate transfer.

The words 'instrument in writing' in S. 130 of the T. P. Act, do not mean a document couched in technical language in any particular form. What is intended is that the transfer should be made in writing and it is sufficient if the intention of the creditor to transfer the debt due to him to the transferee, can be gathered from the writing. An assignment made in a statement of accounts by way of an entry is an assignment within the meaning of the section.

After date of the transfer, the transferee is the only person entitled to sue for the debt.

An assignment does not become invalid for want of consent of the original debtor or by reason of the absence of a novation of the contract. (*Abdur Rahim and Napier, JJ.*) SEETHARAMA AIYAR v. NARAYANASWAMI PILLAI. 47 I. C. 749.

TREASURE TROVE ACT. (IV of 1878) Ss. 20 and 21—For binding a person not a finder to give notice, whether offence—Charge to be clearly stated in doubtful case—Usufructuary mortgage whether owner. *See* (1917) DIG. COL 1221, SITAL v. EMPEROR.

15 A. L. J. 786=42 I. C. 995=19 Cr. L. J. 35.

TREES—Overhanging branches from trees on neighbouring lands, right to cut off. *See* TRESPASS. 20 Bom. L. R. 826.

TRESPASS—Erection of projecting cornice.

Erection of chhajjas (cornices) in a house so as to project over a neighbour's land constituted a trespass on that land. (*Lindsay, J. C.*) KUNJ BEHARI PRASAD v. BASDEO PRASAD. 5 C. L. J. 464=47 I. C. 980.

—Trees—Branches overhanging from trees on neighbouring lands—Right to cut off overhanging branches—Injunction not depen-

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dent on ability to prove damages.

A person has the right to cut off those portions of the trees which overhang his land. He can sue to obtain an injunction to remove the growth even if he is unable to prove actual damage. *Shah and Kemp, JJ.* VISHNU JAGANNATH JOSHI v. VASUDEO RAGHUNATH. 20 Bom. L. R. 826=47 I. C. 622.

TRUST—Administration—Scheme for—Settlement of in a representative suit under O 1 R 8, C. P. Code. *See* C. P. CODE, O. 1, R. 8. 45 I. C. 423.

—Lease by managing trustee of temple—When binding on an institution—Unregistered lease for a term of years—Lessee in possession paying monthly rent—Presumption of monthly tenancy—Right of new lessee from lessor to give notice of suit to monthly tenant—T. P. Act Ss. 106 and 109—English and Indian Law. *See* (1917) DIG. COL 1223; MANIKKAM PILLAI v. RATNASWAMI NADAR. 33 M. L. J. 634=(1917) M. W. N. 837=6 L. W. 689=43 I. C. 210.

—Public trust—Hereditary trustee—Removal, grounds for—Breach of trust—Failure to keep separate accounts of trust funds—Defaulting trustee—Liability to account with compound interest. *See* C. P. CODE, S. 92 (1918) M. W. N. 555.

—Suit on behalf of—All trustees to be impleaded. *See* CO-TRUSTEES, SUIT BY. 27 C. L. J. 605.

—Accounts—Public trust—Duty of trustee to keep separate accounts for trust funds and private property—Mixing up—Effect of.

Trustees are bound to keep their private property distinct from the trust property and to maintain accounts of all loans taken from one property for the benefit of the other. Where the question is as to the ownership of the properties purchased by the trustee, and it is not shown that the purchase money came from private funds, the properties will be held to belong to the trust. Where it is clear that the funds of the trust and private funds of the trustee have not been kept distinct in the accounts, but have been mixed up together, the onus is upon the trustee to prove that the property purchased by him belongs to him and not to the trust. (*Wallis, C. J. and Spencer, J.*) SUBBARAYA CHETTY v. SUBRAMANIA AIYAR. (1918) M. W. N. 786=43 I. C. 833.

—Accounts—Trustee bound to keep separate accounts of income and expenses of endowment—Defaulting trustee—Liability to account with compound interest. *See* C. P. CODE, S. 92. (1918) M. W. N. 555.

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—Of a charity — Execution, by of promissory note — Personal liability. *See* NEG. INST. ACT, SS. 26 AND 27.

35 M. L. J. 90.

—Co trustees—Suit by Parties to—All trustees to join the suit—Objecting trustees impleaded as defts—Decree for entire amount in favour of pliffs:

Where the administration of a trust is vested in several trustees, they all form, as it were one collective trustee and they must exercise the powers of their office in their joint capacity. Their interests and authority being equal and undivided, they cannot act separately but all must join.

The pliffs and the *pro forma* defts. were joint shebaitis of the property dedicated to an idol. The principal defts were the tenants in occupation of the land. The pliffs instituted a suit under S. 148 A of the B. T. Act for recovery of one-fourth share of the rent payable by the tenant defts on the allegation that they were interested to the extent of one-fourth in the dedicated property while the *pro forma* defts. were interested to the extent of three-fourths.

Held that the suit was not maintainable, and that, if the *pro forma* defts declined to join the pliffs, the proper course for the latter was to institute a suit for the recovery of the entire arrear due. (*Mookerjee and Walmsley, JJ*) NARENDRA NATH KUMAR v. ATUL CHANDRA BANERJEE. 27 C. L. J. 605.

—Promissory note—Execution of, by trustee of charity — Personal liability. *See* NEG. INST. ACT SS. 26, 27 AND 28.

35 M. L. J. 90

—Re-imbursement — Right to—None, where trustee has spent moneys for purposes not contemplated by founder. *See* C. P. CODE S. 92 (1918) M. W. N. 555.

—Suit for accounts—Period of accounting—Power of Court to fix limit. *See* C. P. CODE S. 92. 35 M. L. J. 661.

—Suit by on behalf of the trust—All trustees to be parties. *See* CO-TRUSTEES, SUIT BY. 27 C. L. J. 605.

TRUSTS ACT (II OF 1882), S. 6.—Trust creation of—Deed construction.

Except in the cases mentioned in S. 6 of the Trusts Act, it is necessary for the creation of a trust that the property should be transferred to the trustee and to effect this some words of conveyance must be found in the deed. The mere description of a deed as a trust-deed can have no such effect if as a matter of fact, the deed does not by some language purport to transfer or assign the property to the trustee. 37 Bom. 58 dis. 6 M. I. A. 393 expl. (*Abdur Rahim and Seshagiri Aiyar, J.J.*) ALAGAPPA CHETTIAR v. LAKSEMANAN CHETTIAR. 24 M. L. T. 267.

## UNDER-PROPRIETARY RIGHT.

—S. 23 (e) — Defaulting Trustee — Liability to account with compound interest — Public Trustee—Similar principle, applicable to. *See* C. P. CODE, S. 92 (1918) M. W. N. 555.

—Ss. 36 and 42 — Co-trustees — All trustees to act collectively— Refusal of some to co-operate in institution of suit—Procedure. *See* TRUST, CO-TRUSTEES. 27 C. L. J. 605.

—Ss. 81 and 82—Purchase by husband in the name of wife—Advancement—English Law—Management by husband, effect of.

When a husband buys property in the name of his wife he should be presumed to have done so for the benefit of the wife. This rule of English Law applies to persons of British nationality resident in India, and the mere fact that after the purchase the husband continues to manage the property and collect rents is not sufficient to rebut the presumption. (*Maug Kim and Rigg, J.J.*) KATHLEEN MAUD KERWICK v. KERWICK. 47 I. C. 376.

—S. 88 — Advantage gained by fiduciary — Undue influence—Transaction null and void against original transferor and his representative—Contract Act, Ss, 19, 19A and 64.

The plff. and her sister sold their land for inadequate price to their uncle (deft) with whom they were living after death of their parents. The plff. after the death of her sister sued to have the sale-deed cancelled as having been executed through undue influence of the deft who brought them up and to recover possession of the lands. Held that the case fell within the scope of S. 88 of the Indian Trust Act 1882 and that the sale-deed was null and void as regards the plff's share as well as the share of her deceased sister. (*Scott, C J and Hayward, J.J.*) GOVIND v. SAVITRI. 20 Bom. L. R. 911=47 I. C. 883.

—S. 90—Applicability—Grant of Kumak land as Poramboke to wargdar who had antecedently mortgaged the property—Grant does not enure for benefit of mortgagee. *See* SOUTH CANARA, KUMAKI LAND. 35 M. L. J. 120.

UNDERPROPRIETOR—Status of, in Oudh. *See* OUDH RENT ACT. 22 C. W. N. 985.

UNDER PROPRIETARY RIGHT IN LAND—Cash *dahiyak*—Birt right—Distinction—Right of birtdar to deduct *dahiyak* from rental.

A cash is *dahiyak* distinguishable from, birt right in the land entitling the birtdar to hold possession of the land and to deduct the *dahiyak* from its rental. The former may in a sense be an under-proprietary right but it is not an "under-proprietary right in the land" like the latter. (*Lindsay, J. C. and Kanhaiya*

## UMDUE INFLUENCE.

*Lal, A. J. C.)* MAHOMED ABDUL HASAN  
KHAN v. ISHWAR NATH. 21 O. C. 244=  
48 I. C. 265.

UNDUE INFLUENCE—Expectant heir—Un-  
conscionable bargain—Validity. See CON-  
TRACT ACT, S. 16. 35 M. L. J. 614

U. P. COURT OF WARDS ACT (IV OF 1912)  
S. 54—*Applicability of—Defeasible title of ward,  
if within the rule.*

The provisions of S. 54 of the U. P. Court of  
Wards Act cover all suits relating to the prop-  
erty of any ward, that is, any property belong-  
ing to him, though his title thereto may be  
defeasible by reason of a claim for pre-emption  
which may be maintainable in regard to the  
same (*Kanhaiya Lal A. J. C.)* NAU NEHAL  
SINGH v. DY COMMISSIONER, UNAO.  
5 O. L. J. 546=47 I. C. 894.

U. P. CRIMINAL TRIBES ACT, (III of 1911),  
S. 10 (b)—*Rule (a)—Change of residence to be  
notified—Temporary change for a day or two.*

Under rule 8 (a) made by the Local Govern-  
ment for the purposes of the Criminal Tribes  
Act a registered member of a criminal tribe is  
not bound to notify a change of residence which  
is of a temporary character, as one for a day or  
two. (*Knor, A. C. J.)* GHUDEHARI PASI v.  
EMPEROR. 16 A. L. J. 510=45 I. C. 148=  
19 Cr. L. J. 689.

U. P. EXCISE ACT (IV of 1910), S. 64 (c)—  
*Wilfully doing or omitting to do anything—  
Omission to keep correct accounts.*

In order to secure a conviction of a license-  
holder under S. 64 of the Excise Act the legis-  
lature clearly means that it must be proved  
that a license holder (accused of an offence  
thereunder) should have allowed the breach to  
be committed by his servant or that he should  
be cognizant of what the servant was doing.  
(*Banerji J.)* RAM DAS v. EMPEROR.

40 All. 563=16 A. L. J. 474=46 I. C. 362=  
19 Cr. L. J. 718.

—S. 71—*Presumption under, nature of.*

The only presumption which arises under S.  
71 of the Excise Act is that an accused is in  
possession of an excisable article and not that  
he has himself manufactured the liquor.  
(*Banerji J.)* SUKRU v. EMPEROR.

16 A. L. J. 488=46 I. C. 294=  
19 Cr. L. J. 710.

U. P. LAND REV. ACT, (III of 1901) Ss. 32  
(a) and 207—*Application for correction of  
entry in revenue registers and for fixing of  
boundary pillars—Reference to arbitration—  
Award—Suit in Civil Court whether barred—  
Suit between tenants of adjoining holding  
or declaration of title to plots of land—Cogni-  
table in Civil Court. See (1917) DIG. COLL.*

1226; TAPSI SINGH v. HARDEO SINGH.  
39 All. 711=15 A. L. J. 773=  
42 I. C. 681.

## U. P. LAND REV. ACT S. 111.

—Ss. 111 and 112—*Applicability of—Suit  
for partition—Objection by persons not recorded  
as co-sharers if maintainable—Appeal—Forum.*

In a suit for partition of lands, trees and  
wells, the defts. objected to the partition on  
the ground that when their ancestors sold the  
village, they reserved to themselves and their  
heirs the said land, etc. The Assistant  
Collector decided in favour of the objec-  
tors, overruling the plffs. plea that defts.  
not being recorded co-sharers had no *locus  
standi* to object to the partition. The plff.  
preferred an appeal to the Dt. Judge.

Held, that the defts. not being recorded co-  
shares, Ss. 111 and 112 of the U. P. Land  
Revenue Act had no application to the case  
and that no appeal, therefore lay to the Dt.  
Judge. (*Rafique, J.)* LABHU v. RADHA  
CHABAN. 45 I. C. 544.

—S. 111—*Civil and Revenue Court—  
Jurisdiction of—Partition case—Question of  
title raised by applicant*

Where in a partition case filed in a Revenue  
Court, the applicants themselves asked the  
Court to postpone the case until they could  
have the question of their title cleared up in a  
Civil Court and the Revenue Court granted the  
required postponement and the applicants then  
instituted the proposed Suit in the Civil Court

Held, that the Civil Court had jurisdiction  
to entertain the suit (*Lindsay J. C.)* DEOKI  
NANDAN v. KALI SHANKAR.

5 O. L. J. 116=45 I. C. 873.

—C. 111—*Partition—Jurisdiction of  
Civil Court.*

A Civil Court has no jurisdiction to deter-  
mine a question of title with regard to a  
property under partition before a Revenue  
Court, unless the latter Court refers the  
question for decision to the former Court by  
an order explicitly under S. 111 of the U. P.  
Land Revenue Act. (*Lindsay J. C. and  
Daniels, A. J. C.)* CHAUBAR SINGH v.  
BAKHTAWAR SINGH. 5 O. L. J. 486=  
47 I. C. 897.

—S. 111 (1) (b)—*‘Civil Court’ meaning  
of—Institution of suit beyond time, on plaint  
being returned—Bar.*

The words ‘Civil Court’, in S. 111 (1) (b)  
of the U. P. Land Revenue Act mean a Civil  
Court of competent jurisdiction. A suit origi-  
nally instituted within three months of the  
date of the order passed by a Revenue Court  
under S. 111 (1) (b) of the U. P. Land Revenue  
Act in a Civil Court having no jurisdiction,  
and subsequently, on the return of the plaint  
instituted in a Civil Court having jurisdic-  
tion but beyond the said three months, cannot  
be entertained. The Lim. Act has no applica-  
tion to suits contemplated by S. 111 of the  
U. P. Land Revenue Act. (*Stuart, A. J. C.)*  
NURUL HASSAN v. SARJU PRASAD.

43 I. C. 473

## U. P. LAND REV. ACT, S. 118.

—S. 118—Partition—Co-sharers—Buildings belonging to one party on land allotted to another—Right to possess—Presumption. See (1917) DIG. COL. 1229; SARUP LAL v. LALA. 39 All. 707=15 A. L. J. 759=42 I. C. 589.

## U. P. MUNICIPALITIES ACT (1 of 1900)—Rules framed under—Municipal Account Code, R. 40—Non payment of octroi duty—Prosecution for—Repeal of old acts—Effect of

A consignment of cloth addressed to one M. reached Barielly on Feb 19, 1917. The officer in charge demanded a larger sum than M. properly considered leviable and the matter was referred to the Octroi Superintendent who in pursuance of the powers vested in him assessed the duty as Re 1-0-9. Under Rule 40 of the Municipal Account Code framed under Act 1 of 1900, a person in the position of M. could appeal against the decision within sixty days, but that he could only exercise the right by first paying under protest the duty demanded. M. however appealed against the decision without making the payment. On the expiry of sixty days a prosecution was instituted against M. under Act 11 of 1910 and he was fined. He applied in revision to the High Court—*Held*, that the conviction was legal, the jurisdiction was saved by S. 34 of the Local Government Act, and the fact that the prosecution had been instituted under the Municipal Account Code framed under the repealed Municipalities Act I of 1900 did not affect the question,

*Held also*, that the mandatory direction in Rule 40 of the Municipal Account Code lays down, by inference, a period of 53 days on the expiry of which without payment as required the offence is complete and prosecution may be started (*Piggott and Walsh, JJ*) MANIK CHAND v. EMPEROR.

40 All. 105=15 A. L. J. 909=  
43 I. C. 446=19 Cr. L. J. 158.

U. P. MUNICIPALITIES ACT (II OF 1916)  
S. 155—Octroi duty—Person introducing article chargeable with duty—Liability of agent.

A person, acting as broker for another, took delivery of certain bags of sugar within the Municipal limits, and did not pay the octroi duty thereon.

*Held*, that a conviction under S. 155 of the U. P. Municipalities Act was right inasmuch as he was the person who had introduced the goods into the municipal limits. (*Banerji J.*) BABU RAM v. EMPEROR. 16 A. L. J. 632=46 I. C. 848=19 Cr. L. J. 332.

—S. 210—Erect or re-erect a structure—The fixing of a portable plank, whether amounts to erection of a structure. See (1917) DIG. COL. 1232: EMPEROR v. MUHAMAD YUSUF. 39 All. 386=15 A. L. J. 290=40 I. C. 317=10 Cr. L. R. 68.

## U. P. MUNICIPALITIES ACT.

—S. 274—Occupied, meaning of. See (1917) DIG. COL. 1233; PIARE LAL v. EMPEROR 39 All. 309=15 A. L. J. 187=33 I. C. 303=10 Cr. L. R. 81.

—S. 307—Disobedience to notice—Continuing breach—Daily fine—Object of imposition of.

Where under S. 307 of the United Prov. Municipal Act a Magistrate of the first class not only imposed a nominal fine on a person not complying with a notice directing him to execute a certain work in respect of a drain but by the same order made him liable to pay a daily fine until the notice should be satisfactorily complied with, *held*, that that latter part of the order was illegal.

The liability to a daily fine in the event of a continuing breach has been imposed by the Legislature in order that a person contumaciously disobeying an order lawfully issued by a Municipal Board may not claim to have purged his offence once and for all by payment of the fine imposed upon him for neglect or refusal to comply with the said order. The liability is to be enforced by the institution of a second prosecution in which the questions will be (1) how many days have elapsed since the date of the first conviction during which the offender is proved to have persisted in the offence and (2) the appropriate amount of the daily fine, subject to the maximum prescribed. (*Piggott, J.*) AMIR HASAN KHAN v. EMPEROR 40 All. 569=16 A. L. J. 527=46 I. C. 150=19 Cr. L. J. 694.

—S. 326 (1)—Applicability of—Prosecution of municipal servant under the Cattle Trespass Act—Section not applicable. See CATTLE TRESPASS ACT, S. 22.

16 A. L. J. 143.

—S. 326 (4) Notice—Suit for establishment of title and injunction—Service of notice necessary.

A chabutra belonging to the plff. projected on to a public road. The plff. applied to the Municipal Board of Benares for leave to re-build that chabutra which was refused. The Municipal Board then caused a notice to be served on the plff. in June 1916 requiring him to remove the Chabutra. The plff. then served a notice of action on the Municipal Board on 14-7-1916 but commenced the present action on 4-8-1916 i.e., before the expiration of the two months provided for in S. 326 of the Municipalities Act as being necessary for a suit to be instituted. The reliefs originally sought were (1) the establishment of the plff's title; (2) injunction. The Municipal Board contended *inter alia* that the suit could not be maintained as no legal notice had been served by the plff. The plaint was then amended in respect of that relief only. Even after the amendment the relief was for a declaration that the

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platform and the *saiban* were ancestral property of the plf. and that he and his creditors had been in possession thereof for a long time and that the Municipal Board had no right to get the same demolished and he had also asked for an injunction. The first Court held that the suit could not be instituted as no valid and legal notice had been given. The lower appellate court held that the notice was not necessary and remanded the suit.

*Held*, that the injunction not being the only relief claimed service of the notice as provided for in S. 326 of the Municipalities Act was necessary and the suit having been commenced before the expiration of two months of the notice could not be maintained. (*Richards, C. J. and Tudball J.*) **THE MUNICIPAL BOARD OF BENARES v. GAJADHAR.** 16 A. L. J. 792== 47 I. C. 848.

**U. P. PREVENTION OF ADULTERATION ACT, (VI of 1912), Ss. 46 (a) and 12—Commission agent exposing article for sale—Adulteration of article—Whether agent punishable.**

K. a commission agent, exposed for sale canisters containing ghee as good and genuine on analysis the ghee was found to be adulterated:—*Held*, that he was liable to punishment under Act VI of 1912 and that he being a commission agent who exposed the same for sale, could not come within S. 68 of the Act. (*Tudball, J.*) **KEDAR NATH v. EMPEROR** 40 All. 661=16 A. L. J. 681=46 I. C. 514== 19 Cr. L. J. 738.

**U. P. REGULATION (XVII of 1806), S. S.—Mortgage by conditional sale foreclosure proceedings—Service of notice on mortgagor—Proof of—Records of Court, evidentiary value of.**

In a suit for redemption of a mortgage by way of conditional sale made in the year 1866 it was pleaded that the right had been extinguished inasmuch as in the year 1876 the mortgagee had served a notice, under the seal and the official signature of the Dt. Judge, upon the mortgagor warning him that the mortgage would be finally foreclosed in the event of his failing to redeem within a period of one year. The service of the notice was sought to be proved by means of certain records of the Court.

*Held*, that the records of the court were not *prima facie* proof of the fact of the service of the notice and consequently the right to redeem was not lost. 4 A. L. J. 717 foll. (*Piggott and Walsh, JJ.*) **RAM BARAN RAI v. HAR. SEWAK DUBE.** 40 All. 387== 16 A. L. J. 377=45 I. C. 488.

**UNIVERSITIES ACT (VIII of 1904), Ss. 21 (1) (c) (f) 25 (1) and 2 (m). See BOM. CITY MUNICIPAL ACT, Ss. 140 (c), ETC.**

20 Bom. L. R. 839.

**VENDOR AND PURCHASER.****UNSETTLED PALAYAM. See LAND TENURE.** 41 Mad. 749=34 M. L. J. 563**UPPER BURMA CIVIL COURTS REGULATION (I of 1888) Ss 12 and 13—C. P. Code, O. 21, R. 92 and O. 43. R. 1—Application to set aside sale, dismissal of—Appeal—Court proper. See (1917) DIG. COL. 1233. MANDARI v. MISSER.** 11 Bur. L. T. 8= (1916) II U. B. R. 141=39 I. C. 372.**UPPER BURMA LAND AND REVENUE REGULATION III OF 1889. S. 12, RULES 5 And 10—Moveable property—Execution of decrees and orders relating to—Powers of Revenue officers—C. P. Code, S. 144—Restitution—Jurisdiction of Revenue Officers.**

Under S. 12 of the Upper Burma Land and Revenue Regulation and under Rules 5 and 10 under the Regulation, revenue officers have been given the powers of civil courts in the trial of suits and are empowered to enforce orders of ejectment and delivery of possession of immoveable property in manner prescribed in the Civil Procedure Code for the execution of decrees.

The words "any power executed by a civil court in the trial of suits" in S. 12 (1) of the Regulation include the power to execute decrees and orders relating to the immoveable property.

An order for resumption of deeds of grant of land can be executed in the manner provided by the C. P. Code for the execution of a decree or order relating to the immoveable property, viz. by a notice to the person in possession of deeds to hold them in whose favour the order is passed.

Under S. 144 of the C. P. Code, all Courts have an inherent power where a decree is reversed or varied in appeal to order restitution so as to put the parties in the position which they would have occupied but for such a reversal or variation. (*Thompson, F.C.*) **BURMA OIL CO. v. BALI NATH SINGH.**

11 Bur. L. T. 3=46 I. C. 475.

—S. 53 (2) (10) — Jurisdiction of Civil Courts whether barred. See (1917) DIG. COL. 1234; **MAUNG HME v. MAUNG TUN HLA.**

11 Bur. L. T. 87=(1916) 2 U. B. R. 136. 39 I. C. 408.

—S. 53 (2) II—Scope of—Claim between private individuals—Jurisdiction of Civil Courts whether barred. See (1917) DIG. COL. 1233. **SONI LAL v. DELAWAR.** 11 Bur. L. T. 42= (1916) II U. B. R. 151=39 I. C. 567.

**VATAN ACT—See BOMBAY VATAN ACT (V of 1886) S. 2** 20 Bom. L. R. 953.

**VENDOR AND PURCHASER—Covenant for title—Indemnity—Continuing covenant—Breach—Damages—Cause of action—Starting point.** See LIM. ACT, ART. 115 AND 116. 35 M. L. J. 124.

## VENDOR AND PURCHASER.

—Lien for unpaid purchase money—Contract to the contrary—English and Indian Law—Vendor taking a promissory note from one of the vendees for portion of the sale price—Extinction of lien. *See* T. P. ACT. S. 55 (4) (b) 23 M. L. T. 85.

—Purchase money—Non-payment of—Title passes to the vendee notwithstanding. *See* T. P. ACT. S. 54 16 A. L. J. 454.

—Sale in consideration of vendee paying off simple debts of vendor and provision for compensation by vendee in default—Nature of absolute covenant or covenant by way of indemnity—Sale deed—Construction—Failure of vendee to pay—Vendor's suit to recover amount, from vendee—Maintainability—No loss to vendor by reason of vendee's default—Effect.

Where a portion of the purchase money due under a sale deed was reserved with the vendee in pursuance of an agreement that he was to pay off therewith certain simple debts of the vendor and the sale deed provided that the vendee was to compensate the vendor for any loss sustained by him (the vendor) by the vendee's default in paying the amount which he undertook to pay, held that the covenant by the vendor was an absolute covenant to pay the purchase money in the way agreed upon by the parties and not a covenant merely by way of indemnity, that it was open to the vendor to sue the vendee as soon as he failed to pay the debts as they became due and that the fact that no loss had been caused to the vendor by the vendee, default did not disentitle him to bring the suit. 5 L. W. 228; 36 M. 348 foll. 31 A 588 P. C. Expl. and Dist. (*Abdur Rahim and Seshagiri Aiyar, JJ*) KONNU KUTTI v. KUMARA MENON. 35 M. L. J. 692=24 M. L. T. 260.

**VENDOR AND VENDEE**—Vendor's title negatived in suit brought by third party against vendor and vendee—Subsequent suit for purchase money against Vendor Maintainability Deed—Construction Fak saf—Meaning.

Where, in a suit brought by a third party against a vendor and vendee of immoveable property the former admits the claimant's title and the suit is decreed upon that admission, he cannot in a subsequent suit for the recovery of the purchase money paid to him by the vendee, plead that the former suit was wrongly decided.

Per *Imam, J*—In vernacular conveyancing the expression *pak saf* means a flawless title. 15 O. W. N. 655 ref. (*Roe and Imam, JJ*) BHATTU RAM v. GANGA PRASAD GOPE. 3 Pat. L. J. 358=47 I. C. 37.

**VESTED OR CONTINGENT INTEREST**—Immoveable property—Two persons claiming as nearest reversioners—Compromise Provision that properties should be taken on the death of

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a person—One of the two reversioners predeceasing—Nature of interest vested whether passes by survivorship. *See* T. P. ACT. S. 19 8 L. W. 142.

**YIZAGAPATAM AGENCY RULE.** Rr. 10. cl. 5—Suit for land, meaning of. *See* AGENCY RULES. 7 L. W. 564.

**WAGERING CONTRACT**—Common intention essential—Speculation not equivalent to wagering. *See* CONTRACT ACT. S. 30. 34 M. L. J. 305.

**WAJIB-UL-ARZ**—Entry in—Evidence of Custom of Pre-emption. *See* CUSTOM. 43 I. C. 854

—Entries in—Evidentiary value of in regard to custom. *See* CUSTOM. 47 I. C. 920.

—Entry as to—Title—Presumption. Though an entry as to title in a Wajib ul arz or record of rights does not create a title it gives rise to a presumption in its support, which prevails until its correctness is successfully impugned. (*Sir Lawrence Jenkins, J.*) DAKAS KHAN v. GHULAM KASIM KHAN. 45 Cal. 793=24 M. L. T. 271=28 C. L. J. 441=20 Bom. L. R. 1068=48 I. C. 473 (P. C.)

—Statement in—Evidentiary value of—Parjote—Whether recoverable *See* (1917) D.I.G. COL. 1289: MAHOMED FAIYAZ ALI KHAN v. BEHARI. 40 All. 56=15 A. L. J. 873=45 I. C. 329.

**WHIPPING ACT (IV of 1909) S. 3**—Appeal—Whipping after sentence of imprisonment has been served, legality of—Appellate Court—Power of Cr. P. Code. S. 123. *See* (1917) D.I.G. COL. 1241, EMPEROR v. PO WUN. 10 Bur. L. T. 211=41 I. C. 149

—S. 3—Whipping in addition to imprisonment—Legality of.

Under S. 3 of the Whipping Act, a sentence of whipping may be passed in lieu of any punishment of which the offender may be liable under the Penal Code, but it cannot be passed in addition to such imprisonment; ordering a man to be whipped after he has already served part of a sentence of imprisonment is illegal. (*Rigg, J.*) NGA TUN SEIN v. EMPEROR. (1917) 3 U. B. R. 32=43 I. C. 623=19 Cr. L. J. 207.

**WILD ANIMALS**—Ownership in—Wild Elephants—Test of *See* ANIMALS. 1918 Pat. 232.

**WILL**—Construction—Bequest for life—No disposition of corpus—Gift over—Female donee—Prohibition against alienation—Law of perpetuities—"Heir born of the womb" meaning of—Limited estate—Creation of by will—Possession under will of doubtful interpretation if adverse.

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A will recited that if a daughter or son was born to the testator during his life-time such son or daughter will be "owner" of all his property but if there were no son or daughter his niece S. was to take a bequest of a lakh of rupees, and the remainder of moveable and immoveable property was to remain in the possession of his niece. The remainder was disposed of in the following words, if on the death of my wife and my niece there be living a son and a daughter born of the womb of my said brother's daughter then two-thirds of the moveable property will belong to the son and one-third to the daughter. But as regards the immoveable property none shall have the least right of alienation. They will of course be entitled to enjoy the balance left after payment of rent' etc.

*Held*, that the Will purported to convey an absolute estate ultimately to the son and daughter of the niece, and the fact that the corpus was not expressly mentioned was not sufficient to justify the interpretation that the corpus did not pass; that the failure of the bequest of the remainder in favour of the niece's son and daughter on the ground that they were unborn at the testator's death did not make the Will itself invalid. 11 Cal. 684; 24 Cal. 834; (1909) A. C. 275 ref. that the disposition in favour of the niece's son and daughter was a bequest of the remainder to them and was not a mere description of an estate of inheritance in S. The words "heirs born of her womb" could not be interpreted to be a description of an estate of ordinary inheritance 22 Bom. 409 diss., that under the will there was no interest vested in any person other than the widow in the first place and after her the niece. The will therefore contemplated that the estate should be represented first by the testator's widow and thereafter by his niece 22 Cal. 699, 42 Cal. 421; 38 Cal. 68; 35 All. 211 ref. that the estate taken by S. was an estate such as a woman ordinarily acquires by inheritance under the Hindu Law which she holds in a completely representative character but is unable to alienate except in case of legal necessity. 33 Mad. 91 ref. and that by the provision against the alienation the testator had in his mind the ordinary recognised restriction upon the alienation which would apply independently of any provisions in the Will and that he had not in his mind the eventuality of an alienation becoming necessary either for the purpose of providing maintenance for the niece or for the preservation of his estate. 24 Cal. 456 ref.

Where a mere contingent remainder is created after the woman's estate (as in this case) and not a vested remainder, this is an indication that the estate created was a woman's estate in the technical sense and not merely a life-estate.

An estate of the kind that a Hindu widow inherits in the case of an intestacy can be created by a Will.

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Where such an estate has been created by Will a condition prohibiting alienation absolutely is void for repugnancy.

*Obiter*; A Hindu can by will create an estate of life in the English sense, but his intention to do so must be made clear by the terms of the will itself without any importation of English ideas.

It is doubtful whether where a person enters into possession of an estate under a Will of uncertain construction, an absolute title can be acquired by adverse possession in the absence of an express claim to hold an absolute estate. (*Chapman, Atkinson and Imam, JJ.*) **RAM BAHADUR v. JAGER NATH PRASAD.**

3 Pat. L. J. 199=(1913) Pat. 181=

4 Pat. L. W. 377=45 I. C. 749.

—Construction—Bequest by implication—The same rule applies in this country as in England—Bequest to the two daughters of testators—Further provision that the male *santhathi* of one of the daughters should take with the off spring of the other daughters—No express gift to the latter—Latter taking a gift by implication.

A testator died leaving behind him two daughters the elder named Seshamma who had no offspring at the testator's death and the younger named Andalammal who had offspring and by the terms of his will provided as follows "as one of my abovesaid two daughters Andalammal had been attending to all my comforts and as her male *santhathi* are entitled to perform Karmams to me she should enjoy two-third—two of the three shares—and Seshamma should enjoy the third share." The testator further provided that "my daughters should enjoy the said land in the proportion of the above three shares" and further provided that "if a male issue is hereafter born to my daughter that is, Seshamma; that grandson should like the *santhathi* of my younger daughter enjoy her third share having powers of gift and sale from son to grandson and so on from generation to generation" and there were no means of express bequest to Andalammal's children.

*Held*, on a construction of the will, the offspring of Andalammal, though there is no express bequest of properties to them, took an estate by implication.

The rules as to bequest by implication are the same in this country as in England, (*Abdur Rahim and Oldfield, JJ.*) **SRINIVASA SESHACHARLU v. SESHAMMA**

34 M. L. J. 479=47 I. C. 758.

—Construction—Dedication to charity—Appointment of *vars* to conduct charities with properties of testator—Public Trust. See RELIGIOUS ENDOWMENT, DEDICATION.

47 I. C. 611.

—Construction—Devise of land mortgage interest if passes—English and Indian Law.—

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*Spes successiones—Agreement to divide—Effect of.*

Where a Hindu testator devised to his wife his one fourth share in a mita in the belief that he was absolutely entitled to the same and it was found on the testator's death that he had only a mortgage interest in the mita along with three other equal shares held on a construction of the will, that the testator's intention was to dispose of whatever interest he had in the mita in favour of his widow and that his mortgage interest passed to her.

In India, where the legal interest is divided between the mortgagor and the mortgagee just as it is between lessor and lessee and where there is no distinction between reality and personality as to descent, the question of ascertaining the testator's intention from the terms of the will is less complicated than in England.

Where the reversioners to an estate in the possession of a Hindu widow agree to divide it in particular shares on her death the agreement is inoperative to confer any right to the property on any of the reversioners (*Wallis, C.J. and Spencer, J.*) SUBBARAYA GOUNDAN v. MUTHAYAMMAL.

35 M. L. J. 684.

—Construction—Devise to testator's daughter—Absolute estate. See (1917) DIG. COL. 1844 CHUNILAL v. BHOGILAL.

19 Bom. L. R. 990=43 I. C. 468.

—Construction—Gift subject to a life estate—Devises for maintenance out of remainder—Vested remainder.

A Hindu testator devised a life estate in favour of his widow, and on her death, a remainder in favour of his grandson by a predeceased daughter, whom he had brought up as his own son, subject to certain devises for maintenance in favour of the pliffs. who were also his grandsons by another daughter.

Held, that the intention of the testator was to provide immediate means for the maintenance of the pliffs. after his death, and that, therefore, the pliffs. became entitled to the properties devised to them immediately on the happening of that event. (*Lindsay, J. C. and Kanhaya Lal, A. J. C.*) RUDRA PRATAP SINGH v. UMBAI KUNWAR.

5 O. L. J. 505=47 I. C. 512

—Construction—Gift to a female—Right to enjoy absolutely as long as she is alive—Absolute or limited estate.

Where a will executed by the husband in favour of his wife provided that as long as she is alive she shall enjoy the management and she shall have absolute right in the properties held per *Coutts, J.* (*McC, J.* dissenting) that the clause gave the wife a life estate. (*Roe and Coutts, JJ.*) BANI KESHOBTI KUMARI v. KUMAR SATYA NARAYAN SINHA.

5 Pat. L. W. 167=(1918) Pat. 294=

47 I. C. 55.

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—Construction—Principles regulating—Estate taken by widow—Life estate or absolute estate.

Where the language in which a deed is written is not the language of a trained draftsman or a skilled conveyancer but the draft is prepared by an amateur or layman, all that is necessary to interpret such a deed is to give the plain meaning to the words used, neglecting grammatical errors and remembering the limitations and deficiencies of the draftsman.

A will executed by a Hindu gentleman in favour of his wife declared that he left his property to her absolutely and entirely that he liked her to retain certain old servant, on her employment so long as they behaved themselves, and that if she wished to utilise the powers she possessed in order to make an endowment of a religious or a charitable nature, such an object would meet with his approval, though if she did this he would be opposed to her giving the manager of the endowment too free a hand.

Held, that under the above will the testator devised a full, complete estate and not merely a life estate to his wife (*Stuart and Kanhaya Lal (A. J. C.)*) GANGA BAKSH SINGH GOKUL PRASAD.

44 I. C. 645.

—Construction—Rule of—Life estate to daughter-in-law—Gift over to male issue—Son, if can alienate property before estate falls in.

The only safe rule of construing a will is to try to find out the meaning of the testator taking the whole of the document together and to give effect to the meaning.

The will of a Hindu testator to the plaintiff his daughter-in-law and provided that her husband "should receive one-half of the income accruing from the property during his life-time," that after his death, the right of income accruing from immovable property shall devolve upon his male issue if any and that after the pliff's death the property shall devolve upon the male issue if any of the pliff. and her husband. On a construction of the will.

Held, that the testator intended that his estate should vest in his daughter-in-law for her life-time and that his son (Pliffs. husband, and, after his death, his male issue should receive a moiety of the income accruing therefrom; and that during the life time of the pliff. her son had no right whatsoever in the estate and was not consequently entitled to dispose of it either temporarily or permanently. (*Shadi Lal and Scott Smith, JJ.*) MUSAMMAT JASODHAN v. BISHAN SINGH.

44 I. C. 209.

—Construction—Successive or substitutionary bequests—Absolute estate cut down to life estate—Succession Act Ss. 84 and 111.

A testator made a bequest in the following terms:—"On my death my younger brother's widow B and on her death her daughter K, that is my niece, will get one-fourth share; etc."

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On a construction of the will held the testator did not make a substitutional gift to the niece in the event of her mother B predeceasing him, but that the gift which he made was a gift of successive interests, that is, the interest was to go first to the brother's widow B, and then on her death the property was to go to her daughter K.

Notwithstanding S. 82 of the Succession Act, the gift in favour of the brother's widow B. was not a gift of an absolute interest, so that the gift over on her death to her daughter K, was not void as being repugnant to the form of the gift to the mother. The apparently absolute nature of the gift in favour of the mother B. was cut down to a life estate by the direction that on her death the property would go over to her daughter. (*Fletcher and Huda, J. J.*) HARENDRA CHANDRA LAHIRI v. BASANTA KUMAR MAITRA. 22 C. W. N. 689=43 I. C. 991

Construction—Vested estate—Creation of successive life estates—Trust of reversion to a particular legatee "then bring—Estate" when becomes vested.

Where a Parsi testator by his will devised a house to his wife for her life and directed that after her decease his executors should hold the house in trust for his son J for life and in the event of J's death in trust for J's widow (as to part if he so appointed) and for JJ' issue and in default of such issue and subject to such appointment in trust for the testator's son K, if then living and J died unmarried in the life-time of the testator's widow, and of K:—

Held, that upon the death of J the house vested absolutely in K, subject to the life interest of the testator's widow. *Archer v. Jagon* 8 Sim. 446. *In re Mims* 57 L. J. 848 Rel on (*Lord Phillimore*). KAIKHUSHERU BEZONJI CAPADIA v. SHRINIBAI BEZONJI CAPADIA. 21 Bom. L. R. 186=45 I. A. 257.(P.C.).

Execution—Proof of—Sound and disposing state of mind—Burden of proof—Presumption.

The person who sets up a title under a will must satisfy the Court that the will was "duly executed" that is to say, he must furnish proofs of execution which carries with it a conviction that the testator knew and approved of the contents of the instrument. This involves the proposition that he was a free and capable testator. The ordinary rule is that the execution of a will by a competent testator raises a presumption that he knew and approved of the contents of the will; and ordinarily the competency of the testator is presumed, if nothing appears to rebut the ordinary presumption. But where the mental capacity of the testator is challenged by the evidence, it is the duty of the Court to find whether upon the evidence it is established

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that the testator was of sound disposing mind and did know and approve of the contents of the will. In order to constitute what is known in law as "a sound disposing mind" it must be shown that the testator was able to understand his position, able to appreciate his property and able to form a judgment with respect to the parties whom he chose to benefit. 21 Cal. 279 foll. (*Lindsay J. C. and Daniels, A. J. C.*) RAJ BACHAN SINGH v. SHATRANJI. 5 O. L. J. 519=47 I. C. 963.

Executor—Debutter property—Disposition as to, invalid.

Property which is already debutter does not pass by will to the executor. (*Woodroffe and Smither, JJ.*) MOHENDRA NATH BAGCHI v. GOUR CHANDRA GHOSH. 22 C. W. N. 860=46 I. C. 867.

Executor—Delivery of possession to shabait appointed by will—Executor, functus officio.

Where a will appoints an executor and also shabait for debutter property and possession has been made over by the executors to the shabait, the executors become functus officio. (*Woodroffe and Smither, JJ.*) MOHENDRA NATH BAGCHI v. GOUR CHANDRA GHOSH. 22 C. W. N. 860=46 I. C. 867.

Executor—Power to grant ijara—No power to grant permanent lease. See LEASE, CONSTRUCTION. 45 I. C. 852.

Failure of bequest in favour of some person—Will not void *ab initio*. See WILL CONSTRUCTION. 3 Pat. L. J. 199.

Formalities of—Answers to interrogatories.

The rule of English Law that even answers to interrogatories may be regarded either as a codicil or will may not apply to testamentary dispositions in India. Under the Hindu Wills Act and the Indian Succession Act it is doubtful whether such informal declarations could be regarded as testamentary. (*Abdur Rahim and Seshagiri Aiyar, JJ.*) MUTHUKRISH NA NAICKEN v. RAMCHANDRA NAICKEN. 47 I. C. 611.

Oral—Strict proof of, necessary.

Where a person bases title on an oral will the onus lies on him of proving the precise words on which he relies. (*Scott Smith and Shadi Lal, JJ.*) NARAIN v. GAINDO. 83 P. L. R. 1918=85 P. W. R. 1918=45 I. C. 183.

Probate—Caveat—Immediate reversioner not contesting—next reversioner if can enter caveat and contest suit.

A died leaving B his widow. Caveats were entered by the immediate reversioner C. and

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by the mother of the widow of the testator, as well as by D and E who would be reversioners if C were to die before the widow. B by settling with the executor made it impossible from him successfully to challenge the will.

*Held*, that D and E had sufficient interest to entitle them to enter caveat and contest the suit. (*Sanderson C. J. Woodroffe, J.*) SATINDRA MOHAN TAGORE v. SARADA SUNDAR DEBI.

27 C. L. J. 320=45 I. C. 59.

—Probate—Delay in application—Satisfactory explanation—Right to probate

Where a long time elapsed between the death of the testatrix and the date on which the will was put forward by probate, and the testatrix was an illiterate Hindu lady, the prior history of the case was worthy of consideration. When there were reasons for the delay in propounding the will although in such case the Court was bound to scrutinize the evidence very carefully, there was no rule of the law of evidence that such a will was incapable of being proved. (*Fletcher and Newbould, J.J.*) BINODINI DEBYA v. HRIDAY NATH GHOSHAL.

22 C. W. N. 424=45 I. C. 187.

—Probate grant of, not to be refused on the ground that will is "inofficious". See PROBATE. 43 I. C. 208.

—Probate—Petition for—Compromise of—Legality—Withdrawal with liberty—Fresh petition for probate—Maintainability—C. P. Code, O. 23, R. 1—Applicability—Prob and Admn. Act, S. 55—Effect. See (1917) DIG. COL. 248. JAGESHWAR SAHAI v. JAGATDHARI PRASAD.

2 Pat. L. J. 535

=(1917) Pat. 192=5 Pat. L. W. 230=40 I. C. 345.

—Probate—Revocation of—Non Service of citation—locus standi of person seeking revocation—Legatee under earlier will.

A person who is entitled to a much greater benefit under a Will alleged to have been revoked by another Will has *locus standi* as having sufficient interest to oppose grant of probate and to apply for revocation of probate of the later Will on the ground of non-service of citation. It is not necessary to obtain probate of the earlier Will in order to be competent to apply for revocation of the later will. (*Chatterjee and Walmsley, J.J.*) DRAUPADI DASYA v. RAJKUMARI DASYA.

22 C. W. N. 564=45 I. C. 760

also 22 C. W. N. 637.

—Proof of—Disposing state of mind of testatrix—Evidence in support of the will Theory of original will being lost and of forged one substituted instead.

In an application for letters of administration the caveaters admitted the testatrix had a disposing mind on the date on which the

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will was alleged to have been executed and it was proved by expert evidence that the impression on the Will was the thumb mark of the testatrix, but it was contended that the real and original will of the testatrix was lost and that Will propounded was a forgery, written over a thumb impression of the testatrix previously obtained in blank. The Will was supported by the scribe and the three attesting witnesses. The applicant for letters of administration herself testified that she saw the Will written, that it had been made over to her by the testatrix and that she had kept it with herself.

*Held*, that it was not proved that original Will was lost and the theory of a dishonest conspiracy to forge a Will could not be sustained in view of the positive evidence produced in support of the will (*Leslie Jones, J.*) BHAGIRATHI v. GHISA SINGH.

47 I. C. 174.

—Revocation—Proof of—Mere allegation as to execution of subsequent will, if enough.

A Will duly executed is not to be treated as revoked, either wholly or partially, by a Will which is not forthcoming, unless it is proved by clear and satisfactory evidence that the late Will either contained words of revocation or dispositions so inconsistent with the dispositions of the earlier Will that the two cannot stand together.

It is not enough to show that the Will which is not forthcoming differed from the earlier Will if it cannot be shown what the difference consisted in. (*Stuart and Kanhaiya Lal, A. J. C.*) LAL TRIBHAWAN NATH SINGH v. DEPUTY COMMISSIONER OF FYZABAD.

47 I. C. 225.

—Talukdar—Codicil—Construction—Surrounding circumstances See (1917) DIG. COL. 1249; DEPUTY COMMISSIONER OF KHERI FOR MAHEWA ESTATE v. RANI BIJAI RAJ KOER. 20 O. C. 260=(1913) M. W. N. 324=8 L. W. 1=22 C. W. N. 305=43 I. C. 987 (P. C.)

—Testamentary declaration—What constitutes—Elements of a will.

A document sent by a person containing the relevant particulars relating to the history of his estate and declaration as to who was to be his successor in pursuance of an advertisement appearing in a paper announcing the intention of the advertiser to prepare a compilation, showing the family history of the Talukdars of Oudh could not for the purposes of Hindu Law be treated as a testamentary declaration by him of his intention with respect to his property, which he desired to be carried into effect after his death. (*Lindsay and Kanhaiya Lal A. J. C.*) BALRAJ KUAR v. MAHADEO PAL SINGH.

20 O. C. 360=4 O. L. J. 589=44 I. C. 89.

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**WITNESS**—Non production -Adverse inference from—Propriety. See EVIDENCE.

21 O. C. 223.

**WORDS**—Arms—Meaning of. See ARMS ACT, Ss. 4, 19.

32 P. R. (Cr.) 1913.

———"Avyavaharika Debts" meaning of See. 33 M. L. J. 661.

———Bikhri and farokht—Bai—Kharidigi—Meaning of—Implication of Sale. See DEED CONSTRUCTION. (1913) Pat. 156.

———Case, meaning of. See STAMP ACT; S. 57. 16 A. L. J. 49.

———Jagir—Grant of land and not merely of revenue. See C. P. CODE, S. (60) (g). 22 C. W. N. 557 (P. C.)

———Kharidar—Bai—Kharidigi—Transaction of sale. See (1913) Pat. 156.

———Khudkast—Not necessarily zerait land See B. T. ACT, S. 116. 45 I. C. 418.

———(Malik)—Meaning of—Absolute, estate See HINDU LAW, GIFT. 16 A. L. J. 864.

———Maral—Meaning of. See LIM. ACT. ART. 60. 8 L. W. 221.

———"Pak saf" in a deed of conveyance Meaning of. See VENDOR AND VENDEE. 3 Pat. L. J. 353.

———Public street—Meaning of. See PUNJAB MUNICIPAL ACT, S. 175. 60 P. L. R. 1918.

———"Tanaka"—Mortgage. See DEED CONSTRUCTION. 7 L. W. 36.

———Thavanai meaning of. See INTEREST. 43 I. C. 972.

———"Up to" and "until" a certain day —Meaning of. See EVIDENCE ACT, S. 91. 22 C. W. N. 418.

———Vars—Meaning of. See REL. ENDOWMENT, DEDICATION. 47 I. C. 611.

**WORKMAN'S BREACH OF CONTRACT ACT (XIII OF 1859)**—Breach of contract—Refusal to work proof of, Act to be strictly enforced—Statute, Interpretation.

The provisions of the Workman's Breach of Contract Act are not confined only to fraudulent breaches of contract as stated in the preamble.

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Hence, where a workman made a contract under the Act and subsequently refused to complete the contract agreeing to refund the money advanced to him and the Magistrate refused to enforce the provisions of the Act at the instance of the employer as being inapplicable. Held that the Magistrate was bound to act according to it. 16 A. L. J. 164 foll. (Knoor, A. C. J.) AZIZ-UR-RAHMAN v HANSA 40 All. 670=16 A. L. J. 715=47 I. C. 441=19 Cr. L. J. 925.

———Workman, meaning, of—Scope, of the Act. See (1917) DIG. COL. 1252, KUNHI MOIDIN v. CHAMU NAIR. 41 Mad. 182=33 M. L. J. 607=22 M. L. T. 435=(1917) M. W. N. 825=6 L. W. 745=43 I. C. 787=19 Cr. L. J. 211.

———S. 1—Contract for supply of stones by stone-dealer—Breach—Act if applicable.

Where a person who dealt in stones entered into a contract to supply stones and took money in advance for that purpose but failed to supply the stones according to the terms of the contract, held that the Breach of the Contract Act did not apply to him, the case being one of an ordinary contract to supply and the money not having been advanced on account of work to be performed by an artificer workman or labourer. (Banerji, J.) BHAGWAN DIN v. MAHOMUD ALI. 16 A. L. J. 407=45 I. C. 502=19 Cr. L. J. 598.

———S. 1—Magistrate of Police—Jurisdiction of—Offences committed outside territorial jurisdiction.

The term "Magistrate of Police" in S. 1 of the Workman's Breach of Contract Act must be limited to a Magistrate in the territorial limits of whose jurisdiction the employer resides or carries on business.

There is nothing in S. 1 of the Workman's Breach of Contract Act which gives special jurisdiction to a Magistrate, within whose jurisdiction the contract was made or the advance received, to try an offence under the Act committed beyond his jurisdiction.

Both under the Common Law and under the Criminal Procedure Code, no Court, unless expressly authorised by Statute, can try any offences other than those committed within the area of its jurisdiction. (Crouch, A. J. C. and Hayward, A. J. C.) SOBERAJ DWARIDAS v. EMPEROR. 11 S. L. R. 113=45 I. C. 399=19 Cr. L. J. 591.

———S. 1—Proceedings under—Nature of—Criminal case—Person undertaking to supply coolies and work with them if a workman.

Proceedings under the Workman's Breach of Contract Act are judicial proceedings, the workman being in the position of an accused and he cannot, therefore, be compelled to

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make a thumb impression in Court for the purpose of identifying his thumb impression.

A person who undertakes to supply coolies and to work along with them is "a workman" within the meaning of S. 1 of the Workman's Breach of Contract Act (*Twomey, C. J.*) RAMANATHA PANDARAM v. KARUPANNA THEVAR.

11 Bur. L. J. 207=43 I. C. 591=  
19 Cr. L. J. 175.

—S. 2—Order form of—Sentence. See (1917) DIG. COL. 1252. CHINTAPILI v. EMPEROR. 10 Bur. L. T. 251=33 I. C. 313.

—S. 2—Refusal to perform contract—Smallness of advance, if a good excuse, for.

The smallness of the advance is not a reasonable excuse for refusing to perform the contract within the meaning of S. 2 of the

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Workman's Breach of contract Act. 23 I. C. 185 ref. When a man enters into a contract he must carry out the terms of the contract into which he has entered unless he can show some reasonable excuse. One of the terms of the very same contract can hardly be afterwards held up as a reasonable excuse for non-performance. (*Know, J.*) BAKHTAWAR v. EMPEROR.

40 All 282=16 A. L. J. 164=43 I. C. 832=  
19 Cr. L. J. 240.

**WORSHIPPER**—Right of to sue for declaration that alienation by mutwalli void, without Special damage. See MAHOMEDAN LAW.

23 C. W. N. 116.

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4 Pat. L. W. 146.

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**ARBITRATION.**

for the benefit of the enemy means the doing of it while he is an enemy and does not contemplate some possible advantage to him when peace comes. (*Lord Finlay, L. C., Viscount Haldane, Lords Dunedin, Atkinson and Parmoor.*) **HUGH STEVENSON AND SONS v. AITKEN GESSELL SCHAFF FUR CARTON-NAGEN INDUSTRIE.** (1918) A. C. 239.

**Arbitration—Award—Validity of—Alternative form—Award in form of special case—Limited time for setting down case—Award final if case not set down—Award if bad on the face of it—Application to set aside.**

Certain commercial disputes were referred to arbitrators who made an award in an alternative form, first, in the form of a special case under S. 7 (b) of the Arbitration Act, if either party should give to the other 14 days written notice of his desire to take the opinion of the Court and should within 14 days from the service of such notice set the award down for argument before the court as a special case; and secondly, in the form of a final award if the aforesaid 2 conditions were not fulfilled. Held by *Banques and Scrutton, L. JJ.* (*Pickford, J.* dissenting) that the award was not bad on the face of it and it was within the competence of the arbitrators to pass an award in that form. (*Banques*), and *Scrutton and Pickford, L. JJ.*) **OLYMPIA OIL AND CAKE COMPANY, MAC-ANDREW MORELAND & CO. In re.** (1918) 2 K. B. 771 C. A.

—Reference to—Power of arbitrator, to decide in accordance with the contract of parties.

An arbitrator to whom disputes arising out of a contract between the parties, are referred for decision is bound to act on the same principles as the Court, and to determine the rights of the parties according to the contract. (*Pickford and Banques, L. JJ. and Neville, J.*) **NOTT AND CARDIFF CORPORATION In re.** (1918) 2 K. B. 146.

—Special tribunal—Constitution of, by Act of Parliament—Procedure of tribunal, to be judicial.

Where there is a special tribunal set up by Parliament for the purpose of dealing with particular disputes between individuals and a statutory body, that does not absolve the tribunal from dealing with the matter judicially, although it may absolve them from dealing with it according to the procedure which is usually adopted in the case of an arbitration in the ordinary sense. (1915) A. C. 120, 182 Ref. (*Pickford and Banques, L. JJ. and Sargant, J.*) **CLEMENTS v. COUNTY OF DEVON INSURANCE COMMITTEE.** (1918) 1 K. B. 94 (C. A.)

—S. 4—Agreement to refer—Stay of proceedings—Stay in proceedings—Order for mutual discovery—Election.

**BANKRUPTCY.**

The debt, a party to a written contract containing an agreement to refer disputes to arbitration, was sued for the breach thereof. He was not aware of the arbitration clause in the contract. The plffs. in the action took out a summons for discovery. The debt, asked for discovery also, and an order for mutual discovery was made. He then became aware of the agreement to refer and applied for stay of proceedings. Held that he had taken a step in the proceedings within S. 4 of the Arbitration Act and was not entitled to a stay. (*Lawrence and Shearman, JJ.*) **PARKER GAINES & CO. v. TURPIN.** (1918) 1 K. B. 358.

**Assignment—Cause of action—Champerly and maintenance—Applicability of—Repudiation of contract before assignment—Effect of.**

Champerly in the original sense was the maintenance of an action in consideration of a promise to give to the maintainer a share in the proceeds thereof. It was a branch of the general law of maintenance. The doctrine of champerly was however extended to cover the purchase of mere rights of litigation even though no actual maintenance was contemplated. The whole doctrine arose in times when the common law did not recognise the assignability of choses in action and requires to be examined and formulated in the light of modern circumstances.

Causes of action founded on tort, for example, libel or assault, should not on grounds of public policy be assignable. So too, there are contractual causes of action of a particular character, for example, breach of promise of marriage which, for obvious reasons, are not assignable.

A debt cannot destroy the assignability of a right of property, whether it be a contract or other form of property, by committing a breach of contract or by repudiation prior to the assignment. (*Mc Cardie, J.*) **COUNTY HOTEL AND WINE COMPANY v. LONDON AND NORTH-WESTERN RAILWAY COMPANY.** (1918) 2 K. B. 251 at page 261.

**Auction Sale—Law relating to—Conditions of sale—Bidder, if the acceptor of an offer and if entitled to insist on property being sold.**

Upon a sale by auction by increasing bids, the bidder is not in the position of an acceptor of an offer made by the auctioneer; nor can the highest bidder insist that the property shall not be withdrawn. The matter is governed by the conditions of the auction sale. (*Sir Walter Phillimore, J.*) **DEMERARA TURF CLUB v. WIGHT.** (1918) A. C. 605.

**Bankruptcy—After acquired property—Undischarged bankrupt—Dealings with—Transaction for value—Charging order on shares—Validity against trustee—Bankruptcy Act, S. 47.**

## BANKRUPTCY.

The law before the Bankruptcy Act of 1914 and since recognised in S. 47 is that until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him *bona-fide* and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee. The only transactions protected under this rule are dealings with the bankrupt *bona-fide* and for value. A process in *in rem* or a taking in execution by process of law what the judgment-creditor was able to seize of the bankrupt's property is no more a dealing or transaction for value with the bankrupt than a garnishee order would be and is not entitled to protection under the aforesaid rule. (*Swinfen Eady, M. R. Warrington and Duke, L. J.J.*) **HOSACK v. ROBINS.** (1918) 2 Ch. 339 (C.A.)

——— *Foreign Court—Order of discharge—Effect of—Agreement for composition—Recognition of.*

Where the effect of a foreign bankruptcy using the word "foreign" with reference to colonial and other British Courts outside Great Britain, is to divest the debtor of the whole of his property wherever situate and to vest it in the assignee for distribution among all his creditors wherever resident, the courts in England give the same effect to the order or instrument discharging the debtor in the bankruptcy as is given to it in the country where the bankruptcy occurs. This principle, however, is not applicable to a composition by arrangement. (*Swinfen Eady Bankes, L.J.J. and Eve, J.*) **NELSON In re DARE AND DOLPHIN EX-PARTE.** (1918) 1 K. B. 459 (C.A.)

——— *Proof of debts—Guaranteed debt—Payment by surety—Carrying in proof for the whole debt—Double proof, rule of.*

The rule in bankruptcy is that there must not be a double proof for the same debt and in determining whether the two proofs are in respect of the same debt, regard must be had, not to technicalities, but to the substance L. R. 7 Ch. 99 Ref. Where a bank advances moneys to a debtor on a continuing guarantee given by another person, and the debtor becomes bankrupt, the bank in carrying in their proof, are not bound to give credit to payments made by the surety on account of his liability, but might prove for the whole amount just as if no payment had been made by the surety. (*Swinfen Eady, Warrington and Scrutton, L. J.J.*) **MELTON In re MILK v. TOWERS.** (1918) 1 Ch. 37.

**Bill of Exchange—Bill of lading attached thereto—Presentation for acceptance by holder in due course—Representation—Bill of lading found to be forged—Warranty of genuineness—Representation—Right to recover money paid by acceptor—Cause of action.**

## BILLS OF EXCHANGE ACT.

Defendants who were cotton brokers in Liverpool purchased cotton from cotton dealers in America who drew a bill of exchange on the defendant's bank at Liverpool and issued that bill in America. To the bill of exchange was attached the bill of lading, which was subsequently found to be a forgery, as no goods had been shipped under it. The plaintiffs who were dealers in foreign bills of exchange in New York, purchased the bill of exchange with the bill of lading of the cotton attached, in good faith and sent the documents to the defendants' bank at Liverpool who accepted the bill and paid at maturity. On the discovery of the fraud, the defendants brought an action in America against plffs. to recover back the amount of the bill so paid by them. Plffs. brought a suit in England for a declaration that they did not by presenting the bill for acceptance with the bill of lading attached, warrant or represent that the bill of lading was genuine and that they were not bound to repay the amount of the bill.

*Held*, that by presenting the bill of exchange for acceptance, the plffs did not warrant or represent the bill of lading to be genuine and that they were not bound to repay the amount of the bills on the discovery of the forgery. (*Pickford, Warrington and Scrutton, L. J.J.*) **GUARANTEE TRUST CO. OF NEW YORK v. HANNAY & CO.** (1918) 2 K. B. 623.

——— *Due date—Determination of, by law of the country where money is payable—War—Emergency legislation—Postponement of due date—Effect of—Bill of exchange drawn by enemy firm payable in Germany—Bills of Exchange Act, ss. 46 (2) and 72 (5).*

Bills accepted payable in Germany after the outbreak of the war had been drawn by a German firm carrying on business in England and purchased from the firm before the war by an English bank in whose hands they remained unpaid. The due date according to the tenor of the bill had passed, but presentment had not been made. A German ordinance promulgated since the war postponed the maturity of bills till further notice and denied interest to British creditors between the original due date and the end of the period of the postponement. The business of the enemy firm was wound up under the Trading with the Enemy Act, 1913 and a claim was made by the English bank against the assets. *Held*, that the due date being determined by the law of the enemy country where the bills were payable had not yet arrived and that the claim was therefore unsustainable. *Roguet v. Overmann* (1875). L. R. 10 Q. B. 525 applied (*Younger, J.*) **IN RE FRANCKE AND RASCH.** (1918) 1 Ch. 470.

**Bills of Exchange Act 1882 (45 and 46 Vic C 61) ss. 72, Sub S. 1, proviso (b) and 3—Bill of exchange—Drawn by American merchant on**

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*English firm*—"Requisites in form" meaning of—*Suit for declaration that payee is entitled to retain money alleged to have been paid by mistake*—"Enforcing payment of bill," meaning of—*Unconditionality*.

Defts. traders of Liverpool, purchased cotton from dealers in the United States who drew a bill of exchange on the former for the price and issued it in the United States. The bill was in the following form: "Sixty days after sight this first of exchange second unpaid, pay to the order of ourselves. 1,464£. 9sh value received, and charge same to account of 100 bales of cotton." Plffs. dealers in foreign bills of exchange in New York, in good faith purchased the bill of exchange with the bill of lading of the cotton attached, and sent the documents to the defts. in Liverpool who paid the bill at maturity. It was found subsequently that the bill of lading was a forgery and no cotton had been shipped under it. The defts., on discovery of the fraud, claimed that the bill of exchange was conditional on the genuineness of the bill of lading and brought an action in America against the plffs. to recover back the amount of the bill so paid by them. The American Court held that the case must be decided according to the law of England. Plffs. then sued in England, for a declaration that they did not, by presenting the bill for acceptance with the bill of lading attached, warrant or represent that the bill of lading was genuine and that they were not bound to repay the amount of the bill. Under the American Law, unlike the English, the bill of exchange in question was not a negotiable instrument, but was conditional on the genuineness of the bill of lading.

*Held*, that the action must fail. The question whether, the bill of lading was conditional or not was a question relating to the "requisites in form" within the meaning of S. 72 sub-S. 1 of the Bills of Exchange Act and should be determined by the American law and that the defts. were entitled to recover their money back. The expression "enforcing payment thereof" in S. 72 sub-S. (1) proviso (b) does not include the obtaining of a declaration that the holder of a bill who had been paid was entitled to retain the money, and that as the action was brought by the plaintiffs for the purpose, not of obtaining payment but of preventing the defendants from getting the money back, the proviso did not apply. (*Bailhache, J.*) GUARANTEE TRUST COMPANY OF NEW YORK v. HANNAY AND CO.

(1918) 1 K. B. 43.

—Reversed on appeal (1918) 2 K. B. 623 (G. A.)

*Carrier—Liability of, for loss of goods—Carriage partly by land and partly by sea—Goods of particular value not declared to be such—Effect—Carriers Act 1830 S. 1—Onus.*

Certain valuable goods over 10 £ in value, were delivered by the plffs. to the deft. Ry. Company for carriage from London to Belfast

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part of the transit being by land and part by sea. The plffs. failed to make a declaration as to the nature and value of the goods as required by S. 1 of the Carriers Act, 1830. The goods were lost during the transit and in defence to an action for the value of the goods the defts. relied on S. 1 of the Carriers Act.

*Held* that the Carriers Act afforded protection to the carrier only where the goods were lost by land and that the defts. having failed to show that the goods were lost during the land portion of the transit they were liable to the plffs. for the value of the goods.

Per *Scrutton, L. J.*—Before the Carriers Act 1830, and since the Act in the case of those to whom it does not apply, a carrier, if he failed to deliver goods entrusted to him for carriage was liable unless he proved that the loss was due, to the act of God or the King's enemies. If he proved something which *prima facie* raised a case of exception, he so far had done his duty, and the burden was shifted to the plff. If the carrier proved something which was equally consistent with liability and non-liability he failed to displace the plff's case. (*Pickford, Bankes and Scrutton, L. JJs.*) ASHTON & Co. v. LONDON AND NORTH WESTERN RAILWAY. (1918) 2 K. B. 483 (C. A.)

—Railway—Loss in transit—Value and nature of goods not declared—Transit partly by land and partly by sea—Onus of proof—Carriers Act, 1830 (11 Geo. 4 and 1 Will. 4, C. 68), S. 1,

Three packets each above the value of 10 £ was delivered by plff. to the deft. for carriage from London to Belfast, part of the transit being by land and part by sea. The plff. made no declaration as to the nature and value of the goods as required by S. 1 of the Carriers Act 1830. In an action for damages for loss of the goods, *held* that the defendants during transit having failed to show that the goods were lost in the land portion of the transit, the protection given by S. 1 of the Carriers Act of 1830 did not avail them and that they were liable. (*Lawrence and Shearman, JJs.*) ASHTON AND Co v. LONDON AND NORTH WESTERN RAILWAY. (1918) 1 K. B. 488.

—Cause of Action—Offer and acceptance by post—Cause of action arises in part where offer is received and not where it is posted. *See JURISDICTION.* (1918) 1 K. B. 128.

*Charge—Security for future advances—Collateral security deposited by mortgagee with mortgagor's bank to secure loan account—Sale and realisation by bank—Application of proceeds in discharge of loan account—Rights of mortgagee.*

A. by a memorandum of charge executed in favour of his two sisters charged his real property to secure certain sums stated to be due and such further sums as should be advanced to him by them or either of them. The two sisters on various dates deposited certain securities owned by them with A's bank by

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way of collateral security for A's loan account. After A's death the bank realised these securities and applied the moneys in discharge of the loan account. A's sisters claimed a charge in respect of the amounts applied by the bank. *Held*, that the moneys realised and applied by the bank were in the nature of further sums advanced to A. by his two sisters within the meaning of the memorandum of charge. (*Peterson, J.*) *In re SMITH, LAWRENCE v. KITSON.* (1918) 2 Ch. 405.

**Charity—Bequest to—Advancement of religion—Masses for soul of the testator—Void bequest—Superstitious uses—**1 Edw. 6 C. 14.

A bequest for masses for the soul of the testator is invalid under the statute. 1 Edw. 6 C. 14.

*West v. Shuttleworth*, (1835) 2 My. and K. 684; *A. G. v. Fishmongers Co.* (1841) 5 My. and Cr. 11. *Heath v. Chapman* (1854) 2 Drew. 417; *In re Michael's Trust* (1860) 18 Beav. 30; *In re Blundell's Trust* (1861) 30 Beav. 360 foll. (*Swinfen Eady, M. R. Warrington and Duke, L. J.*) *EGAN IN RE KEANE HOAR.* (1918) 2 Ch. 350 (C. A.)

———**Bequest to—Gift for particular purpose—Particular purpose impossible—Cyprus not applicable—Failure of charitable bequest—Lapse into residue. See CYPRUS.** (1918) 1 Ch. 437.

**Company—Costs of motion to rectify register—Directors joined as respondents, if and when liable to pay.**

Directors of a Company are not proper parties to an originating motion under S. 32 of the Companies Act for rectification of the register even though their unjustifiable acts at board meetings may have led to the application. Unless they are joined at their own request, the Court has no power to make a punitive order against them for payment of the costs of the motion. (*Peterson, J.*) *IN RE KEITH, FROWSE & CO. LTD.* (1918) 1 Ch. 487.

———**Director—Payment of dividends out of capital—Loss on revenue account—Appreciation of capital assets—Liability to recon—Fixed capital.**

Neither the Companies Act. 1908, nor the general law, prohibits a company from distributing the clear net profit of its trading in any year unless its paid-up capital is intact or until it has first made good all trading losses incurred in previous years.

There is no law forbidding a company from setting off an appreciation in the value of its capital assets as ascertained by a *bona fide* valuation, against losses on revenue account.

The fixed capital of a company is what the company retains in the shape of assets upon which the subscribed capital has been expended and which assets either themselves produce income independent of any further action of

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the company, or, being retained by the company are made use of to produce income or gain profits. The circulating capital of a company is a portion of the subscribed capital intended to be used by being temporarily parted with and circulated in business in the form of using goods or other assets which, or the proceeds of which, are intended to return to the company with an increment and to be used again and again and always return with accretions. When circulating capital is expended in buying goods which are sold at a profit or in buying raw materials from which goods are manufactured and sold at a profit, the amount so expended must be charged against or deducted from receipts, before the amount of any profit can be considered. (*Swinfen Eady, Warrington and Scrutton, L. J.*) *AMM-LIA SODA CO. v. CHAMBERLAIN.* (1918) 1 Ch. 266.

———**Memorandum of association—Objects of.**

The memorandum of association of a company must "state the objects" which means that it must specify the objects, that it must delimit and identify the objects in such plain and unambiguous manner as that the reader can identify the field of industry within which the corporate activities are to be confined. The purpose is two-fold. The first is that the intending incorporator who contemplates the investment of his capital shall know within what field he is to be put at risk. The second is that any one who shall deal with the company shall know without reasonable doubt whether the contractual relation into which he contemplates entering with the company is one relating to a matter within its corporate objects. (*Lords Finlay, Parker of Woodington and Wrenbury.*) *COTMAN v. BROUGHAM.* (1918) A. C. 514.

———**Winding up—Private Company—Deadlock—Articles of association providing for winding up in case of non-purchase of shares by other members—Actions instituted by shareholders, pendency of—"Just and equitable"—Companies Act (1908) S. 123 (5).**

A private Company consisted of three shareholders only and they being the original allottees held all the issued shares, which were fully paid up, in equal proportions. One of them resident in America and the remaining two residing in England were the present directors of the Company. Owing to quarrels between them the affairs of the Company were now at a deadlock and several actions between the shareholders and the Company were pending. Under the articles of the association a shareholder desirous of withdrawing from the Company should offer his shares to the others and if neither of them purchased the same the shareholder desirous of withdrawing should be entitled to have the Company wound up. One of the directors offered his shares to the

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other two shareholders neither of whom purchased them. He thereupon presented a petition for the compulsory winding up of the Company and it was found that the Company had sufficient assets to realize a considerable sum for the shareholders in a winding up. Held that under the circumstances it was just and equitable that the Company should be wound up by the Court. (*Neville, J.*) **AMERICAN PIONEER LEATHER COMPANY, IN RE.**

(1918) 1 Ch. 556.

**Contract—Assignment—Benefit of contract assignable—Rule—Exception—Hire purchase agreement—Rights under, transfer of, not a repudiation of the contract.**

The benefit of a contract is assignable in equity and may be enforced by the assignee except in cases of executory contracts where the personal skill or the personal confidence reposed in a party is involved in the due performance of the contract on his part. It is open to a person to assign the benefit of a hire purchase agreement and it is not competent to the owner to treat the assignment as a repudiation of the hire purchase agreement. (*Swinfen Eady, M. R. Warrington and Duke, J.J.*) **WHITELEY v. HILT.** (1918) 2 K. B. 803 C. A.

**—Dissolution of, by intervening circumstances—Time charterparty—Requisition of ship by Admiralty—Frustration of adventure.**

When people enter into a contract which is dependent for its performance on the continued possibility of a specific thing and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is *prima facie* regarded as dissolved. The contingency which has arisen is treated, in the absence of a contrary intention made plain, as being one about which no bargain was made. The principle applies equally whether performance of the contract has not commenced or has in part taken place. On this principle the doctrine of commercial frustration is applicable to a time charterparty. Whether in a given case the doctrine of frustration of adventure is to be applied to a particular time charterparty depends on the circumstances. The main consideration is the probable length of the total deprivation of the vessel as compared with the unexpired duration of the charterparty. (*Pickford, L. J.*) **COUNTESS OF WARWICK STEAMSHIP COMPANY v. LE NICKEL SOCIETE ANONYME.**

(1918) 1 K. B. 372 (C. A.)

**—Dissolution of war—Trading with the enemy—Enemy firm—Branch, meaning of—Trading with the enemy proclamation, No 2 cl. 6—Contract not revived by winding up order.**

A Hamburg firm before the war accepted through its London office, orders from British customers for delivery of iron and steel goods at future dates, which in the event, were after

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the outbreak of war between England and Germany. Held that the outbreak of war effected a dissolution of the contract on both sides and it was not revived by the appointment of a controller for winding up the firm's business under the Trading with the Enemy Amendment Act, 1916. The business in England was not a branch of the firm within the meaning of the Trading with the Enemy proclamation No. 2 cl. 6. (*Younger, J.*) **IN RE COVINTHO CARO & CO.**

(1918) 2 Ch. 384.

**—Employment—Contract by Company to employ agent for fixed time—Consideration given by agent—Voluntary liquidation—Determination of agency.**

Under an agreement of the year 1915 made between the plaintiff and a limited Company carrying on business in Lancashire, the plaintiff subscribed for 1,000 shares of the Company and agreed to introduce certain new classes of goods to be manufactured by them and the Company appointed plaintiff their sole agent in the United Kingdom and the Colonies for the sale of those goods for the term of seven years (if the agent should so long live) and thereafter until the agreement should be determined by 6 months' notice on either side. The agent was to use his best endeavours to obtain orders for the Company's goods at current prices and to communicate them to the Company who were to carry out such orders as were accepted without delay. The agent was not to definitely accept orders for the Company, but only subject to confirmation and acceptance by the Company, such confirmation or acceptance not to be unreasonably withheld. The Company were to pay the agent a commission upon the invoiced prices of all goods delivered by the Company and duly paid for by the respective purchasers. A few months afterwards the Company required fresh capital, and they applied to the plff. for assistance which he was not able to render. The Company then required the plff. to give up the agency for the Manchester District, on the ground that if he would "stand down" so far as that district was concerned, the Company would find the necessary capital. The plff. refused to do so and the Company being insolvent, passed resolutions in December 1917 for voluntary winding up and ceased to do business through plff. and eventually sold their business. Plff. sued for damages for breach of the agreement to employ him. Held, that the agreement was to employ plff. as agent for 7 years; that a term could not be implied to the effect that the Company could terminate the agency at any time by ceasing to carry on their business and that the voluntary winding up was a repudiation of the agreement by the Company who were therefore liable in damages (*Pickford-Banks and Scrutton, L. J.J.*) **REIGATE v. UNION MANUFACTURING CO.**

(1918) 1 K. B. 592.

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—Enforceability of—Non-compliance with statutory formalities—Effect of—Name—Business name—Omission to register—Right to enforce business contract—Registration of Business Names Act (1916) S. 8 Sub-S. (1).

The goods in question which were seized under an execution against one Rogers who had been carrying on business as a customer, were claimed by Fantini as her property. By a contract of 9th January 1917, Rogers sold his business and stock in trade to Fantini who took possession on January 1917 and paid the balance of the purchase money on the 23rd. On 31st January Daniel obtained judgment against Rogers and executed his decree in June by attaching the goods in the possession of Fantini. Fantini claimed the goods as hers while the judgment-creditor contended that the claimant was precluded from enforcing any right to the goods on account of her omission to register the transfer of the business under S. 8 Sub-S. (1) of the Registration of Business Names Act.

Held, that S. 8 Sub-S. (1) did not preclude the claimant from enforcing her right to the goods, for her right at the time of the claim rested on her common law title by possession and did not arise under the assignment.

Semle, S. 8 Sub-S. (1) is limited to prohibiting the enforcement of contracts coming within its scope, as between the immediate parties thereto. (*Pickford and Scrutton, L. J.*) DANIEL v. ROGERS. (1918) 2 K. B. 228.

—Illegality—Contract for sale of goods by instalments—Outbreak of war during currency of contract—Suspensory clause in contract—Effect of—Public policy—Abrogation and not mere suspension.

Held, following *Eriel Bieber & Co. v. Rio Tinto Company* and affirming the judgment of Mc-Cardie, J., in (1918) 1 K. B. 331 that the contracts in question were dissolved and not merely suspended by the outbreak of the war. (*Mc-Cardie, J.*) NAYLOR BENZON AND CO. LTD., v. KRAINSCHKE INDUSTRIE GESELLSCHAFT. (1918) 2 K. B. 486.

—Illegality—Public policy—Commission payable for obtaining benefit from Government—Illegality not pleaded—Duty of Court.

A contract may be against public policy either from the nature of the acts to be performed or from the nature of the consideration. It is contrary to public policy that a person should be hired for any or valuable consideration when he has access to a person of influence to use his position and interest to procure a benefit from the Government. When it appears on the face of a contract that it is unlawful, it is the duty of the Judge himself to take the objection and that, too whether the parties themselves take or waive it. (*Shearman, J.*) MONTEFIORE v. MENDAY MOTOR COMPONENTS COMPANY LTD. (1918) 2 K. B. 241.

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—Implied term—Duty of Court in the construction of a contract.

In construing a contract the first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract, that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties "what will happen in such a case" they would both have replied "of course so and so will happen we did not trouble to say that because it is too clear." Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed. (*Scrutton, L. J.*) REEGATE v. UNION MANUFACTURING CO. (1918) 1 K. E. 592, 605.

—Impossibility of performance—Sale of goods—Outbreak of war—Discharge of contract.

Under a contract for sale of timber containing no war or force majeure or other suspensory provisions, debts agreed to supply pliffs. with a certain quantity of Finland timber free on rail at Hull. Before the war the regular practice was to load the timber on vessels at ports in Finland for direct sea carriage to English ports and not to send it by rail across Scandinavia and ship it from a Scandinavia port to England. When war broke out Germans declared timber to be contraband, but even before that declaration, sailings from Finnish ports had entirely ceased, and the ordinary and normal method of supplying Finland timber came to an end. It was not possible to get Finland timber to England after the outbreak of the war, through the usual route. In an action by the pliffs. for damages for breach of contract the debts. contended that the contract was at an end because it was in the contemplation of both parties that the debts. should be able to supply the timber according to the ordinary method of supplying it in the trade, and that when that became impossible both parties were discharged from their obligations.

Held, allowing the pliffs. claim that no condition as to the continuance of the usual facilities for transport, could be imported into the contract between the parties. The occurrence preventing the performance of the contract was not of such a character and extent so sweeping that the foundation of what the parties were deemed to have had in contemplation had disappeared and the contract itself had vanished with that foundation. (1916) 2 A. C. 397, 406. (1916) 1 A. C. 486, 512. Ref. (*Pickford Bankes and Warrington, L. JJ.*) BLACKBURN BOBBIN CO. LD. v. T. W. ALLAN AND SONS LD. (1918) 2 K. B. 467.

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—*Impossibility of performance—Outbreak of war—Effect of on contracts for sale of goods—Discharge.*

The law upon the question as to when a change of circumstances (not due to the default of either party) will cause a dissolution of the contract is in process of evolution. The original rule of English Law was clear in its insistence that where a party by his own contract creates a duty or charge upon himself he is bound to make it good notwithstanding any accident by inevitable necessity because he might have provided against it by his contract. There are some exceptions to the rules which have grown up. First, where British legislation or Govt. intervention has removed the specific subject-matter of the contract from the scope of private obligation; secondly, where the actual and specific subject-matter of the contract has ceased to exist, apart from British legislation or administrative interference; thirdly, where a specific set of facts directly affecting a specific subject-matter has ceased to exist; fourthly, where a specific set of facts collaterally only affecting a specific subject-matter, but yet constituting the basis of contract, has ceased to exist; and fifthly, where British administrative intervention has so directly operated upon the fulfilment of a contract for a specific work as to transform the contemplated conditions of performance.

In the absence of any question as to trading with the enemy or of any administrative intervention by the British Government a bare and unqualified contract for the sale of unascertained goods will not be dissolved, even though there has been so grave and unforeseen a change of circumstances, as to render it impossible for the vendor to fulfil his bargain. Authorities on the question reviewed. (*McCordie, J.*) **BLACKBURN BOBBIN COMPANY v. J. W. ALLEN AND-SONS.**

(1918) 1 K. B. 540.

—*Restraint of trade—Trade combination to control prices and restrict output—Sale to a limited market on terms to be fixed by combination—No limit of time fixed—Reasonableness of contract—Money for goods sold paid into pool—Right to share of pool—Account stated—Action for recovery of share.*

Pliffs. and defts. were members of an association formed for the regulation of prices and the taking of action for the protection of the members concerned in a particular industry. Part of the scheme consisted of a compensation to those members whose turnover fell below a fixed percentage of the trade by payment out of a pool or fund created by payments into it by the members whose turnover exceeded a fixed percentage. Pliffs. claimed a sum of 958£ as due to them, on accounts stated, in respect of such compensation. Held on the facts, that the agreement was unreasonable in the interests of the contracting parties and that was enough to invalidate it.

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The invalidity of the agreement could be pleaded by the defendants though the restrictions on which such invalidity rests affected only the plaintiffs who raised no such objection.

A contract in restraint of trade is sometimes spoken of, as being an illegal contract, sometimes as a void contract sometimes and more properly, a contract, which the law will not enforce.

*Semble.* In a case like the present where the consideration has been wholly executed by the party setting up the account stated, the other party will not be allowed to dispute the original debt on the ground merely that the contract under which the debt was incurred was an unreasonable restraint of the trade of the party suing on the account stated. (*Pickford, Bankes, and Scrutton, L. JJ.*) **JOSEPH EVANS AND CO. v. HETHCOTE.** (1918) 1 K. B. 418.

—*Void contract legally unenforceable—Money paid under—Recovery of—Account stated, claims on. See CONTRACT, RESTRAINT OF TRADE.* (1918) 1 K. B. 418.

—*Void for uncertainty—No specific performance or damages.*

A promise must be reasonably certain and if the parties have expressed their agreement in such ambiguous and imperfect terms as to make it impossible to ascertain any definite meaning, then the agreement is necessarily void. The court cannot either by specific performance or the award of damages enforce a contract which it is unable to interpret. (*McCordie, J.*) **COUNTY HOTEL AND WINE COMPANY v. LONDON AND NORTH-WESTERN RAILWAY COMPANY.** (1918) 2 K. B. 251.

**Costs—Company—Motion to rectify register—Directors joined as respondents not liable for costs. See COMPANY.** (1918) 1 Ch. 487.

—*Taxation—Instruction for brief—Attendance on counsel—Lump sum charged—No distinction between sums chargeable or not chargeable—Taxing master, duty of—Payment to foreign lawyers, if reasonable.*

Though it is well settled that the court will not interfere with the exercise of a discretion by a taxing Master except where he has acted on a wrong principle, yet if the Court is satisfied that the bill brought in for taxation does not contain the necessary materials to enable him reasonably to exercise his discretion it will direct the bill to be amended and the taxing Master to review his taxation of the bill so amended.

Under the heading of "Instructions for brief" the bill of costs should state the length of the documents to be perused (when perusal has not been previously charged) the names of the witnesses who have been attended, the places to which journeys have been made with

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the time occupied in each, and the amount of travelling expenses.

Attendances by a solicitor on counsel at conferences in respect of which no fees are charged for cannot be charged.

A party claiming to be allowed the amounts paid to foreign lawyers must show that the amount is fair and reasonable and ought to be allowed. (*Sankey, J.*) *HENMAN v. BERLINER*. (1918) 2 K. B. 236

—Taxation—Solicitor-trustee—Action to set aside settlement—Charges of undue influence against trustee—Dismissal of action—Fees—Two counsel—Supreme Court Rules, O. 45, Rr. 27, 29 and 38.

In an action to set aside a settlement of which the debt, a solicitor, was the trustee, several unfounded charges of misconduct were alleged in the statement of claim against the debt. The action was eventually dismissed. *Held*, that the debt, was entitled to the costs of briefing two counsel in his defence, although the plff. had abstained from claiming any relief against him personally, and has professed in the pleadings to sue him personally. (1917) 2 Ch. 285 affirmed. (*Swinfen Esq. v. Warrington and Scrutton, L. J.J.*) *BRUTTY v. EDMUNDSON*. (1918) 1 Ch. 112.

—Trustee—Unsuccessful action by—Trust estate when liable. See *TRUSTEE*, COSTS. (1913) 1 Ch. 24.

**Criminal law**—Charge—Murder—Joinder of, with other charges, improper.

An indictment for murder ought not to contain counts for other offences, such as robbery with violence. (*Lawrence, J.*) *REX v. JONES*. (1913) 1 K. B. 416.

—Detention of army stores—Army Act (1881) S. 156 (1).

S. 156 Sub-S. (1) of the Army Act makes it an offence for a person to buy, exchange, or take in pawn goods of the description specified therein from a soldier or to detain such goods. *Held* that the word 'detain' as used in the section merely meant the adverse with holding of possession of the goods from the Government and does not bear the technical meaning applied to it in an action of detainee and that it was not necessary for the prosecution to prove that there has been a demand for the goods and a refusal to give them up. (*Darling, Avory, and Shearman, J.J.*) *PULLEN v. CARLTON*. (1913) 1 K. B. 207.

—Mens-rea—Dentist—Unregistered person—"Name or title of dentist"—"Take or use"—Statement made as a witness—Dentists Act (1878) S. 3.

Where an artificial teeth specialist who was not a registered dentist, while giving evidence

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in court, stated in answer to a question put to him by the Judge that he was a dentist and he was charged in respect of this statement for unlawfully "taking or using the name or title of dentist" contrary to S. 3 of the Dentists Act.

*Held*, by the majority of the court, that there was evidence on which the court could find that the accused had committed the offence charged.

*Per Shearman, J.* In order that a person may be convicted of an offence under S. 3 of the Dentists Act there must be proof of *mens rea*, of a deliberate intention to do an act forbidden by the statute. The Act was intended to prohibit an unqualified person who is practising or attempting to practise dentistry from describing himself as being a qualified dentist. A person who, when merely giving a description of himself in the witness-box, states that he is a dentist is not guilty of an offence under S. 3. (1887) A. C. 383 *ref.* (*Shearman, J.*) *BLAIN v. KING*. (1918) 2 K. B. 30.

—Prostitution—Procuration—"Common prostitute"—Acts of lawfulness, sufficiency of.

The term "common prostitute" in S. (2) of the Criminal Law Amendment Act, 1885, includes a woman who offers her body commonly for acts of lawfulness for payment although there is no act or offer of an act, of ordinary sexual connection. (*Darling, Lord Coleridge and Salter, J.J.*) *THE KING v. DE MUNCK*. (1913) 1 K. B. 635.

—Public health—Unsound food—Exposure for sale—Meaning of—Public Health Act, (1875) Ss. 116 and 117—Fish sent in fulfilment of agreement to sell.

S. 117 of the Public Health Act empowers a justice to order the destruction of unsound meat, etc., which having been exposed for sale and intended for the food of man, has been seized by the sanitary authority; and the person to whom the same belonged at the time of exposure for sale is liable to a penalty. The respondent a fish merchant at Hull, was asked by letter by a hospital commandant at Eastbourne to supply herrings for sale to the hospital. The respondent thereupon put upon railway at Hull for delivery at Eastbourne some herrings in boxes. It was found that the herrings were not unfit for human food when despatched at Hull, but that they were unfit when delivered at Eastbourne. *Held*, that the sale was subject to the implied condition that the herrings should be fit for human food, not only when they were put upon the railway at Hull, but also when in the ordinary course of transit they arrived at Eastbourne and the boxes were opened and examined by the intending purchaser within a reasonable time having regard to the fact that they contained fish; that there was an "exposure for sale" in

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the case because there was an exposure for the purpose of completing the agreement previously entered into. (*Darling, Avery and Atkin, JJ.*) **OLLETT v. JORDAN.** (1913) 2 K. E. 41

—Receiving stolen goods—Guilty knowledge—Evidence of—Possession of stolen goods and statement of prisoner with regard thereto—Admissibility of—*Larceny Act, S. 43 Sub-S. (1).*

Under S. 43, sub-S (1) of the Larceny Act the evidence which may be given by the prosecution as to the finding of stolen goods in the possession of the prisoner is not limited to the fact of its having been so found, but includes evidence as to the circumstances in which it was found and as to statements made at the time by the prisoner in explanation of the property being found in his possession. (*Darling, J.*) **THE KING v. GEORGE SMITH.** (1918) 2 K. B. 451.

—Vagrancy—Pretending or professing to tell fortune, etc.—Proof of intention to deceive, essential—*Vagrancy Act, 1824 (5 Geo. 4, C. 83), S. 4.*

Under S. 4 of the Vagrancy Act, 1824, every person pretending or professing to tell fortunes to deceive and impose on any of His Majesty's subjects shall be deemed to be a rogue and vagabond and be liable to penalties. *Held*, that to constitute an offence under this section, proof of an intention to deceive is essential and evidence to show that the accused honestly believed in the possession of some power which enabled her to tell the thoughts of person, etc., is relevant and admissible. (*Darling, Sankey and Avery, JJ.*) **DAVIS v. CURRY.** (1918) 1 K. B. 109

**Criminal Trial**—Trial by jury—Adjournment of trial—Conversation between jurymen and witness outside Court—Effect on trial.

On the trial of a person for an offence, before the summoning by up the judge, a jurymen conversed with two or three witnesses for the prosecution outside court, in a restaurant. The judge presiding at the trial being apprised of this fact questioned the jurymen who stated that the conversation had reference solely to the duration of the case and the length of a previous trial at which the jury had disagreed. Another jurymen had conversed with the accused's landlady who was also a witness for the prosecution but the nature of the conversation was such that it would tend to remove any bad impression the jurymen might have formed of the prisoner. The judge accepted the jurymen's explanation and in accordance with the verdict of the jury convicted the accused. *Held*, on appeal that nothing had taken place to prejudice the fair trial of the prisoner and that the conviction must be upheld (1915) 1 K.B. 467 dist. (*Darling, Avery and Lush, JJ.*) **THE KING v. TWISS.** (1918) 2 K. B. 383.

## DAMAGES.

**Crown—Relief against—Remedy by action or petition of right—Contract by servant on behalf of the Crown—Declaratory judgment.**

The general principle is that a servant of the Crown who contracts on behalf of the Crown cannot be sued on the contract. An action can no more be brought against a servant of the Crown for a declaration as to what a contract means than it can be brought for a substantive remedy on the contract itself. (*Swinfen Eady M. R. Scrutton and Duke, L. JJ.*) **HOSIEN BROTHERS v. DEBY (EARL.)** (1918) 2 K. B. 671 C. A.

**Custom—Reasonableness of—Custom that express terms of a contract are to be disregarded—Custom bad in law.**

A custom excluding the power of the parties to contract out of the custom cannot exist in law. A custom must be reasonable and it is absolutely unreasonable to say that parties who sign their names to a document containing the terms of the contract between them should be permitted to say that a clause in that document, the terms of which they have actually amended, does not form part of the contract because there is a custom by which it can be disregarded. Such a custom is unreasonable. (*Pickford, Bankes and Scrutton. L. JJ.*) **LEOPALD WALFORD (LONDON) v. LES AFFRE TEWS REUNIS SOCIETE ANONYME.** (1918) 2 K. B. 493.

**Cypres—Applicability of doctrine—Will—Charitable bequest for particular purpose—Impossibility of—Failure of Charitable bequest—Effect of.**

There are two classes of cases, first, where in form, the gift is given for a particular charitable purpose, but it is possible, to say that, notwithstanding the form of the gift, the paramount intention of the testator is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect; the second class of cases is where, on the true construction of the will, no such paramount general intention can be interred, and where the gift, being in form a particular gift—a gift for a particular purpose—and it being impossible to carry out that particular purpose, the whole gift is held to fail and to lapse into the residue. (1913) 1 Ch 320 referred to. (*Neville, J.*) **PACKE, IN RE; SANDERS v. ATTORNEY GENERAL.** (1918) 1 Ch. 437.

**Damages—Conspiracy to slander—Gist of the action—Claims against individual defendants—Effect of.**

Damage is the gist of the cause of action for a conspiracy and where a plaintiff is given damages against several defendants individually, he

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is not at the same time entitled to damages against them all jointly for a conspiracy to slander. (*Pickford, Bankes, L. J. and Neville, J.*) **THOMAS v. MOORE.**

(1918) 1 K. B. 555.

—Contract for employment by company for fixed term—Company voluntarily winding up before expiry of period—Liability of Company See **CONTRACT**

(1918) 1 K. B. 592.

—Measure of—Ship—Collision—Mode of calculating damages—Prospective loss.

There is no special measure of damages applicable to a ship different from the measure of damages applicable to any other chattel. The nature of the thing damaged may give rise to more difficult questions in the assessment of damages. A ship is a thing by the use of which money may be ordinarily earned, and the only question in a case of collision, is, what is the use which the ship owner would, but for the accident, have had of his ship and what (excluding the element of uncertain and speculative and special profits) the shipowner, but for the accident, would have earned by the use of her. (1917) P. 191 : 13 P. D. 191, 201. (*Pickford, Bankes and Scrutton, L. J.*) **THE KINGSWAY**

(1918) P. 344.

—Slander—Pliff, holding on office of profit or honour—Special damage, proof of, not essential.

Where the pliffs, in an action for damages for slander are proved to hold offices of profit or honour, and the slander imputes misconduct in office to each of them in his office, the action is maintainable without proof of special damage. An office of trust, though it is not an office of profit, is enough. (*Pickford Bankes, L. J. and Neville, J.*) **THOMAS v. MOORE**

(1918) 1 K. B. 555 (C. A.)

**Debtor and Creditor—Payment, mode of—Payment by post—Implied request.**

*Prima facie* it is the duty of the debtor to seek out his creditor and pay his debt at the creditor's house or place of business. But this duty may sometimes be varied by a creditor intimating to his debtor that he is prepared to receive payment through the post. There must be a request, either expressed or implied, but very little evidence beyond a course of dealing is evidence of an implied request. Even if there is an implied request to send by post, remittance of a large sum of £48 in treasury notes by post without registering the packet, is not a good payment if the contents of the packet are stolen in the course of transit. (*Bailache, J.*) **MITCHELL HENRY v. NORWICH UNION LIFE INSURANCE SOCIETY.**

(1918) 1 K. B. 118.

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—Payment—Mode of—Remittance by post—Implied request—Registered letter containing treasury notes.

A creditor sent a written notice to his debtor stating that a sum of £48 and odd, which would shortly become due to the former, should be paid at his office and asking the debtor "when remitting" to return the notice. The debtor sent to the creditor by registered post a packet containing £48 in Treasury notes and a postal order and stamps for 5 sh. 8d. The packet was stolen before it reached the creditor who never received the money. The debtor claimed a declaration, that he had paid the money due to the creditor. *Held*, that by the use of the word "remitting" the creditor had impliedly authorised the debtor to pay him by sending the money through the post in the ordinary way in which money was remitted by post, but that it was not usual to send so large a sum as £48 in treasury notes by post and that the debtor had failed therefore to prove that he had paid his debt to the creditor. (*Pickford and Warrington, L. J.*) **MITCHELL HENRY v. NORWICH UNION LIFE INSURANCE SOCIETY.**

(1918) 2 K. B. 67. O. A. from (1918) 1 K. B. 118.

**Discretionary Power—Statutory body—Exercise of power—Duty to enquire—Right of parties to be heard—Ex parte Order—Trinidad—Governor—Transfer of indentured immigrants—Immigration Ordinance, S. 203.**

Under S. 203 of the Immigration Ordinance of Trinidad the Governor has power, "on sufficient ground shown to his satisfaction" to transfer the indentures of immigrants from one employer to another. Such power cannot properly be exercised without inquiry; and except in exceptional circumstances such as an emergency, any person against whom a complaint is made must be given a fair opportunity to make any relevant statement, and to controvert any relevant statement made to his prejudice. Where however an *ex parte* order is made against an employer and subsequently on hearing the employer and his manager, the order is confirmed and put into operation after considering their explanation the discretion is properly exercised. (*Lord Parmoor.*) **VERTEUIL v. KNAGGS.** (1918) A. C. 557.

**Divorce—Costs of—Costs against co-respondent—Knowledge that respondent is married—Date of knowledge—Discretion of Court.**

The court has an absolute discretion as to costs. It is an established rule not to award costs in favour of a husband petitioning for a divorce against a co-respondent who had no knowledge that the respondent was a married woman. But it is too broad a statement of the rule to say that the co-respondent must have such knowledge at the time he first misconducted himself. In a case where adultery after knowledge is established the court is not precluded from awarding costs by the mere

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fact that the co-respondent has also committed adultery at a date before he had knowledge. In a case where the proof of such prior misconduct depended only on confession the court gave costs against the co-respondent. (*Hill, J.*) **NORRIS v. NORRIS AND SMITH.**

(1918) P. 129.

——— *Grant of relief, when petitioner is guilty of matrimonial offence—Discretion of court—Matrimonial causes Act (1857), S. 31*

It is the guiding principle of the court that they who seek matrimonial relief should themselves be free from matrimonial offence. This principle will be relaxed only in exceptional circumstances. The mere fact that a decree for divorce will be in the interests of the parties concerned, and will replace an immoral connection by lawful marriage is not enough to justify the grant of a decree for divorce when both parties are guilty of a long continued adultery. (*McCartie, J.*) **HINES v. HINES.**

(1918) P. 364.

**Easement—Prescriptive title to—Essentials of—Interference with natural right—Injunction.**

Consent or acquiescence of the owner of the servient tenement lies at the root of prescription and hence the acts of user, which go to prove it, must be *nec vi, nec clam, nec precario*: for a man cannot, as a general rule, be said to consent or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive. If the enjoyment has been secret, not surreptitious or actively concealed from, but unknown to and unsuspected by the servient owner, then it cannot be relied upon as the foundation of rights to his prejudice.

Before time can commence to run under the Prescription Act there must be an invasion of some legal right. Acts which are neither preventable nor actionable cannot be relied on to found an easement. In order, therefore, to measure the prescriptive period, it is necessary to fix the time when first a power to prevent or a right of action accrued to the person to whose prejudice the easement is alleged to exist.

A person whose rights are threatened or interfered with in such a way as to enable the aggressor to acquire a right by prescription, is entitled to an injunction restraining the other side from interference. (*Eve, J.*) **LIVERPOOL CORPORATION v. H. COG HILL AND SON.**

(1918) 1 Ch. 307.

**Election—Priority—Benefit of election if can be taken advantage of, by persons not parties to the transaction.**

The respondent, a Chinese resident of Chicago and his nephew residing at Hongkong had names which, in English, were rendered

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alike, but spelt differently in the Chinese language. By a deed signed and delivered by the nephew in 1909 land was conveyed to the name of the respondent but described as a resident of Hongkong. The nephew signed the deed with the respondent's name signed in Chinese and paid the consideration but with money supplied by the respondent. In 1913 the nephew, in fraud of the respondent, created an equitable mortgage of the land in favour of the appellants. In 1914 the respondent took from his nephew a conveyance of the legal estate subject to the appellant's mortgage, the nephew agreeing to pay the respondent the amount of the mortgage. Held that under the conveyance of 1909 the legal estate did not pass to the respondent, that the respondent by taking the conveyance of 1914 had elected not to keep alive against the appellants his prior equitable estate and that the appellants though not parties to the transaction could claim the benefit of it. (*Lord Parker.*) **FUNG PING SHAN v. TONG SHUN.**

(1918) A. C. 403.

——— **Will—Bequest—Conflict of laws—Effect of.**

If an English testator has by his will manifested an intention to dispose of foreign heritage away from the foreign heir, (heir under the foreign law) and has in fact, so far as words are concerned effectually so disposed of it, the English Court will hold that it is against conscience that that foreign heir, given—a legacy by the same will, and to that extent an object of mere bounty on the part of the testator—shall take and keep, under the protection of the law, the land by the will destined for another, without making to that other out of his English legacy, so far as it will go, compensation for his disappointment thus effectuating the testator's intentions. But in so doing, the English Court violates no foreign law: it leaves the law as it must, untouched. (*Younger, J.*) **OGILVIS IN RE. OGILVIE v. OGILVIE.**

(1918) 1 Ch. 492.

——— **Will—Failure of certain legacies—Other legacies increased in value thereby—Compensation.**

A volunteer under a will cannot take the benefit and at the same time wilfully defeat the expressed intentions of the testator. As between the devisees and the legatees claiming under the will, the disappointed legatees are entitled to sequester or to keep back from the other devisees or legatees the property so devised and bequeathed until compensation is made. Thence arises the doctrine of an equitable charge or right to realize out of the property the sum required to make the compensation. (*Neville, J.*) **MACARTNEY, In re: MACFARLANE v. MACARTNEY.**

(1918) 1 Ch. 300.

**Evidence—Admissibility of—Covenant by tenant to insure against loss by fire—Policy**

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*to be effected in named companies—Usual policy—Exception of war risks—Construction of covenant.*

A lessee under a lease of the year 1905 covenanted that he would insure and keep insured the demised premises against loss and damage by fire in the names of the lessor and lessee in the Imperial Insurance Co. or in some other responsible office in London or Westminster to be previously approved of in writing by the lessor. The premises were insured through the agency of the lessor with the Alliance Co., (with which the Imperial Insurance Co. had become incorporated) under a policy which excepted loss or damage occasioned by or happening through invasion "foreign enemy, military or usurped power. This policy was accepted by the lessor as sufficient till July 1916, when in consequence of German air raids, he required the lessee to insure the premises against loss and damage caused by enemy air craft in pursuance of the covenant. The lessee refused to do so where upon the lessor sued for possession alleging a breach of covenant.

*Held, by (Warrington and Scrutton, L. JJ.) Pickford, L. J. dissenting) that evidence was admissible to prove that the named company and other traffic offices in London and Westminster had never insured against craft risks and that their policies had always excepted the risks above mentioned, that the covenant was to effect only such a policy as was the usual policy of the companies in question at the date if the lease or such policy as might from time to time be usual during the currency of the lease and that consequently there had been no breach of that covenant by the lessee. (Pickford, Warrington and Scrutton, L. JJ.) UPJOHN v. HITCHENS UPJOHN (1918) 2 K. B. 43.*

*Admissibility of -- Written statement by accused voluntarily made—Prisoner detained for enquiries.*

A statement by an accused person is not admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained for him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The question whether a person has been duly cautioned before making a statement is a circumstance to be taken into account by the Judge in exercising his discretion whether to exclude the statement, but the absence of a caution does not, as a matter of law make this statement inadmissible. (Lawrence, J.) REX v. VOISIN. (1918) 1 K. B. 531.

*Contract -- Construction -- Implied term, when imposed. See CONTRACT. (1918) 1 K. B. 592.*

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*Contract in writing—Evidence to show that contracting parties were acting as agents of undisclosed principals, admissibility of.*

Where an agreement is made with an agent in his own name, it is competent to show that one or both of the contracting parties were acting as agent for other persons and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principal, and this whether the agreement be or be not required to be in writing by the Statute of Frauds and that evidence in no way contradicts the written instrument (*Swinfen Eady and Warrington, L. JJ.*) REDERI AKTIENBOLO GET FRANS ATLANTIC v. FRAD DUGHORN. (1913) 1 K. B. 394.

*Criminal trial—Charge of gross indecency—Evidence of possession of indecent photographs—Admissibility of.*

On the trial of a man on a charge of committing acts of gross indecency with a boy, the accused denied his guilt and the prosecution offered evidence to prove that certain photographs of nude boys were found in the lodgings of the accused. On objection being taken to its admissibility. *Held* that evidence that photographs of nude boys were found in the lodging of the accused, was admissible for the purpose of showing what the practice of the prisoner was, just as the possession of the tools of a burglar or the apparatus of an abortionist is evidence as showing the possession of appliances and implements used by persons carrying on that particular kind of business in crime. (1918) A. C. 221 Ref. (*Dorling, Ivory and Lush, JJ.*) REX v. TWISS. (1918) 2 K. B. 853.

*Depositions taken in action to perpetuate testimony—Admissibility of, in subsequent proceedings—Limits of.*

An order for the publication of depositions in an action to perpetuate testimony should not be made unless it is proved to the satisfaction of the court that the witnesses are either dead or so ill or otherwise incapacitated as to be unable to attend and give evidence in open court at the trial of the issue in the subsequent action with reference to which their evidence is desired. 19 Ves. 670, 674; 20 Feav. 402, 404, foll. (*Swinfen Eady, Warrington and Scrutton, L. JJ.*) EERESFORD v. ATTORNEY GENERAL. (1913) P. 33.

*Entry in Births and Deaths Register—Prima facie correct—Births and Deaths Registration Acts, 1836 and 1874.*

An entry in a register of births, deaths and marriages is by statute *prima facie*, but not conclusive evidence of all the facts required by statute to be entered therein. Therefore, when a husband has proved the impossibility

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of access to his wife for a certain period, an entry signed by the wife of the birth of a child during that period is *prima facie* evidence of the date as well as fact of the birth, and incidentally, of the wife's misconduct. The court may, however, require corroboration. (*McCardie, J.*) **BRIERLEY v. BRIERLEY AND WILLIAMS.** (1918) 1 K. B. 257.

—Expert testimony—Life—Insurance policy—Non disclosure of material fact—Admissibility of evidence of medical men. See **INSURANCE, LIFE.** (1918) 1 K. B. 632.

—Identity, proof of—Charge of indecency—Plea of alibi—Evidence of possession of powder puffs and indecent photographs—Admissibility.

The accused who was charged with acts of gross indecency with boys pleaded an alibi and gave evidence in support thereof. It was proved that the man who committed the offence made an appointment to meet the boys 8 days later at the time and place where the offence was committed and that the accused met the boys at the appointed time and place and gave them money. The prosecution tendered evidence that on the occasion when the accused was arrested the appellant was carrying powder puffs and had indecent photographs of boys in his rooms.

*Held*, that in the circumstances of the case, the evidence was admissible on the issue of identity. (*Lords Finlay, L. C. Dunedin, Atkinson, Parker, Sumner and Parmoor*) **FRIMPERSON v. KING.** (1918) A. C. 221.

**Executor—Retainer, right of—Legacy of stocks to debtor.**

A testatrix by her will bequeathed sums of colonial stocks to H. who had borrowed £500 from her and had not repaid it. The whole debt was statute barred. *Held*, that the executor of the will had no right to retain the amount of debt out of the stocks.

The right of an executor where a legacy has been given to a person owing money to the testator is properly a right of retainer. (*Sargent, J.*) *In re SAVAGE*: **CULL v. HOWARD.** (1918) 2 Ch 146

—Retainer—Right of—Principal under-lying—Testator surety for residuary legatee for a limited sum—Principal creditor not fully paid—Executor's payment to, to be brought into hotchpot by assignee.

A person who owes an estate money, that is to say, who is bound to increase the general mass of the estate by a contribution of his own cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it. Nothing in truth is retained by the representative of the estate nothing is in strict language set off;

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but the contributor is paid by holding in his own hand a part of the mass which, if the mass were completed, he would receive back. Where the executors as sureties were compelled to pay the sum of £313, the full amount of a continuing guarantee given by the testator on behalf of a residuary legatee who became a bankrupt and whose principal creditors valued their security and proved for the whole balance of their overdraft on which they received 10 sh. in the pound. *Held*, that the £313 must be brought into the hotchpot by the legatee. (*Swinfen Eady, Warrington and Scrutton, L. JJ.*) **MELTON, In re MILK, v. TOWERS.** (1918) 1 Ch. 37.

**Foreign law—Proof of—Presumption—Public policy—Question of to be determined with reference to English law only.**

Until the contrary be proved, the general law of a foreign State is presumed to be the same as the law of this country. (1918) A. C. 157 Ref.

The question whether a contract entered into by a British subject with a German company becomes void as being against public policy on the outbreak of war between the two countries is to be determined in an English Court with reference only to the English Law. (*Lords Dunedin, Atkinson, Parker, and Sumner.*) **DYNAMIT ACTION GESELLSCHAFT v. RIO TINTO COMPANY.** (1918) A. C. 292.

**Grant—Construction—Grant of land adjoining highway or river—Right of grantee to half the adjacent land.**

Where there is a conveyance of land bounded by a highway or by a river then half the bed of the river or half of the road passes to the grantee, unless there is enough in the circumstances or in the expressions of the instrument to show that that it is not the intention of the parties. (*Warrington, L. J. and Scrutton, J.*) **THAMES CONSERVATORS v. KENT.** (1918) 2 K. B. 272.

**Habeas Corpus—Alien—Deportation—Order for arrest and detention—Duty of executive to consider each individual case—Power of Court to go behind order**

An order for the arrest and detention of an alien against whom a deportation order has been made must be made by the Secretary of State himself in each individual case.

*Semble.* The Court can go behind an order for arrest which is valid on its face, as for instance, if it is a mere sham not made bona fide. (*Pickford, Warrington and Scrutton, L. JJ.*) **REX v. CHISWICK POLICE STATION SUPERINTENDENT SACKSTEDER EX PARTE.** (1918) 1 K. B. 578.

**Hire Purchase Agreement—Piano—Option to purchase—Sale by hiree during currency of**

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*the term of hire—Repudiation of agreement—Right of owner to value of piano.*

Plffs. let a piano on the terms of a hire-purchase agreement whereby the hirer agreed that she would pay a quarterly sum of £2 so long as she saw fit to continue the hire and would not remove the piano without the consent of the plffs. and that in case of breach of the agreement the plffs. might retake possession and the plaintiffs agreed that the hirer might at any time terminate the agreement by returning the piano to the plffs. that she might become the owner of it by punctually paying the said quarterly sums until the full sum of £82 7 sh. should be paid but that until such full sum was paid she should be a bailee only. The hirer paid several of the instalments, but before they were fully paid sold the piano to the defendant. In an action by the plffs to recover the piano or its full value, *held*, that the deft. had acquired no interest in the piano for the hirer by wrongfully selling it had *ipso facto* repudiated the agreement and therefore had no interest in it to convey; and that the measure of damages was consequently the full value of the piano and not merely the amount of the unpaid instalments. (*Salter, J.*) **WHITELEY v. HILT.** (1918) 2 K. B. 115.

*Husband and Wife—Wearing apparel—Duty of husband to provide—Agreement that all wearing apparel provided for the wife shall be the property of the husband—Validity of.*

The obligation of a husband to provide clothes for his wife can be performed by his giving her the clothes or by lending them to her. The fact that there was attached to the loan a right in the husband to repossess himself of the clothes as and when he pleased does not affect the obligation. An execution creditor of the wife is not entitled to proceed against clothes possessed by the wife on the conditions aforesaid since they are the absolute property of the husband (1917) 2 K. B. 636 appl. (*Pickford and Bankes, L. JJ. and Sargant, J.*) **RONDEAW, LE GRAND & CO. v. MARKS.** (1918) 1 K. B. 75 (C. A.)

*Implied Contract—Question, when one of law—Terms when to be implied.*

Terms are to be implied in Contracts, not because they are reasonable, but because they are necessarily involved in the contractual relation, so that the parties must have intended them, and have only failed to express them because they are too obvious to need expression. Unless there are undisputed facts which can only admit of one implication the question of implied contract in such a case should be left to the jury. *The Moorcock*, 14 P. D. 67 (*Scrutton, L. J.*)

**GUARANTY TRUST COMPANY OF NEW YORK v. HANNAY AND CO.** (1918) 2 K. B. 623, 664.

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*Income Tax—Liability to—British trustees of foreign beneficiary—Dividends on shares remitted to beneficiary abroad directly.*

British trustees resident in the United Kingdom holding shares in a foreign company on behalf of a foreign subject domiciled abroad are not chargeable with income tax in England in respect of dividends on those shares not remitted to England but paid direct to the beneficiary abroad. (*Scrutton, J.*) **WILLIAMS v. SINGER.** (1913) 2 K. B. 749.

*Liability to pay—Deduction—Annual value of business premises situated abroad—Income Tax Act, 1912 (5 and 6 Vic. C. 35), S. 109.*

A firm of merchants carrying on business in London, Singapore and Penang claimed to deduct an expense in arriving at the amounts of their gains or profits assessable to income tax under Sch. D the annual value of the premises owned and occupied by them at Singapore and Penang for the purposes of their business. *Held*, that it was a proper deduction notwithstanding the fact that the premises being situated abroad were not assessable to income tax under Sch. D. (*Swinfen Eady Warrington and Scrutton, L. JJ.*) **STEVENS v. BOASTED AND CO.** (1918) 1 K. B. 382.

*Injunction—Compromise of disputed claim—Alleged forgery—Action settled on terms that agreement alleged to be forged was to be destroyed—Affidavits taken off file—Subsequent user of copies of alleged forgery and affidavit—Implied condition.*

In an action brought in 1916 T. C. & Co. claimed an injunction to restrain the present plff. who had been a clerk in their employ from committing an alleged breach of a restrictive clause in his agreement of service with them. The agreement of service contained an alteration which the firm alleged and the clerk denied was a forgery. The action was settled between the parties on terms embodied in an order of the Court. The order provided that the agreement of service should be destroyed and that certain affidavits should be taken off the file, but contained no direction as to the destruction of copies of the affidavits or of photographs of the alleged forgery which had been taken by the parties. In 1918 the present plff. applied for admission as a solicitor and T. C. and Co. lodged an objection to his admission and exhibited a photograph of the alleged forgery and copies of the affidavits that had been taken of the file. In an action by the plff. for an injunction to restrain T. C. & Co. from using any copy or photograph of the documents that had been destroyed and moved for an interlocutory order. *Held*, that it was not an implied term of the settlement as embodied in the order of court that no use whatever was to be made in future of any copy of the documents destroyed; and that there was no breach of good faith in the use which

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the debts, had made of the copies of the documents in question.

In a proper case it is the practise of the Court to order not only the destruction of an original document but of all copies and extracts from it and there are instances in which the Court goes further and restrains the parties from communicating in any way the contents of the document. (*Swinfen Eady and Benkes, L. JJ.* and *Neville, J.*) *JONES v. TRINDER CAPREN AND CO.* (1918) 2 Ch. 7.

———Riparian rights—Infringement of—Injury but no damage—Right to injunction. *Sec. WATER COURSE.* (1918) A. C. 435.

**Insurance—Fire—Warehousemen—Agreement to insure goods—Value of goods—Liability to increase—Floating policy**

A warehouseman is entitled to know what value is placed upon the goods for insurance purposes by the person who deposits them in the warehouse and if that person desires to have the goods insured for any particular value other than that appearing from the documents handed to the warehouseman it is for him to give the necessary information to the warehouseman. In the absence of such information the warehouseman will be liable only for the amount specified in the documents handed to him in the usual course of business. (*Bailhache, J.*) *CARREARS v. CUNARD STEAM SHIP COMPANY.* (1918) 1 K. B. 118.

———Jewellery—Loss under the policy—Consignment of jewels abroad for sale or return—Outbreak of war—Inability of consignee to deal with the goods.

By a non-marine policy a firm of English jewellers insured their stock of jewellery against any "loss damage or misfortune" to the goods or any part thereof arising from any cause whatsoever, whilst the goods were in the United Kingdom or any country in Europe or in transit from any port in the United Kingdom or Europe to any other part. In June and July, 1914, the jewellers consigned certain pearls so insured to trade customers at Frankfurt and Brussels for sale or return within a limited period on the condition that the pearls remained the property of the consignors until invoiced by them. Owing to the occupation of Brussels by the Germans on account of the war it became impossible for the consignors to recover the possession of the pearls. There was no evidence that the pearls had been seized or specifically interfered with by the German authorities. As regards the pearls sent to Frankfurt there was no evidence that they had not remained with the possession of the consignees; and as to the pearls sent to Brussels, the consignors placed them in a bank for safe custody and there was no evidence that they had not remained in the bank. In an action to recover on the policy as for a total loss, *held* that the policy being on goods

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and not on an adventure, the evidence did not establish loss under the policy (*Lords Atkinson, Parker, Broom and Wrenbury.*) *MOORE v. EVANS.* (1918) A. C. 185.

———Life—Concealment of material fact—Knowledge of agent—Subsequent receipt of premium—Waiver—Knowledge of agent, knowledge of principal.

The assured was described in the proposal form of a life insurance policy as a fisherman, that being his ordinary occupation. The fact that he was a member of the Naval Reserve Force and as such exposed to additional risks was not stated in the proposal form, but was communicated personally to the District Manager of the Insurance Company and the premium due under the policy subsequently were paid to and accepted by the District Manager. In an action on the policy the Insurance Co., pleaded that the policy was void by reason of a clause in the proposal form for a policy that if any material information was withheld from the Insurance Co. it was to be absolutely void.

*Held*, that the District Manager's knowledge of the true facts was the knowledge of the Company: that the acceptance of the premium by the District Manager was a waiver by the Company of the breach of the clause in the proposal form: and that the policy was therefore not invalidated. (*Lawrence and Atkinson, JJ.*) *AYREY v. BRITISH LEGAL AND UNITED PROVIDENT ASSURANCE CO.* (1918) 1 K. B. 136.

———Life—Non-disclosure of material fact—Proposal—Questions—Truth of answers—Illness—Sober and temperate habits—Addiction to veronal habit—Matter of fact or opinion—Evidence of experts—Admissibility.

A proposal for a life insurance policy contained *inter alia* the questions: "what illnesses have you suffered," to which the answer of the intending assured was, "None of any consequence." There was another question, "Are you now and have you always been, of sober and temperate habits?" to which the answer was, "yes." The intending assured also signed a declaration to the effect that the statements in the answer were true and that the declaration and proposal should be the basis of the contract between him and the Insurance Co. and that if any material information had been withheld, or if any of the statements had not been made truly, the insurance should be void. A policy was issued stating that the declaration and policy were the basis of the contract. In an action to recover the moneys due under the policy after the death of the assured, it was found that the assured had failed to disclose that he suffered from heart trouble and insomnia and was addicted to the veronal habit. *Held* that the question as to what illness the assured had suffered

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was not ambiguous and that the answer thereto was not a mere expression of opinion and that the untruth of the answer rendered the policy void.

The words sober and temperate in the proposal refer only to the use and abuse of alcohol, and are inappropriate to drug habits.

The opinion of medical men as to the materiality of facts not disclosed by an insured is admissible in evidence in the action. (*McCardie, C. J.*) *YORKE v. YORKSHIRE INSURANCE CO.* (1918) 1 K. B. 662.

— *Marine—Proximate cause—Intervening cause—Liability under the policy—“War-ranted free from all consequence of hostilities”—Ship injured by torpedo ultimately loss by sinking.*

Under a policy of insurance, a ship was insured against the perils of the sea including the consequences of hostilities. The ship was torpedoed by a German submarine and was about to sink when the aid of tugs she reached a port. But owing to a heavy gale which immediately sprang up, the ship was moored to a berth inside the outer breakwater. She remained there for two days taking the ground at each ebb tide when her bulkheads gave way, and she sank and became a total loss.

*Held*, that the grounding was not a *novus cause interveniens* and that the torpedoing was the proximate cause of the loss; and that consequently the underwriters were protected by the warranty against all consequences of hostilities. (*Lord Finlay L. C. Viscount Hall and Lords, Dawson Atkinson and Shaw.*) *LEYLAND SHIPPING CO. LTD. v. NORWICH UNION FIRE INSURANCE SOCIETY, LTD* (1918) A. C. 350.

— *Marine—Restraints of Princes, meaning of—Requisition of ship by Admiralty—Illegal order—Obedience to—Effect of claims due to delay meaning of.*

A cargo of barley shipped by plffs. on board a British ship for carriage from N a Russian port in the Black Sea to Falmouth was insured against the usual perils, including restraints of princes and risks excluded by the free of capture clause, but excluding all claims “due to delay” consequent on the declaration of war with Turkey. The Dardenelles was closed and the ship was unable to make the voyage from N. The cargo was landed and the ship remained at N. Subsequently the Admiralty requisitioned the ships while she was lying in the port. Plaintiffs claimed under the policy for a constructive total loss of the barley.

*Held*, that the plffs. were not entitled to recover on the policy.

Although the closing of the Dardenelles was a restraint of princes, the claim based thereon was a claim due to delay within the exception in the policy. (1897) A. C. 609 foll.

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The order requisitioning the ship was *ultra vires* the Admiralty as the proclamation of 3—8—1914 only authorised the requisitioning of British ships within the British Isles or the water adjacent thereto, and the compliance of the ship-owners with the order, not having been brought about by these acts or use of force, was therefore not due to a restraint of princes. (*Bailhache, J.*) *RUSSIAN BANK FOR FOREIGN TRADE v. EXCESS INSURANCE COMPANY.* (1918) 2 K. B. 123.

— *Marine—Sale of goods ex ship—Payment against documents—Cargo risk—Policy effected by sellers—Buyer's interest not covered—Intention—Right of buyer to sue on the policy*

L. carrying on business at Colombo brought teak logs to be shipped at a price “ex-ship, payment against documents. The sellers shipped from Bangkok to Colombo 332 logs of which 144 were in fulfilment of their contract with L who was informed of the shipment. The sellers had insured the whole of the consignment with the debts for the voyage to cover aircraft risk. The policy identified the parcels of logs by their marks and was expressed, as usual, to be made for all persons to whom the goods should appertain wholly or in part. L. paid the price and took delivery of the logs ex-ship, but while they were still afloat, a large number of them were driven out to sea by a gale and lost. In an action on the policy by L.

*Held*, that there was no evidence that the policy was effected on behalf of or to cover his interest; and that consequently he could not maintain the suit. (*Lord Sumner.*) *YANGTSEZEE INSURANCE ASSOCIATION v. LUKMANJEE.* (1918) A. C. 585.

— *Marine Policy—Free of capture and seizure clause—Exemption from liability—Onus of proof—Proximate cause of loss unascertained.*

In an action in a policy insuring a ship against loss by perils of the sea with the usual clause excepting loss by capture, seizure, etc., and the consequences of hostilities, it is not necessary for the plff. whose ship has been lost at sea to prove that it was not lost by the excepted causes. In an action on a policy insuring a ship against loss by capture, seizure and the consequences of hostilities, plff fails if on the evidence the probabilities are equally in favour of a loss by the perils insured against and a loss by other perils. The rule as to burden of proof in actions on policies of insurance discussed (*Bailhache, J.*) *MUNRO BRICE AND CO. v. WAR RISKS ASSOCIATION.* (1918) 2 K. B. 78.

**International Law**—Bill of exchange accepted payable in foreign country—Due date determination of governed by *lex loci* of performance. See **BILL OF EXCHANGE.**

(1918) 1 Ch. 740.

## INTERPRETATION.

*Interpretation—Statute—Bye-laws of public bodies—Benevolent construction—Uncertainty and unreasonableness—Bye-law, void.*

By-laws, especially those of public bodies, should be approached from the point of view of upholding them, if possible, and should be, as it has been described, benevolently interpreted: but still they must be reasonable.

If the effect in a given case, which might be of frequent occurrence, of construing a bye law in a particular way would lead to a result quite unnecessary for the protection of the public health and would impose a serious restriction upon the ordinary rights of property owner with no good object one would be entitled to say that the by-law was void because it was unreasonable. (*Pickford, Warrington and Scrutton, L. J.J.*) **REPTON SCHOOL GOVERNORS v. REPTON RURAL COUNCIL.** (1918) 2 K. B. 133.

*Statute—By-laws—Public body—Principles of construction.*

When the Court is called upon to consider the by-laws of public representative bodies clothed with authority by a statute and exercising that authority accompanied by the checks and safeguards mentioned in the statute the by-laws ought to be supported if possible. They ought to be "benevolently" interpreted and credit ought to be given to those who have to administer them that they were reasonably administered. If the effect in a given case, which might be of frequent occurrence, of construing a by-law in a particular way would lead to a result quite unnecessary for the purposes aimed at by the statute, and would impose a serious restriction upon the ordinary rights of a property owner with no good object, then the court might well say that the by-law is void because it is unreasonable. (*Bailhache, J.*) **REPTON SCHOOL GOVERNORS v. REPTON RURAL COUNCIL** (1918) 1 K. B. 26.

*Statute—Compulsory acquisition of private property by the state—Compensation, liability to pay—Mode of assessing compensation—Right to have recourse to the ordinary courts of the land not to be taken away in the absence of express statutory prohibition.*

It is a proper rule of construction not to construe an act of Parliament as interfering with or injuring person's rights without compensation, unless one is obliged to so construe it. If it is clear and obvious that Parliament has ordered and there is no other way of construing the words of the Act, then one is bound to so construe them, but if one can give a reasonable construction to the words without producing such an effect, one ought to do so.

The amount of compensation must, if no other method, has been provided, be determined in an action between the parties. (*Younger, J.*) **CANNON BREWERY COMPANY LTD. v. CENTRAL CONTROL BOARD.**

(1918) 2 Ch. 101.

## JUDGMENT.

*Statute—Expropriating statute—Construction in favour of subject.*

Where a special law is passed by the Legislature in derogation, of the rights of a subject and for the Government's own benefit or for the benefit of a company which it was concerned in promoting, the construction of that statute ought to be in favour of the subject, in the sense that general or ambiguous words should not be used to take away legitimate and valuable rights from the subject without compensation, if they are reasonably capable of being construed so as to avoid such a result consistently with the general purpose of the transaction. (1903) A. C. 355 363, 364 ref (*Lord Sumner*.) **UNION OF SOUTH AFRICA MINISTER OF RAILWAYS AND HARBOURS v. SUMNER AND JACK PROPRIETARY MINES.** (1918) A. C. 591.

*Statute—Obligation imposed by—Breach—Remedy—Forum.*

Where a statute creates an obligation, and enforces the performance in a specified manner, the general rule is that performance cannot be enforced in any other manner. (*Shearman and Sankey, J.J.*) **HULME v. FARRANT LTD.** (1918) 2 K. B. 426.

*Judgment—Fraud—Setting aside—Inherent power.*

A court has inherent right to set aside its own order if procured by fraud and by wilful suppression of material evidence. (*Sir Samuel Evans, J.*) **THE ALFRED NOBEL THE BJORN STERJRE BJORNSEN THE FRIDLAND.** (1918) P. 293.

*Cause of action—Posting of offer—Absence of Jurisdiction—Objection to writter of—Step taken by, defendants in proceedings.*

Where a contract is made by offer and acceptance through the post between parties residing in different districts, the posting of the offer is not part of the cause of action. Where in an action instituted with leave in the district where the letter is posted the deft. enters appearance by a solicitor and applies for particulars of the claim in order to enable him to ascertain whether any part of the cause of action arose within the district in which the action is brought and gives an address for service the steps taken by the deft. are not such steps as to disentitle him to object to the jurisdiction of the Court. (*Lawrence and Lush, J.J.*) **CLAREK BROTHERS v. KNOWLES.** (1918) 1 K. B. 128.

*Civil Court—Stock Exchange—Re-election of members British subject—Objection on the ground of enemy-birth—Relevancy of—Discretion of committee—Interference by court, limits of.*

Under the rules of the Stock Exchange, members are elected annually for one year only and no member has any vested right to be

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elected, either absolutely or conditionally, upon his fulfilling certain qualifications or in the absence of any disqualifications. If upon consideration of all the facts and circumstances relating to an applicant the committee do not "deem him eligible" for re-election, there is no power vested in any Court to overrule their decision. The question of an annual re-election is wholly different from that of expulsion or suspension during the year for which a person has been duly constituted a member. The committee in refusing to re-elect a member, are not found to give their reasons, and if they do give them the question of their sufficiency is not for the Court. If the only objection to the applicant be that he is of enemy birth, and if the committee, in refusing re-election act on that alone, they will be justified in doing so. A member has no right to be re-elected unless the committee deem him eligible and that is entirely a question for them. The duty of the committee with regard to re-electing members is an ordinary act of administration involving exercise of discretion, and not a judicial or quasijudicial act. If the committee act with honesty and good faith, their decision cannot be questioned. (*Swinfen Eady and Bankes L. JJ. and Eve J.*) **WEINBERGER v. ENGLISH.** (1918) 1. Ch 517 (A. C.)

———*Foreign Domicil—British Protected subject—Extra territoriality.*

Domicil is not mere residence but the relation which the law creates between an individual and a particular country. Residence in a Foreign State as a privileged member of an extraterritorial community although it may be effectual to destroy a residential domicil acquired elsewhere is ineffectual to create a new domicil of choice. The position of persons resident in Egypt under British protection, considered. (*Swinfen Eady, Warrington and Scrutton L. JJ.*) **CASDAGLI v. CASDAGLI** (1918) P. 89.

**Landlord and Tenant—Covenant to repair—Demise of portion of a house—Defective condition of the house—Damage to tenant—Liability of landlord—Want of notice of defective condition.**

Ordinarily a landlord who has covenanted with his tenant to keep the premises in tenantable condition is not liable for damage caused to the tenant by the condition of the premises becoming defective unless he had express notice of it. *L. R. 6. Ex. 25, 30; 91 L. T. 310* ref.

This rule has no application to a case where in which the landlord demises only a portion of the premises and retains in his own control the portion the defective condition of which causes the damage. (*Salter, J.*) **MELLES AND CO v. HOLMES** (1918) 2 K. B. 100.

———*Notice to quit—Validity of—Options to landlord to waive a notice, reservation of, if invalidates notice.*

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A notice by a land lord to a tenant to quit the holding, was accompanied by a letter in these terms:—"I am instructed to serve upon you the enclosed notice to quit which is intended to terminate your tenancy at Michaelmas next unless my client (landlord) sees sufficient reason in the meantime to change his opinion." The tenant claimed that the notice was a conditional notice and therefore invalid.

*Held*, that the notice was a definite notice that the tenancy would be determined at Michaelmas, and that the accompanying letter merely gave expression to the right which a landlord has to waive a notice to quit by arrangement with the tenant and that therefore the notice was valid. (*Avory, J.*) **NORFOLK COUNTY COUNCIL v. CHILD.**

(1918) 2 K. B. 351.

———*Notice to quit—Validity of—Notice enclosed in covering letter—Reservation on condition.*

The defendant, a tenant, had been in arrear with his rent in March 1916 and notice to quit had been served on him. That notice was withdrawn at the request of the defendant upon his paying the rent in arrear. Rent was again in arrear in March 1917 and a notice to quit which admittedly in itself good in form was again given. There was a letter accompanying, the notice and containing an intimation that the landlords plaintiffs would not withdraw the notice as they did in the previous year unless they saw sufficient reason in the meantime to change their opinion. *Held* that there was nothing in the accompanying letter which could be said to introduce a condition or reservation into the notice to quit. (*Bankes and Scrutton L. JJ. and Eve, J.*) **NORFOLK COUNTY COUNCIL v. CHILD.** (1918) 2 K. B. 865 C. A. (1918) 2 K. B. 351 affirmed.

———*Nuisance—Overhanging yew trees—Death of lessee's horse—Liability of landlord.*

Where a landlord let land to tenant with a yew tree on the adjoining land in the occupation of the landlord overhanging the land demised to such an extent as to be dangerous to the tenants horses which ate the leaves of the tree and died, *held* that on the principle that a lessee takes the property as he finds it, the landlord was not liable for the loss of the horses. (*Pickford and Bankes, L. JJ. and Sargent, J.*) **CHEATER v. CATER** (1918) 1 K. B. 247 (C. A.)

———*Rent—Deduction from—Tenant paying property tax—Right to deduction without producing receipt.*

Where a tenant pays the property tax on the demised premises he is entitled to a corresponding deduction from the rent due to the landlord and the landlord is bound to allow the deduction notwithstanding that the tenant refuses to show him the collector's receipt for payment of the tax. (*Pickford, Warrington*

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*and Scrutton, L. J.J.)* NORTH LONDON AND GENERAL PROPERTY CO., LTD. v. MOY, LTD. (1913) 2 K. B. 439.

—Several tenancies—Separate rooms—Common flight of steps—Control of lessor—Obligation as to safety of steps—Breach—Damages.

A lessor who lets rooms in a building to a tenant and retains control of a common stair case and flight of steps, is not under an absolute obligation towards his tenant to keep the steps reasonably safe. The lessor's obligation towards his tenant is, however, not merely to avoid exposing the tenant to a concealed danger or trap of which the tenant has no notice or warning, but is an obligation to take reasonable care to keep the steps reasonably safe and unless the tenant has been guilty of contributory negligence the visibility of the danger is no defence to an action by the tenant against the lessor for damage caused by their not being reasonably safe. *Indermaur v. Dames* L. R. 2 C. P. 311; *Miller v. Hancock* (1893) 2 Q. B. 177; *Smith v. London and St. Katherine Docks Co.* (1868) L. R. 3 C. P. 326; *Hugget v. Miers* (1908) 2 K. B. 278; *Quay v. Bawden* (1914) 2 K. B. 318; *Hart v. Rogers* (1916) K. B. 646; *Dobson v. Horsley* (1915) 1 K. B. 634, *Ref. (Lush, J.)* DUNSTER v. HOLMES. (1918) 2 K. B. 705.

Lease—Construction—Covenant by lessor or qualification of lessee's covenant—Question depending on circumstance.

A lease of a farm contained the following clause among the covenants by the lessee "And will also from time to time during the said term at his own expense, being allowed all necessary materials for this purpose (to be previously approved in writing by the lessors) and causing such materials free of cost,..... shall repair and maintain the farm house."

Held that the clause above set forth in italics, when read with the rest of the provisions of the deed, was a qualification of the lessee's covenant to repair and not a covenant by the lessor to supply the materials necessary for the repairs.

Whether the clause is intended to be a covenant by the lessor or a qualification of the lessee's covenant depends in each case upon the provisions of the lease as a whole. A clause may be both a covenant and a qualification. (*Pickford, Scrutton and Bankes L. J.J.*) VESTACOTT v. HAHN. (1918) 1 K. B. 495.

Lessor and Lessee—Breach of covenant—Damages—Covenant by lessee to pay outgoings and keep premises in repair—Collateral agreement by landlord to put drains in repair—Order by sanitary authority on lessor to reconstruct drains—Liability of lessee.

Deft. agreed with plaintiff to take a lease of the latter's house on condition of his putting the drains into a sound and proper condition.

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The deft. subsequently executed a lease containing covenants by him to pay all outgoings payable in respect of the premises during the tenancy, and to keep the premises in repair. Plff. did not either before or after the execution of the lease put the drains into a sound or proper condition, and by reason of that omission a nuisance from defective drainage was caused on the premises during the currency of the lease and the plff. incurred expense in complying with an order of the sanitary authority to abate the nuisance, under the Public Health Act, 1891. Held, that the deft. was not liable because the covenant to pay outgoings did not apply to a payment for work rendered necessary by plff.'s omission to repair the drains in accordance with the agreement and the covenant to keep the premises in repair did not apply to the drains unless and until they had been put in repair by the plff. (*Sankey, J.*) HENMAN v. BERLINER. (1918) 2 K. B. 236.

—Forfeiture—Relief of under-lessee after forfeiture of lease—Breach of covenant to repair—Conditions of relief—Form of order.

Where a lease has been forfeited for breaches by the lessee of a covenant to repair, the fact that an under lessee has been guilty of breaches of a similar covenant in the under-lease does not disentitle the latter to relief under S. 4 of the Conveyancing Act.

The Court passed an order fixing 4 months for the performance of the covenants failing which liberty was given to the lessor to apply for possession. (*McCardie, J.*) HARD v. WHALEY. (1918) 1 K. B. 448.

Libel—Privilege—Common interest—Malice, absence of—Letter to firm—Publication to clerks in due course of business—No loss of privilege.

Certain disputes between the defendants and a firm of M. C. were referred to arbitration and M. C. proposed to appoint plff. as an arbitrator. Defts. objected to the appointment of the plff. in a letter which they wrote to the firm of M. C. Containing defamatory statements concerning the plff. The letter was opened in the ordinary course of business by a clerk of the firm of M. C. who passed it on to another clerk who finally placed it in the hands of his principals. In an action for libel by the plaintiff against the defendants, held, that the letter in question was a communication between parties having a common interest in its subject-matter, and that the occasion was therefore privileged. The privilege was not lost by the publication in due course of business to the clerks of the firm of M. C. and the action therefore, failed (*Swinfen, Lady M. R. Scrutton and Duke, L. J.J.*) ROFF v. BRITISH AND FRENCH CHEMICAL MANUFACTURING CO. (1918) 2 K. B. 677 (C. A.)

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**Limitation—Cause of action—Money payable on demand—Formal demand, if necessary—Principal and surety—Claim against surety.**

Generally, a request for the payment of a debt is quite immaterial, unless the parties to the contract have stipulated it should be made. Even if the word 'demand' is used in the case of a present debt, it is meaningless, and express demand is not necessary, as in the case of a promissory note payable on demand. But it is otherwise where the debt is not present but to accrue, as in the case of a note payable three months after demand; or where the debt is not a present debt, but a collateral promise. The promise of a surety to pay on demand if his principal does not, is a collateral promise and an express demand is necessary on the part of the plaintiff before he can hold the surety liable. The cause of action arises against the surety only from the date of demand. *Wallon v. Maseall*, (1844) 13 M. and W. 452; *Norton v. Ellam* (1837) 2 M. and W. 461; *In re Rutherford*, 14 Ch. D. 687; *Birks v. Tippet* 1 Wms. Saund. 32; *In re Brown's Estate* (1893) 2 Ch. 300. (*Pickford, Banks and Scrutton, L. J.*) *BRADFORD OLD BANK v. SUTCLIFFE*. (1918) 2 K. B. 833 (C. A.)

**Exemption from—Fraud—Concealed fraud—What is—Fraud of defendant or his agent essential.**

Where the cause of action is for concealed fraud, the fraud must be that of the defendant personally or of some person for whose action in doing so he is directly responsible. Mere notice of want of title on the part of the person transferring property in breach of duty is not enough, unless there is such notice of actual fraud as extends to the defendant a fiduciary obligation to disclose what it becomes fraudulent on his part to conceal. (*Viscount Haldane*) *JOHN v. DODWELL COMPANY*. (1918) A. C. 563.

**Money had and received—Cause of action—Trust fund—Transfer of moneys by agent in breach of duty—Liability of transferee—Ceylon Ordinance (22 of 1871), Ss. 8, 10, 14 and 15.**

The respondents had authorised the manager of their business at Ceylon to draw cheques in their names upon their banking account for purposes of the business. The manager however drew cheques upon the respondents account to pay off his own private and personal debts which he had incurred through the appellants. The appellants received the amount of the cheques in 1909 and 1910 without fraud but with knowledge that the manager was acting in excess of his authority and was drawing for his own purposes on the respondents' funds. The appellant paid over the proceeds of the cheques to the real creditors of the manager. The respondents discovered the fraud of their manager in October and

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instituted a suit for recovery of the amount of the cheques in January 1913.

*Held*, the respondents had a cause of action to recover the moneys from the appellants as held in trust for them, that the period of limitation for the suit was under 3 years from the date of the transaction, either under S. 8 or under S. 11 of the Ceylon Ordinance, and that no new cause of action arose when the fraud was discovered since the fraud was not that of the appellants or any person for whom they were responsible. (*Viscount Haldane*) *JOHN v. DODWELL COMPANY*. (1918) A. C. 563.

**Local Authority—Statutory power to execute works and recover expenses from private owners on failure of the latter to comply with demand by notice—Time limit for execution of works—Unreasonable time—Invalid notice—Local authority not entitled to recover expenses.**

Where a statute provides that an authority may send a notice for work to be done within a time to be specified in such notice it must, in order to be a valid and not an illusory notice, specify a time within which the work can reasonably be completed. The authority must consider the nature and extent of the work and having regard to the circumstances, the time which ought fairly and reasonably to be allowed for the completion of that work. They have no discretion to fix a shorter time. When once the least time that could be fairly and reasonably allotted for the completion of the work has been ascertained that it is the least time to be inserted in the notice, they have, however, a discretion to allow further time.

Where therefore a notice fixing an insufficient time was served by a local authority on the frontagers of a highway requiring them to construct certain works and on their failure to do so the local authority constructed the works and claimed the expenses thereof from the frontagers. *Held* that the notice was bad in not specifying a reasonable time for the execution of the works, and that the local authority could not recover the expenses from the frontagers. (*Swinfen Eddy, Warrington and Scrutton, L. J.*) *BRISTOL CORPORATION SINNOTT*. (1918) 1 K. B. 62.

**Mandamus—Local authority—Power to consent to sale of publications—Refusal of consent by resolution without considering application individually—Discretion.**

A local body on whom is conferred the jurisdiction of granting licenses to applicants for the sale of certain publications within the local area, must hear each application on its merits and cannot come to a general resolution to refuse a license to everybody who does not conform to some particular requirements. This is specially so where the public body is entrusted with such powers for the public benefit. The Court will grant a mandamus to hear the

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application in case the local authority refuses to entertain it. (*Darling, Ivory and Sankey, JJ.*) *R. v. LONDON COUNTY COUNCIL.*

(1918) 1 K. B. 68.

**Marriage—Condition in restraint of—Condition subsequent in a will—Effect of.**

By the Civil law all conditions in wills restraining marriage whether precedent or subsequent, whether there was any gift over or not, and however qualified, were absolutely void; but the English Courts never adopted this rule to its full extent and subjected it to various modification.

Under the English law a condition in restraint of marriage is only *prima facie* and not *per se* void. Where therefore a testator gave a woman with whom he had co-habited an annuity of £1,200 only until marriage with a gift of over £400 of it on her marriage to his child and a residuary annuity of £800 for her life, held that even if the condition was a condition subsequent it was valid, the intention and object of the testator being to make provision for the child, not to restrain the marriage of the mother. Authorities on the point discussed (*Younger, J.*) *HEWETT IN RE: ELDRIG v. LLES.* (1918) 1 Ch. 458.

**Master and servant—Contract of service—Increase of salary and promotion to higher grade—New contract.**

If an employee by the terms of his contract is entitled to receive remuneration at a progressive rate on each occasion when his salary is thus increased there is not a new contract entered into. The increase is by virtue of his old pre-existing contract. But when the increase is not an increase automatically under an existing contract, but is an increase owing to the position of the employee being changed by the employers voluntarily promoting him to a higher grade, or in one case, voluntarily making him an increase of salary, then the position is altogether different. In such a case a new contract is, in law, entered into between the employer and employee (*Swinfen Eady M. R. Warrington and Duke L JJ.*) *MBEK v. PORT OF LONDON AUTHORITY.*

(1918) 2 Ch. 96.

**Employment—Determination of—Notice—Reasonable notice—Implied term of contract.**

In every contract of hiring in which nothing is said as to the notice necessary to terminate the contract, there is an implied term that it can be determined only by either party giving a reasonable notice. (*Darling L. J. Lawrence and Ivory, J.*) *PAYZU v. HANNA FORD.* (1918) 2 K. B. 348.

**Negligence—Injury to servant from defect in master's premises—Liability of master.**

The owner of a garage owes a duty to his *Chauffeur* to take reasonable care to maintain

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the premises in a condition free from any concealed danger of which the owner is or ought to be aware. (*Lawrence and Shearman, JJ.*) *COLE v. DE TRAFFORD*

(1918) 1 K. B. 352.

**Wrongful dismissal—Damages—Right to when arises.**

A master may dismiss his servant for many reasons, such as misconduct, substantial negligence, dishonesty and the like. If a dismissal be without just cause the master is deemed to have wrongfully repudiated his contractual obligations to the servant. "Wrongful dismissal" is an illustration of the general rule that an action will lie for unjustifiable repudiation of a contract. The doctrine of repudiation equally applies when the master wrongfully refuses before the period of employment has arrived, to take the servant into his service.

In every case the question of repudiation must depend on the character of the Contract the number and weight of the wrongful acts or assertions, the intention indicated by such acts or words, the deliberation or otherwise with which they are committed or uttered and on the general circumstances of the case. If the matters alleged to constitute a repudiation are in writing, then it is for the court to determine whether such documents evidence a determination not to be bound by the contract. But if such matters consist of acts or conduct, then it is for the jury as judges of fact to determine whether repudiation is established. (*McCardie, J.*) *RUBEL BRONZE AND METAL CO. AND VOS, IN RE.* (1918) 1 K. B. 315.

**Money lender—Business carried on at a place other than at registered address—Isolated transaction—Void—Statutory prohibition—Effect of.**

A statutory prohibition avoids any transaction in contravention of the prohibition as the transaction is unlawful, and any contract which forms part of it is void and can confer no rights. Where therefore a registered money lender lends money and takes a promissory note therefor at a hotel at a short distance from his registered address, the transaction contravenes S. 2 Sub. (1) (b) of the Money Lenders Act, and is therefore void. (1910) A. C. 423 and (1910) A. C. 514 dist. (*Lord Finlay, L. C. and Viscount Haldane, Lords Dunedin Atkinson, and Parmoor.*) *CORNELIUS v. PHILLIPS.* (1918) A. C. 199.

**Negligence—Concealed danger in premises—Injury to person lawfully on the premises—Liability—Act of servant—Course of employment—Liability of master.**

The owner of a house employed a workman to renovate the house and instructed him to employ the debts to execute the necessary work in connection with gas fittings. The debt's workman in the course of their work removed

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a board on the floor of the upper storey leaving a hole about 3 feet long and 6 inches wide. The plff. with the permission of the owner of the house inspected it with a view to taking a lease of a portion of it. She went upstairs on the direction of the deft's. workmen and put her foot into the hole which was unfenced and subsustained injuries. In a suit for damages, held that the deft's. workmen, having created the dangerous condition of the flooring and knowing that plff. was lawfully going to the place where the danger was, were under a duty to warn her of the existence of the hole; that this duty arose independently of the occupation of the premises or of any invitation or license; and that as the hole was made in the ordinary course of the workmen's duty the defts. were liable. (*Pickford Bankes and Scrutton, L. JJ.*) **KIMBER v. GASLIGHT AND COKE COMPANY.** (1918) 1 K. B. 439.

— *Harbours and docks — Docks and Harbour Board — Warranty of fitness of Quay to receive goods — Liability of Dock Board for injury to goods discharged on to Quay — Duty of porters.*

Plffs. were owners of ox-hides which arrived on board a ship at the docks of a port. The cargo was unloaded on to the quay by porters whose duty it was to unload ships in the docks. The hides were damaged while on the quay owing to some powdered barilla ore, which had been lying scattered in the interstices on the quay, having been unloaded a few weeks before. In an action for damages by the plff. against the Docks Board held that the Board must be taken to have warranted that the quay was reasonably fit for the purpose of receiving hides to be dealt with in the usual course of business and that they were therefore liable in damages for breach of that obligation (*McCardie, J.*) **LIEBIG'S EXTRACT OF MEAT COMPANY, LTD v. MERSEY DOCKS AND HARBOUR BOARD AND WALTER NELSON & SON, LTD.** (1918) 2 K. B. 381.

**Nuisance—Offensive and injurious trade—Opening of a children's hospital for tuberculosis—Proper equipment and management.**

The carrying on of a properly equipped and well managed hospital for surgical treatment of tuberculosis of children, is not *per se* a noisy noisome or offensive business. (*Eve, J.*) **FROST v. KING EDWARD VII WELSH ETC. ASSOCIATION.** (1918) 2 Ch. 180.

**Parent and child—English Law—Adult son—Liability of father to maintain.**

Apart from contract, a father is under no liability by English Law to maintain his adult son, even when the son is unable to maintain himself except the liability imposed by the Statute of Elizabeth. (43 Elis C. 2, S. 6. (*Slater, J.*) **GOLDINGHAM PARISH COUNCIL v. SMITH.** (1918) 2 K. B. 90.

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**Part Performance—Doctrine of — Landlord and tenant—Incomplete agreement—Tenant let into possession—Formal lease afterwards drawn up but not signed—Retention of possession after conclusion of contract—Statute of Frauds, S. 4—Effect of.**

Continuance in possession may, if unequivocally referable to the contract alleged, be a sufficient act of that performance although the taking of possession was antecedent to the contract. The doctrine of part performance applies only where the parties are agreed and does not apply to mere negotiations pending which possession is given. (*Lawrence and Avory, JJ.*) **BISS v. HYGATE**

(1918) 2 K. B. 314

**Practice—Appearance by agent—Non-employment of solicitor—County Court Rule, O. 44, R. 1.**

A plff. in the County Court can lawfully empower an agent, who is not a solicitor, to initiate proceedings and file the necessary praecipe on his behalf. (*Lawrence and Shearman, JJ.*) **KINNELL AND CO. v. HARDING WACE & CO.** (1918) 1 K. B. 155.

— *Causes of action, joinder of—Conspiracy to slander—Separate claims for individual slanders.*

The causes of action for a conspiracy to slander and for separate slanders by each individual defendant can be joined in one action, subject to the power of the judge to order separate trials of the different causes of action in case of any embarrassment in the trial. (*Pickford and Bankes, L. JJ. and Neville, J.*) **THOMAS v. MOORE.** (1918) 1 K. B. 555.

— *Discovery—Denial of plaintiff's negative allegation—Onus of proof on plff—particulars of denial—Supreme Court Rules O. 19, R. 7.*

Where the onus of establishing a positive or negative allegation lies on the plffs, the Court will not order the deft. to give particulars of his traverse of that allegation, such a traverse not being a "matter stated", within O. 19, R. 7. of the Rules of the Supreme Court. (*Ashbury, J.*) **WEINBERGER v. INGLIS.** (1918) 1 Ch. 133.

— *Jury — Finding of fact—Reversal of, by court of appeal, when justified.*

Where all the facts are before the court of appeal and the court is satisfied that only one possible verdict could be reasonably given, the court is not bound to order a new trial when it disagrees with the conclusion of the jury, but has jurisdiction, to reverse the finding of the jury and enter judgment for the appellant. (*Swinfen Eady and Bankes L. JJ. and Eve, J.*) **WINTERBOTHAM GURNEY & CO v. SIBTHORP & COX.** (1918) 1 K. B. 625.

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——— *Parties — Addition of — Action on contract against sole defendant — Addition of joint contractor as co-defendant — Jurisdiction to add at the instance of defendant — Discretion.*

In an action on a joint contract against one only of the joint contractors the court has jurisdiction, without obtaining the consent of the plff to make an order requiring the plff. to add the other joint contractor as a co-defendant. The fact that the defendant desires to have his alleged joint contractor added as a co-defendant, in order that they may thereupon bring a joint counter-claim against the plff is an additional ground for making the order. The court will make the order without prejudice to the consideration at the trial of the question whether the contract was in fact joint, and will so frame it as to protect the plff. in regard to costs if it should appear that that other person ought not to have been joined. (*Pickford Warrington and Scrutton. L.JJ.*) NORBURY NATZIO CO., LTD. v. GRIFFITHS.

(1918) 2 K. B. 369

——— *Precedents — American decisions — Duty of English Judge.*

When American cases are cited in English Courts, upon questions involving the decision of English law, they are treated with the utmost respect and as valuable guides, but they are not binding on the English Courts. When the question is one of American law, and the opinion of experts differ and the American cases cited are in conflict, an English Court would treat them in the same way as it does conflicting English decisions of equal authority and follow the cases which seem in accordance with principle. (*Balache, J.*) GUARANTY. TRUST OF NEW YORK v. HANNY & CO.

(1918) 1 K. B. 43. 62.

——— *Summons — Service of — 'Residence' if includes place of business.*

Where a summons is required by a statute to be served at the residence of a ratepayer the ratepayer's place of business is to be treated as his "residence" although he does not sleep there. (*Darling, Ivory and Sankey, JJ.*) REX v. BRAITHWAITE

(1918) 1 K. B. 1.

**Principal and Agent — Knowledge of agent that of his principal — Insurance company — Policy — Omission to state facts material — Knowledge of agent — Waiver — Policy valid. See INSURANCE, LIFE.** 1918 1 K. B. 136.

**Principal and Surety — Discharge of surety — Assignment of debt by creditor — Novation — Effect of on surety's liability.**

A creditor may assign his debt or his securities and the assignment does not discharge the surety or alter his liability, for, the creditor enters into no contract with the surety not to assign the debt or the securities.

But it is necessary to distinguish between a mere assignment and an assignment which

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amounts to a novation. Novation introduces a new contract and requires the assent of all parties; mere assignment transfers rights be acquired under the old contract, and may be made without the assent of the debtor. Where a new debtor is accepted by the principal creditor and the old discharged, as in the case of changes of partnership, the surety has not guaranteed that the new debtor will perform obligations and is therefore released 7 A. C. 345; 1893 A. C. 313; 7 D. M. and G. 261; L. R. 16 Eq. 60, 74, Ref. (*Pickford, Bankes and Scrutton L. JJ.*) BRADFORD OLDBANK v. SUTCLIFFE.

(1918) 2 K. B. 333.

——— *Relations between — Principles governing.*

The law of principal and surety is worked out by having regard to three principles. 1. The debtor must discharge the debt once and he need not discharge it more than once. 2. The creditor is entitled to get his 20sh. in the pound from some one and he cannot get more. 3. The surety is not entitled to keep as against the debtor more than he has paid or is liable to pay. If the creditor is paid in full by the surety, that does not prevent the creditor suing for the whole debt, because though he has received 20sh in the pound he has not received it from the debtor: but he can enforce the claim as trustee for the surety who has paid the 20sh. If the debtor has paid the surety the full amount but owing to the fault of the surety the creditor is not paid then the creditor can recover the debt, from the debtor. If, however, the debtor pays more than 20sh. in the pound, he can get the surplus back. (*Swinfen Eady, Warrington and Scrutton, L. JJ.*) MELTON In re. MILK v. TOWERS.

(1918) 1 Ch. 37, 59.

**Prize Court — Contraband — Doctrine of continuous voyage — Articles to be manufactured in neutral country with a view to substitute them for other articles exported from that country to an enemy.**

It is not in accordance with international law to hold that raw material on its way to the citizens of a neutral country, to be there manufactured into an article for consumption in that country, is subject to condemnation merely on the ground that the consequences are that another article of a like kind would be exported to the enemy by other citizens of the neutral country. (*Evans, J.*) THE BONNAI.

(1918) P. 123.

**Probate — Practice — Executor passed over — Absconding executor — Citation dispensed with.**

A sole executor appointed by the testatrix's will absconded the country under fear of criminal proceedings seven years before the testatrix's death and had not been since heard of. On the application of one of two residuary legatees, with the consent of the other, the executor was passed over without citation, and

## RESTITUTION OF CONJUGAL RIGHTS.

administration with the will annexed made to the applicant (*Coleridge, J.*) *In re WILLIAMS.* (1918) P. 122.

**Restitution of conjugal rights—Right to co-habitation, how far enforceable.**

Though the duty of matrimonial intercourse cannot be compelled by the court, matrimonial co-habitation may. In a suit for restitution of conjugal rights, an offer by a husband to live under the same roof with his wife each party being free from molestation by the other, is not an offer of matrimonial co-habitation and is therefore no defence to the suit. (*Hill, J.*) *WILY v. WILY.* (1918) P. 1.

——— **Suit by wife—Defence to—Refusal of marital intercourse.**

The rights of husband and wife as to marital intercourse are mutual and either party refusing intercourse without sufficient reason gives just cause to the other for withdrawal from co-habitation. The court will therefore, in its discretion, regard such a refusal as a valid defence to a wife's petition for restitution of conjugal rights. (1900) P. 180. L. R. 3 P. & M. 223 Rel. (*Lord Coleridge, J.*) *DAVIS v. DAVIS.* (1918) P. 85.

**Riparian Rights—Nature and extent of—Interference with, actionable without proof of action or present damage—English law, applicability of to other countries. See WATER-COURSE.** (1918) A. C. 485.

**Sale of Goods—Merchantability—Warranty of soundness—Perishable goods—Transit—Place of delivery.**

When a person undertakes to supply another with goods which are not specific goods, there is an implied warranty that the goods shall be fit for the purpose for which they ordinarily would be intended to be used, and with regard to animals used for human food that they are fit to be so used till they are appropriated to the contract and for a reasonable time thereafter, that does not necessarily mean that goods shall be merchantable on delivery if the vendee directs them to be sent by a long and unusual transit. (*Darling, Ivory and Alkin, JJ.*) *OLLETH v. JORDAN.* (1918) 2 K. B. 41.

——— **Statement of particulars prior to contract—Innocent Misrepresentation—Contract—Condition of Warranty—Not accountable for errors in description—Incorrect statement of dead weight capacity of ships.**

Deflt. wished to sell two steamships to the plff. and gave the latter particulars in writing stating *inter alia*, that the dead weight capacity of each ship was 460 tons. The particulars also contained the words "not accountable for errors of description." The plff. relying upon the particulars agreed to buy the ships, and a

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contract not referring in terms to the particulars was signed by the parties. The ships were delivered to and accepted by the plff. and it was subsequently discovered that the dead-weight capacity of each ship was only 360 tons. In a suit by the plffs. to recover damages for a breach of a condition of the contract and alternatively, for breach of warranty, held that the statement in the particulars of the ships as to the dead weight capacity, which was made *bona fide* was no part of the contract and that the defts. were not liable. (*Pickford, Warrington and Scrutton, L. JJ.*) *T AND J. HARRISON v. KNOWLES AND FOSTER.* (1918) 1 K. B. 608.

**Shipping—Charterparty—Brokerage commission—Charterers if can sue for.**

Where a clause in a time charterparty provided that a commission of 3 per cent on the estimated gross amount of hire was due to one L. W., a broker, on the signing of the charter (ship lost or not lost) held that the charterers could, as trustees for the brokers, enforce the clause against the ship-owners. (*Pickford, Bankes and Scrutton, L. JJ.*) *LEOPALD WALFORD (LONDON), LTD. v. LES AFFETEURS REUNIS SOCIETE ANONYME.* (1918) 2 K. B. 493.

——— **Charterparty—Commission payable to charterers—Demurrage at port of discharge.**

If brokerage is to be paid on more than the freight that is to pay on dead freight and demurrage, either it will have to be proved that the custom has become sufficiently universal for the court to take notice of or it will have to be established on the construction of the particular charterparty. (*Pickford and Bankes, L. JJ and Sargent, J.*) *MOOR LINE v. LOUIS DREYFUS & CO.* (1918) 1 K. B. 89 (C. A.)

——— **Charterparty—Construction of—Dead-weight capacity guaranteed to be a specified number of tons—Cargo of maize—Cubic capacity, insufficiency of—Breach of guarantee.**

Held, on a construction of the charterparty that the primary meaning of the phrase "ships dead weight capacity" was not her capacity to carry tons of maize, but her abstract lifting capacity, and that the mere fact that maize was mentioned as the cargo to be carried in the earlier part of the charterparty did not change the meaning of the phrase from a designation of the ship's lifting capacity in the abstract to a designation of her combined lifting and cubic capacity applied to the ratio of bulk to the weight of maize. (1917) 2 K. B. 637 affirmed. (*Swinfen Eady and Bankes, L. JJ. and Eve, J.*) *W. MILLAR AND CO. v. SS. FREDEN.* (1918) 1 K. B. 611

——— **Charterparty—Steamship requisitioned by Admiralty—Risk of all consequences of**

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*hostilities or warlike operations—Navigation lights screened by Admiralty instructions—Collision—Liability of admiralty.*

A steamship was requisitioned by the Admiralty and taken into its service on the terms of a charterparty under which the Admiralty took the risk of "all consequences of hostilities or warlike operation." While in the service of the Admiralty the steamship was sailing one night at full speed with her lights obscured in accordance with the instructions of the Admiralty. While so, the ship collided with a French war vessel similarly sailing in the opposite direction and became a total loss. *Held* that the loss of the ship was a consequence of warlike operation within the charterparty and that the Admiralty were liable 14 C. B. N. S. 259 dist.

It is not enough for the plffs. in a case like this to prove that the loss happened in course of a military operation or that a military operation was one of the contributory cause which together produce the loss. The military operation must be the direct or dominant cause of the loss and no new and independent cause must operate after the military operation alleged. *Spinfen Bady, M. R. Scrutton and Duke, L.J.J.* BRITISH AND FOREIGN STEAMSHIP CO. v. THE KING.

(1918) 2 K. B. 879 C. A.

*Freight—Right to—Abandonment of ship at sea—Cargo salvaged subsequently.*

The defendants' ship while on a voyage carrying a cargo of wood was attacked by an enemy submarine and the master and crew were compelled to leave the ship in the boats. The ship was long after found drifting in a derelict condition by a patrol boat and was brought with the cargo and taken charge of by the receiver of wrecks. On the receipt of information of the attack of the ship from the master, the owners wrote to the cargo owners stating that the ship had been sunk by an enemy submarine. Plffs. who were indorsees of the bill of lading, claimed delivery of the cargo free of freight. *Held*, (by the majority of the court) that, whether or not the act of the master and crew in leaving the ship under threats amounted to an abandonment of the ship, the letter of the ship-owners was clear intimation to the charterers of their inability to carry out their contract and the plffs. were therefore entitled to receive the cargo free of freight. (*Pickford and Bankes, L. J.J. and Sargant, J.*) NEWSUM AND CO. LTD. v. BRADLY.

(1918) 1 K. B. 271.

*Salvage—Requisition of ship by admiralty—Damage to ship—Danger from mine-fields—Payment for salvage—Liability of—Admiralty to contribution.*

The Admiralty requisitioned a steamship on condition that they were not liable for loss or injury caused by sea risk, the risks of war which were taken by the Admiralty were those

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excluded from an ordinary policy of marine insurance by an f.c. and s. clause. The ship while on a voyage in the North Sea broke her propeller and became disabled and was being driven by a strong gale and the tides towards German mine-fields few miles off. Salvage services were rendered to the ship by another vessel. *Held* that the Admiralty were liable to contribute, inasmuch as they had contracted with the owners of the steamship to pay if the vessel sustained injury from a war risk and that in the present case she had been saved from such a peril. (*Bailache, J.*) PYMAN STEAMSHIP CO. v. ADMIRALTY COMMISSIONERS. (1918) 1 K. B. 480.

*Time charterparty—Frustration of adventure—Doctrine of applicable. See CONTRACT, DISSOLUTION.*

(1918) 1 K. B. 372 C. A.

*Slander—Privilege—Judicial body—Military tribunal—Defamatory statements made by a member in the course of proceedings—Not actionable.*

Where a tribunal is a Court of Justice or a military body acting in a manner similar to that in which a Court of Justice acts any statement made by a member thereof in the course of the proceedings is absolutely privileged and no action can be brought thereon. This absolute privilege extends also to advocates, litigants and witnesses and the reason which underlies this principle, is that it is desirable that persons who occupy certain positions as judges, advocates or litigants should be perfectly free and independent, and to secure their independence that their acts and words should not be brought before tribunals for inquiry into them merely on the allegation that they are malicious. (*Sankey, J.*) CO-PARTNERSHIP FARMS v. HARVEY SMITH.

(1918) 2 K. B. 405.

*Specific Performance—Lessor and lessee—Covenant by lessor to appoint and pay house-keeper to clean the premises—Not capable of specific performance—Remedy by damages.*

In an action for specific performance of a contract by a lessor that he would provide and pay a house-keeper who shall act as the servant of the lessees and clear the premises, *held* having regard both to the fact that the court would have to see to the enforcement of a long continued series of acts during the whole time of the tenancies of each tenant and to the fact that there are a number of small services embraced in the general obligation of the persons appointed to act as servant of the lessees the court could not grant specific performance of that obligation though the conduct of the lessor was perverse and want only obstructive. (*Sargant, J.*) BARNES v. CITY OF LONDON REAL PROPERTY COMPANY. (1918) 2 Ch. 18.

## STATUTE.

**Statute** — *Operation of* — *Date of coming into force*—*Statute and statutory orders, distinction between.*

The rule is that a statute takes effect on the earliest moment of the day on which it is passed or on which it is declared to come into operation. But there is a publicity about statutes even before they come into operation which is absent in the case of many orders made in pursuance of a statutory power. Consequently orders made in pursuance of a statute e. g., requisition of grain for the purposes of war, become effective and come into operation only when they are communicated and published (*Bailache, J.*) **JOHNSON v. SARGENT AND SONS.** (1918) 1 K. B. 101.

**Statutory body** — *Powers of Acts in excess of powers*—*Dealing with property so as to incapacitate itself from performing its public duties.*

A statutory incorporated body is restricted as regards its powers to the purposes of its creation and the terms of its parliamentary mandate. Moreover, a corporation of a public nature may not so deal with its property or exercise its power as either to incapacitate itself from performing or from fettering itself in the full performance of its public duties. (*Mc Cardie, J.*) **COUNTY HOTEL AND WINE COMPANY v. LONDON AND NORTH-WESTERN RAILWAY COMPANY.** (1918) 2 K. B. 251 at page 267.

**Statutory Power** — *Rule made under*—*Ultravires*—*subsequent amendment of statute*—*Effect of.*

A regulation which was *ultra vires* the statute in force at the time when it was made does not become valid upon the statutory power being extended by subsequent legislation so as to warrant the subsequent making of a similar regulation. (*Lord Sumner*). **UNION OF SOUTH AFRICA MINISTER OF RAILWAYS AND HARBOURS v. SUMNER AND JACK PROPRIETARY MINES.** (1918) A. C. 591.

**Supreme Court Rules O. 19, R. 7**—*Discovery*—*Particulars* — *Traverse of plff's negative allegation*—*Onus of proof on plffs.*—*Particulars of traverse, not to be ordered.* See PRACTICE. (1918) 1 Ch. 133.

**Tort**—*Cause of action*—*Principal and agent*—*Libellous communication by principal to agent*—*Document mislaid by agent's partner and coming to the knowledge of the persons libelled*—*Damages recovered against principal*—*Liability of agent.*

Plaintiff employed defendant, a chartered accountant, to investigate the affairs of a Company in which plff. had a pecuniary interest and deft. accepted the position of the plff's agent for reward in this matter. Plff. wrote and sent to deft. a letter containing libellous statements about the manager of the

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Company and two other persons. The deft. left the letter with his partner with a direction to attend to it, but the partner mislaid it with the result that the two persons libelled became aware of it, brought an action for damages against the plff. and recovered damages from him on the ground that the plff. was actuated by malice in making the communication. Thereupon plff. brought the present action against deft. for breach of an implied term of the contract of employment, alleging that the deft. was bound to keep the letter secret. *Held*, that there was no such term implied by law in the contract between the parties and therefore no breach or direction of duty was committed by the deft. Further there was no principle of law under which plff. could recover damages against another person, because he had had to make reparation for a wrongful act committed by himself. (*Darling, J.*) **WELD BLUNDELL v. STEPHENS.** (1918) 2 K. B. 742.

—*Trespass by sheep affected by disease*—*Impounding by police authorities* — *Damage to plff's sheep* — *Liability of defendant* — *Scienter*—*Novus actus interveniens.*

Defendant's sheep trespassed on plaintiff's land where they developed scab and in consequence thereof they were interned on the plaintiff's land by an order of the police under the Diseases of Animals Act, 1891. The internment order extended also to sheep belonging to plff. which had been in contact with the trespassing sheep. In an action by plff. for damages for trespass, *held* that the action being founded on trespass the doctrine of *scienter* had no application to the case; and that the plff. was entitled to recover damages which were the natural consequence of the presence of the deft's sheep on his land both before and after the notice of detention by the police. (*Lawrence and Avory, JJ.*) **THEYER v. PURNELL.** (1918) 2 K. B. 333.

**TRADE MARK**—*Infringement*—*Rectification of register*—*Seven years' registration* — *Common and ordinary word*—*No distinctive user*—*Trade-mark if can be reserved from the register on account initial error in registration* — *Trade Marks Act, (1905) Ss. 11, 35 and 41.*

The fact that a registered trade mark was, at the time of its registration, not properly registered as not coming within S. 4 of the Trade Marks Act, 1905, does not render it "disentitled to protection in a Court of Justice" within the meaning of S. 41, and after the lapse of seven years from the date of registration, it cannot on that ground be removed from the register under S. 35. (*Swinfen Eady, M. R. Warrington and Duke, L. JJ.*) **IMPERIAL TOBACCO CO. v. PASQUALI.** (1918) 2 Ch. 207 C. A.

**TRADING WITH ENEMY**—*Contract for sale of goods by instalments*—*Executory con-*

## TRADING WITH ENEMY.

*tract—Outbreak of war—Suspensory clause in contract—Effect of—Public policy*

Prior to the outbreak of war between Germany and Great Britain, an English Company owning Cupreous ore mines in Spain contracted to sell to three German Companies large quantities of this ore, to be shipped from Spain to Rotterdam or other continental ports, by instalments extending over a number of years. The contracts contained a suspensory clause providing that, if owing to war or other cause the English Company should be prevented from shipping or delivering the ore, the obligation to ship and deliver should be suspended during the continuance of the impediment and for a reasonable time afterwards. At the date of the outbreak of the war, some of the contracts had been partially executed, the others were wholly executory. The contracts with one of the German Companies were in English form and those with the two other Companies were made in Germany and in the German language. *Held*, that the contracts were abrogated on the outbreak of the war, inasmuch as they involved trading with the enemy and that the suspensory clause was void as being opposed to public policy and as tending to the detriment of Great Britain and the advantage of the enemy.

As regards the German contracts the presumption was that the Law of Germany was the same as the law of England and assuming that the contracts were valid under the law of Germany, the question whether they were void as against public policy was to be determined by the law of England. (*Lords Dunedin, Atkinson, Parker and Sumner.*) *ERTEL BIEBER AND CO. v. RIO TINTO COMPANY.*

(1918) A. C. 260.

*Trust—Implied—Principal and agent—Transfer of property by agent in breach of duty—Liability of transferee to principal.*

Where an agent is entrusted by his principal with property to be applied for the purposes of the latter, and to be accounted for on that footing he is, by virtue of doctrines which apply under the law of England, and other countries in a fiduciary position, and any third person taking from the agent a transfer of the property with knowledge of a breach of duty committed by him in making the transfer, holds what has been transferred to him, under a transmitted fiduciary obligation to account for it to the principal. That there is no privity of contract between him and the principal does not make any difference, for the title does not rest on contract. The property belongs to the latter in the contemplation of Courts which administer equity, and excepting in so far as the lapse of time or some other special circumstance affords a defence the transferee cannot resist the claim of the principal. (*Vicount Haldane.*) *JOHN v. DODWELL AND COMPANY.*

(1918) A. C. 563

## VENDOR AND PURCHASER.

*Trustee—Costs—Unsuccessful action—Trust estate, when liable—Action without consulting co-trustee or beneficiaries and without permission of Court—Improper conduct.*

A trustee who, without consulting his co-trustee or the beneficiaries and without the sanction of the Court, brings an unsuccessful action, does so at his own risk as regards the costs, even if he acts on counsel's opinion; and when the trustee seeks to obtain such costs out of his trust estate he ought not to be allowed to charge them against his *cestuique* trust unless under very exceptional circumstances. (1898) 1 Ch. 547, 557. *Ref. (Eves, J.) ENGLAND'S SETTLEMENT TRUSTS, In re DOBB v. ENGLAND.* (1918) 1 Ch. 24.

*Vendor and Purchaser—Defect in title—Knowledge of purchaser—Covenant for title—Effect of—Decree for specific performance—Vendor's right to adduce evidence after decree—Evidence if admissible.*

If there is a written agreement of sale which expressly provides that a good title to the lands is to be made, it is not open to the vendor to prove that at the time of the contract the purchaser knew of a defect in title for the purpose of leading to the inference that a good title was not to be shown in that particular. This would be to vary a written contract by parol evidence. But, if the contract is open, the obligation which the law would import into it to make a good title in every respect may be rebutted by proving that the purchaser entered into the contract with knowledge of certain defects in the title. The inference in such a case is that he was content to take a title less complete than that which the law would otherwise have given him by implication. In a case of this kind if the vendor means to rely on such knowledge by the purchaser at the time of the contract he must prove it by evidence at the hearing and before judgment. He cannot adduce such evidence during the course of an inquiry as to title under an ordinary vendor's decree for specific performance. (*Lord Finlay*) *MC GRODY v. ALDERDALE ESTATE COMPANY* (1918) A. C. 503.

*—Lien—Assignee of patent or copyright—Unpaid royalties—Lien on sale proceeds at the hands of transferee—Liability of the transferee.*

The terms of an assignment may, either expressly or by implication, negative any lien for royalties by a patentee or author. In such cases no question of lien can arise as against a subsequent assignee. *Prima facie* no vendor's lien for royalties will exist if the assignment contains express words to the effect that the whole interest of the patentee or author is transferred to the assignee, or if there be an express statement that the assignee is to be the sole owner of the patent or copyright. To destroy the *prima facie* presumption in such a case the other terms of the bargain must show

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with actual clearness an intention to reserve a lien. No vendor's lien will be created by the mere reservation in the assignment of future royalties, or by mere provisions as to the obligations of second or later assignees. The terms of an assignment may expressly give a lien for future royalties. In such a case any subsequent assignee with notice takes subject to a lien in respect of all accrued and unpaid royalties. The assignment will create a vendor's lien for royalties if some of the provisions of the document fairly, though impliedly, point to a reservation of such a lien by the patentee or author, provided that the effect of such provisions is not negatived by the other terms of the bargain. (*McC. Cardie, J.*) *BARKER v. STICKNEY*. (1918) 2 K. B. 356.

**Water Course**—Meaning of—Stream exclusively fed by rainfall—Drying up in hot season—Riparian rights—Diminution of supply and pollution—Absence of damage—Right to declaration and injunction—Form of decree—Grant of time to abate nuisance—English law, applicability of.

A stream flowing in a permanent defined channel, though fed exclusively by rain water running off the surface of the land is a water-course. Sometimes there might be no water in the water course, sometimes what there is might not course, nor is it necessary that it should be fed by springs. A river may be fed by the rains directly, without any intermediate collection of the water in the bowels of the earth, and still be a river and a river which naturally runs during a good part of the year does not cease to be a river merely because at times it is accustomed to be dry.

An owner of land on the bank of a natural stream is entitled to have the natural flow of the water without any sensible diminution subject to the lawful rights of upper riparian owners and without sensible alteration in its character or quality. Any invasion of this right causing actual damage or calculated to form a claim which may ripen into an adverse right entitles the party injured to the intervention of the court. In the latter case no present or actual damage need be proved. The proper remedy in the case of invasion of such a right is an injunction. 7 H. L. C. 600, 612; 5 Ch. D. 769 (1907) 1 K. B. 588, 603, Ref.

In applying the English Law as to water-course to the circumstances of a very different country, and particularly to a tract of land which is of value as a mining area and of little value for agriculture regard must be had to those circumstances in moulding the remedy to be granted to a riparian owner and in considering whether there has been a sensible diminution or pollution of the water. But the distinction between injuria and damnum is fundamental.

The Privy Council held that in the circumstances of the case there should be declarations as to the rights of the injured proprietors, but

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that no injunction should issue until the debts had time to execute works which would enable them to conduct their operations in a different way; that it should be ordered accordingly that the debts undertaking to pay from time any pecuniary damage which the Court of first instance should find that the plffs. had suffered, the plffs. should have liberty to that Court for an injunction after a period of 2 years. (*Lord Sumner*) *STOLLMEYER v. TRINIDAD LAKE PETROLEUM COMPANY*.

(1918) A. C. 485.

**Will**—Charitable bequest gift for particular purpose—Impossible—Cypres not applicable—Failure of charitable bequest—Lapse into residue. See *CYPRES*. (1918) 1 Ch. 437.

—Construction—Bequest of 'any other monies'—Reversionary interest in personality, if passes.

Where a testator by his will bequeathed to his niece moneys invested in two specified Companies 'and any other monies which I may possess and not mentioned in this will and not herein otherwise provided for' and the gift was followed by other specific bequests held that the word 'monies' included investments also and that the clause in the will contained a residuary bequest of the testator's whole personal estate ending a reversionary interest in personality not mentioned in the will. (*Eve, J.*) *WOOLLEY, In re. OATHCART v. EYKENS*. (1918) 1 Ch. 83.

—Construction—Children—Gift to—Grand-children, if can take.

There is no fixed rule of construction that, if a legacy is given to 'children' of a person who was known by the testator to be dead on the date of the will, and to have no child then living, grand-children will take. The question must always be one of construction of the particular will. (*Younger, J.*) *In re ATKINSON, PYBUS v. BODY*. (1918) 2 Ch. 381.

—Construction—Clear annuity—Income-tax payable by annuitant.

Where a testator directed his trustees to pay his wife out of the income "a clear annuity of 2,000£ and, during her widowhood"

Held, that the annuity was not given free of income-tax and that the annuitant was liable to pay the tax. (*Swinfen Eady and Bankes, L. JJs.*) *VELESS In re. FARRER v. LOVELESS*. (1918) 2 Ch. 1.

—Construction—Conflict of laws—Election. See *ELECTION*. (1918) 1 Ch. 492.

—Construction—Gift to persons attaining the age 25—Date when gift takes effect.

A testator bequeathed his estate to such of his three sons as shall attain the age of 25 years. The eldest son was born on 27-7-1891